Proposed variation to the NBN Co Special Access undertaking

ACCC

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Public version

Executive Summary

We welcome the opportunity to respond to the ACCC's *Proposed variation to the NBN Co Special Access Undertaking Consultation Paper* (May 2022) (**Consultation Paper**). TPG Telecom welcomes the commencement of the ACCC's formal consideration of NBN Co's Special Access Undertaking (**SAU**) variation proposal.

The ACCC's consultation represents an important milestone towards redefining the regulatory framework which underpins the NBN. A comprehensive revision of NBN Co's regulatory framework has been needed for some time. We do not believe incremental changes, as proposed by NBN Co, are sufficient and we believe NBN Co's variation proposal is not capable of being accepted by the ACCC. We are hopeful the ACCC's review will lead to material and impactful changes to the way NBN Co operates.

It is clear to almost all industry participants the status quo is not working to the benefit of end-users. After years of feedback from industry, and months of ACCC-led workshops, NBN Co still refuses to offer any meaningful changes in its SAU variation to address the fundamental issues caused by its monopoly status.

We believe NBN Co's proposed SAU variation does not promote the long-term interests of end-users (**LTIE**) and will instead result in significant consumer detriment. In essence, NBN Co is seeking sign-off from the ACCC to immediately increase wholesale prices and grant it full discretion to increase prices further each year, while NBN Co provides no certainty regarding service quality and fails to guarantee constraints on its revenue will be effective.

NBN Co's proposal places financial objectives ahead of consumer interests. The proposal:

- **renders broadband access unaffordable for price sensitive customers**: NBN Co's proposal to abolish NBN12 as the entry level product will make broadband access unaffordable for price sensitive customers. In a competitive market, prices for products tend to be cheaper over time, yet here NBN Co is proposing to increase prices for NBN12 services. While NBN Co says it wants to increase usage, its pricing proposal means a segment of the population will likely seek alternatives to the NBN. To promote greater usage of the NBN and bridge the digital divide, NBN Co should make the price of NBN25 (the proposed new entry-level product) the same as the current effective wholesale price for NBN12 services.

- **reflects a significant increase in wholesale prices compared to the status quo**: The general trend in competitive telecommunications markets is better services for lower prices, yet NBN Co is subverting this by charging more for the same service. NBN Co's proposal allows it to increase prices year-on-year for the same product, with no guarantees of minimum service levels and no link to efficient costs.

  The ACCC should not accept a proposal which would see RSPs face higher wholesale prices than under the status quo if WBA4 continued. When comparing forecast prices under WBA4 for 2023 against NBN Co's proposal, RSPs will be worse off. For instance, our modelling shows under NBN Co's proposal, the effective NBN12 wholesale prices would immediately increase by **[c-i-c]** and NBN50 wholesale prices are higher by **[c-i-c]**. The ACCC ought not to accept an SAU variation which allows NBN Co to increase prices beyond the current effective wholesale prices for equivalent products. Ideally, NBN Co should remove overage and freeze effective prices for existing in-market plans at current levels, such that end-users who are on an existing NBN connection are not faced with a sudden price increase for their services.

- **enables NBN Co to continue engaging in market distorting discounting activity**: NBN Co's proposal gives it the ability to continue engaging in short term discounting activity at its discretion. This does not solve the issues caused by NBN Co's current discounting practices which have led to the pricing uncertainty RSPs face today.

In addition, the regulatory framework proposed by NBN Co does not impose sufficient regulatory constraints. This is because it:

- **does not adequately prevent NBN Co from leveraging its monopoly in residential services to expand into competitive markets**: To ensure current and future consumers are not underwriting NBN Co's expansion into competitive markets, the starting presumption must be that any expenditure is allocated to competitive markets, with the onus on NBN Co to demonstrate otherwise. NBN Co has been permitted to overbuild existing infrastructure in adjacent markets, despite this not being in its initial remit of residential supply. NBN Co has every incentive to claim a higher proportion of costs are attributed to monopoly residential services and shared costs, rather than to services it seeks to supply into competitive markets. The cost allocation methodology and principles proposed by NBN Co do not sufficiently address these issues.

- **provides no guarantee the revenue cap will constrain NBN Co's pricing**: The revenue cap and unders and overs mechanism offered by NBN Co imposes no real and meaningful constraint on NBN Co's prices and revenues in the future.

In support of this submission, TPG Telecom has asked the CIE to provide a report assessing the impact of NBN Co's building block model. The report is attached to this submission.

Given the above, among other matters, we believe the SAU variation proposal is not capable of acceptance by the ACCC.

Instead of incremental changes to the SAU which are temporary band-aid fixes, we believe the better course of action is a fundamental assessment of what market outcome is consistent with the LTIE. For example, it is obvious allowing NBN Co to charge more for less for internet access is not in the LTIE. Yet, this is the future NBN Co wants to achieve.

We believe the right outcome which promotes the LTIE includes:

1. **Transitional pricing**: Interim pricing measures ought to be put in place to ensure RSPs are not penalised with higher costs until the SAU and WBA5 are agreed.

2. **AVC-only charging**: The uncertainty caused by CVC and overage are well known to the ACCC, NBN Co and industry. NBN Co should not rely on overage and ought to implement an AVC-only charging model for all speed tiers.

3. **No year-on-year price increases**: NBN Co should not be able to automatically increase its prices every year for the same service.

4. **Limit NBN discounting**: NBN Co discounting creates uncertainty and allows NBN Co to circumvent regulatory controls. NBN Co should not be able to discount.

5. **Minimum service standards**: Baseline service standards must be included in the SAU to provide some guarantee of a minimum service quality for RSPs and consumers.

6. **Careful interrogation of residential and enterprise cost allocation required**: NBN Co should not be allowed to self-determine which costs are attributed to monopoly residential and competitive services. The starting assumption must be that any costs which remotely can be attributed to competitive services should be allocated as such.

Contents

Submission

The Consultation Paper identifies significant shortcomings with NBN Co's SAU variation. The purpose of our submission is not to repeat the observations made by the ACCC in the Consultation Paper, but rather to provide additional information regarding the potential detrimental impact of NBN Co's proposal on TPG Telecom customers.

TPG Telecom relies on the companion report from the CIE titled "*Implications of NBN's proposed building block model*" (19 July 2022).

TPG Telecom also relies on its submission to the ACCC NBN SAU industry roundtable framing paper and NBN SAU pricing paper (July 2021), along with the report from the CIE titled "*Pricing principles and structures for the nbn*" (July 2021).

1. ACCC intervention

The ACCC hosted an industry roundtable on NBN regulation 12 months ago. Despite the feedback from industry and subsequent months of ACCC-led workshops, NBN Co has failed to listen to industry concerns. Instead, NBN Co has submitted a dual pricing model which will see RSPs worse off than the status quo and will lead to prices increasing year-on-year. The consequences of NBN Co's proposal would be higher prices for the same products with no service improvements and limited regulatory constraints. This clearly does not promote the LTIE.

It is self-evident NBN Co is not co-operating and ACCC intervention is reasonable and required. Without ACCC intervention, there is a real risk the regulatory process will face further delays with no outcome in sight, while RSPs continue to be exposed to ever increasing overage charges.

The issue with the current regulatory process is it is NBN Co led. This handicaps the ACCC's ability to put forward what it considers to be appropriate regulatory measures. We understand the ACCC has two options: (1) accept the entirety of the SAU variation (without amendment) or (2) reject the SAU variation. The ACCC does not have the power to issue a notice to NBN Co to vary the SAU, as it did with the original SAU. The key issue with this limitation is if the ACCC does not accept the SAU in its entirety, the ACCC and industry must restart the process, in the hope NBN Co will come forward with an improved and acceptable proposal. This will add significant delay, particularly if multiple revisions are required.

We are eager to engage in an ACCC-led process to arrive at a solution which can be endorsed by all parties and provide a stable basis for pricing and regulation into the future.

2. Interim pricing

We note WBA4 is due to expire on 30 November 2022. NBN Co has requested RSPs extend WBA4 by 10 months, such that the new expiry date will be 30 September 2023.

It is unclear when NBN Co will commence negotiations regarding WBA5. The last update from NBN Co indicates these discussions will take place after the ACCC's consultation period for its SAU variation, however no release date has been set.

RSPs are being placed in an increasingly difficult and uncertain position. It is not reasonable for NBN Co to expect RSPs to engage in WBA5 negotiations while issues such as pricing constructs are being considered by the ACCC. At the same time, NBN Co has stated certain matters, such as service standards, will be subject to commercial negotiation under WBA5.

In the meantime, NBN Co has refused to commit to increasing CVC inclusions under its *TC-4 Bundles Discount Roadmap* from 1 May 2023. This is despite unanimous calls from RSPs to immediately increase the CVC inclusions.

It is unfair and unreasonable for RSPs to be penalised with higher CVC costs if NBN Co's SAU variation proposal fails. At this stage, NBN Co cannot realistically expect the SAU variation to be agreed before November 2022.

The NBN Co SAU variation has already been beset by delays. NBN Co first indicated it would lodge the variation with the ACCC by December 2021.[1] The formal SAU variation was not lodged with the ACCC until 3 months later on 29 March 2022. Industry had to wait another 2 months before the SAU variation was published on 23 May 2022.

NBN Co has stated it will review the *TC-4 Bundles Discount Roadmap* pricing in October 2022, if the SAU variation process is likely to be delayed beyond September 2022 and peak utilisation growth is greater than expected. It is unclear what decision NBN Co will make in October 2022.

In the circumstances, we urge the ACCC to intervene and impose interim pricing measures which apply from when WBA4 expires on 30 November 2022 until the SAU variation and WBA5 are in effect. We believe the ACCC should exercise its powers under Part XIC to require NBN Co to (a) freeze prices for TC-4 bundled offers; (b) increase CVC inclusions in bundled offers by at least 15%, consistent with NBN Co's own usage data[2] and (c) mandate NBN Co immediately introduce utilisation-based CVC billing.

Interim pricing will provide certainty for RSPs and consumers between now and when the revised SAU and WBA5 are finalised.

While we appreciate utilisation-based CVC billing forms part of the SAU variation proposal, there is no reason why NBN Co cannot immediately implement this. NBN Co has conceded this is easy to do, given it can "*implement these pricing improvements through simple billing changes (rather than material product construct changes)*" and these changes can be made

[1] NBN Co, *RMID1064 – nbn Special Access Undertaking Variation 2021 – Discussion Paper* (June 2021), page 30.
[2] See NBN Co, *RMID1098 Pricing Review 2022 Consultation Paper* (March 2022), page 5.

with "*minimal migration costs and operational burden for RSPs*".[3]

NBN Co's approach of billing RSPs for CVC provisioned (rather than utilised) introduces unnecessary inefficiencies. NBN Co's data shows that "*inherent in the provisioned bandwidth CVC approach is an allocation of CVC headroom…which caters for the instantaneous peak burst capacity. This is CVC capacity that generally sits idle unless there are significant demand surges, however RSPs pay for this capacity and the amount required increases as overall customer usage grows.*" In this respect, the CVC provisioned model disincentivises use of the NBN, as increased usage means a proportionate increase in the amount of CVC headroom a RSP must acquire.

NBN Co's data shows a long-term average trend of RSPs purchasing 20% to 25% of additional CVC to account for CVC headroom and to shield themselves from potential price shocks caused by NBN Co's CVC pricing construct. This means CVC billing based on provisioned CVC has allowed NBN Co to inefficiently charge RSPs 20% to 25% more than necessary. The immediate shift to CVC utilisation-based billing promotes the efficient use of CVC, enables RSPs to use the excess funds to invest in their networks and is in the LTIE.

3. Proposed pricing under the SAU

Basic NBN access will be unaffordable for price sensitive consumers

The SAU proposal will see NBN12 wholesale prices immediately increase, when compared with forecast pricing under the status quo if WBA4 continued. TPG Telecom's modelling shows in December 2023, under WBA4, TPG Telecom's NBN12 wholesale prices would be **[c-i-c]**. Under NBN's SAU proposal, in December 2023, prices for the same NBN12 service are forecast to be **[c-i-c]**. This reflects an increase of between **[c-i-c]**. This assumes the starting prices proposed by NBN Co apply in December 2023, although NBN Co could impose price increases from 1 July 2023 if the SAU variation is operational prior to 1 July 2023.

We believe any future regulatory framework must take into account affordability and the broader social and economic benefits provided by the NBN. Affordability is a core tenet of NBN Co's Statement of Expectations (26 August 2021):

> *The Government's objective is to maximise the economic and social benefits of the NBN and for NBN Co to operate as a sustainable, commercial business… NBN Co will reliably and affordably meet the current and future broadband needs of households and businesses, including in regional and remote Australia, foster productivity and innovation, and support our goal for Australia to be a leading digital economy and society by 2030.*

Despite this, the measures in the SAU variation will make broadband access unaffordable for many Australians. The proposal will result in underuse of the NBN, further broaden the digital

[3] NBN Co, *nbn SAU Working Group Response Paper*, 22 December 2021, page 28.

divide and make the economics of NBN Co more difficult than it is today.

NBN Co currently has a regulatory obligation under the existing SAU to supply a minimum 12 Mbps speed service. It is seeking to make the NBN12 product unaffordable by making it as expensive as NBN25, while refusing to ever include any CVC for NBN12, whereas NBN25 has 0.1 Mbps CVC included. The limited number of RSPs who still offer a NBN12 service will likely withdraw those products from market under NBN Co's proposal, with the consequence that the floor price for NBN services is raised.

In the ACCC *Inquiries into NBN access pricing and wholesale service standards*, the ACCC accepted NBN Co's pricing for the NBN12 product on the basis:

> "*the price for this access bundle should reduce over time so that the access cost and retail price could remain steady in nominal terms notwithstanding ongoing growth in CVC utilisation. In this regard, we estimated that CVC per service would grow at a rate of 20 per cent per annum for entry level broadband.*
>
> *The rationale for these access arrangements was twofold – that it would allow retail customers to migrate to the NBN without a price shock, and would serve as an effective anchor on the pricing of higher bandwidth NBN offers.*"[4]

NBN Co's proposal is entirely at odds with the views previously expressed by the ACCC. NBN Co is now walking back on commitments it made to the ACCC only 18 months ago. This appears to be a means for NBN Co to circumvent regulatory obligations to supply an NBN12 entry level service.

NBN Co argues its proposal for NBN12 supports an effective $35 wholesale price and an unlimited retail offer of $60/month.[5] However, this fails to factor in that NBN Co will not include CVC for the 12 Mbps speed tier. The consequence is as usage increases, the relative wholesale price of NBN12 also increases due to CVC costs. Therefore, an effective wholesale price of $35 cannot be sustained.

For TPG Telecom, the average CVC usage of the NBN12 and NBN25 cohort is currently **[c-i-c]**. Using this combined base mix, the effective price under the new SAU would be **[c-i-c]**. This wholesale price will increase as usage increases, without any commensurate increase in CVC inclusions for NBN12. **[c-i-c]**.

NBN Co states its proposal would see RSPs 'migrate' significant portions of their broadband customer base from NBN12 to NBN25. On the retail side, RSPs cannot force customers to 'migrate' to higher priced NBN25 plans. For instance, our TPG brand offers NBN12 with unlimited data for $59.99 per month and NBN25 with unlimited data for $64.99 per month. A

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[4] ACCC, *Inquiries into NBN access pricing and wholesale service standards: Final report* (November 2020), page 14.
[5] NBN Co, *nbn Special Access Undertaking Variation 2022 – Supporting submission: Public version* (March 2022), page 99.

forced migration from NBN12 to NBN25 will see customers pay an additional 8.5% on their monthly access price. These retail prices will increase as wholesale costs increase due to NBN Co's CVC-based charging proposal.

There are functional differences between NBN12 and NBN25 speeds. We believe a shift between these speed tiers could result in changes to consumption behaviour. As the ACCC is aware, streaming services contribute significantly to data usage. Netflix recommends a 15 Mbps connection speed for 4K/Ultra high-definition video quality. Unless customers choose a lower video quality setting, NBN25 customers should expect to receive 4K Ultra high-definition video quality as default. A consistent download speed of at least 15 Mbps also allows consumers to watch 4K Ultra high-definition videos on Youtube.[6]

The difference in data usage between video qualities is material. For Netflix, 4K Ultra high-definition video quality uses up to 7 GB of data per hour, per device, compared with only 3 GB of data for high-definition video quality per hour, per device.[7]

This means there could be a substantial increase in network usage if there were a mass end-user migration from NBN12 to NBN25. This is not due to active customer preferences, but due to the way Netflix (and other video streaming services) configure their default service settings. The likely consequence of this is *more* CVC costs for RSPs, which have to be passed on to end-users.

In this respect, we find it difficult to reconcile the findings in NBN Co's Accenture report with its proposal to make NBN25 the new entry level product.[8] NBN Co refuses to move to AVC-only pricing because Accenture claims that it would adversely impact low data usage customers. NBN Co claims this is because NBN Co would be forced to increase the access price for all end-users in order to finance its operations. The irony here is that NBN Co proposes to increase access prices anyway, without the pretence of having concerns about low data usage end-users, or any end-users at all.

TPG Telecom is one of the few remaining suppliers of data capped products. We currently offer data capped plans on the NBN12 speed tier. As of 31 May 2022, **[c-i-c]**

NBN Co argues a shift to AVC-only pricing will harm consumers on data capped plans. Yet, under NBN Co's pricing proposal, it would not make sense for an RSP to ever purchase the NBN12 wholesale product.

If NBN Co's pricing proposal is adopted, the potential options available to TPG Telecom are: **[c-i-c]**

If a future pricing proposal includes CVC for some speed tiers, an appropriate mechanism

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[6] YouTube Help, *Watch HD or 4K movies & TV shows on Youtube*, https://support.google.com/youtube/answer/3306741?hl=en.
[7] Netflix, *How to control how much data Netflix uses*, https://help.netflix.com/en/node/87.
[8] See Accenture, *Moving to a fixed price wholesale pricing model: Risks for low data users* (26 May 2021).

could be to prevent NBN Co from reducing CVC inclusions or imposing a minimum CVC floor that increases in lockstep with end-user usage. This would promote use of the NBN and greater certainty in wholesale pricing.

An issue with the pricing proposal is it does not align with NBN Co's stated policy positions. NBN Co claims it wants to increase usage of the NBN, however its pricing proposal will see price sensitive customers seek alternatives or go mobile-only.

The reality is operators such as TPG Telecom are incentivised to offer fixed wireless services because NBN Co does not want to serve price sensitive customers. This creates an opportunity in market for wireless providers. NBN Co's proposal to increase NBN12 prices further pushes fixed wireless providers to step in and ensure reliable low speed broadband access is available for this segment of customers.

Ordinarily, this is not an outcome which requires regulatory intervention, but the ultimate consequence of end-users bypassing the NBN is *everyone else* (including present and future users of the NBN) will have to pay more for their NBN access.

We believe the ideal outcome is if NBN Co wishes to withdraw NBN12 from the market, it ought to offer NBN25 at the same effective price point as the current NBN12 product. This, in combination with the ACCC's preferred price cap mechanism, would ensure NBN Co is not allowed to increase the floor price for NBN services beyond the reach of the segment of end-users who are most price sensitive.

AVC-only pricing provides greater certainty than NBN Co's dual pricing model

We believe pricing predictability and stability are key to a sustainable NBN, however the CVC pricing construct undermines this. The proposed dual pricing model does not address the issues caused by the CVC construct. Ideally, all NBN products ought to be AVC-only, and at a bare minimum NBN50 ought to be AVC-only as well.

For the last decade, TPG Telecom and other RSPs have called for the abolishment of CVC. NBN Co is well aware of the issues with the CVC construct, yet its submission mischaracterises the issue. NBN Co states:

> *In particular, the Variation addresses key industry concerns around cost uncertainty and operational complexity associated with demand variability and management of CVC, <u>removing variable charges on high-speed tiers where these issues are most pronounced.</u>*[9]

RSPs have time and time again confirmed the greatest detriment caused by CVC relates to sub-100 Mbps services. These are the services the majority of consumers purchase. It would follow these are the services where CVC issues are most pronounced, rather than higher

[9] NBN Co, *nbn Special Access Undertaking Variation 2022 – Supporting submission: Public version* (March 2022), page 10.

speed tiers. Furthermore, NBN Co has a strategy where it would over-provide CVC for higher-cost services at the same time as under-provide CVC for lower-cost speed tiers, to incentivise RSPs to buy the more expensive service and punish those that wish to offer lower-cost NBN access to end-users.

Instead of responding to industry concerns, the proposal introduces a dual pricing model which creates more complexity and uncertainty, along with increased overage costs. NBN Co's forecast financials will see it recover 160% of overage fees from RSPs – an increase from $114,660,000 to $298,282,000 between FY21 and FY25. NBN Co's pricing proposal will continue to embed rising costs associated with the CVC construct.

With its proposal, NBN Co shows that it wishes for the NBN100 product to become the *de facto* entry level product for consumers. Put differently, NBN Co is seeking to lift the floor price of NBN services. We do not believe this outcome would be in the LTIE.

For consumers that do not value an NBN100 service, they would have to pay an ever-increasing price for their sub-NBN100 service until it costs the same as the NBN100 service, or more likely, seek alternative means of home internet access. For those consumers who cannot afford the price of an NBN100 service but would benefit from such a service, they would be incentivised to seek alternative means of home internet access, or purchase a cheaper but less suitable NBN service for their needs.

The retail market has shown there is a price-quality trade off and consumers are attached to the below $100 retail price point.[10] NBN100 services are already on the high end of an end-user's willingness to pay.

TPG Telecom's internal subscriber data shows **[c-i-c]**.

Given our suite of brands, TPG Telecom is in a unique position to comment on the impact of a range of different retail offers on new customer take-up. For NBN50 with unlimited data, there are some key differences between our brands:

- TPG is priced at $69.99/month.
- iiNet is priced at $74.99/month, with Fetch TV included at $0 for the first 24 months, then $5/month thereafter.
- Internode is priced at $79.99/month with Fetch TV included at $0 for the first 4 months, then $5/month thereafter. Internode is currently offering a promotional price of $59.99/month for the first 6 months.
- Vodafone is priced at $65/month when the consumer already has a phone plan with

[10] See *ACCC Communications market report 2020-21* (December 2021).

Vodafone, otherwise the price is $80/month.

[c-i-c]

In late 2020, NBN Co launched its 'Focus on Fast' campaign to encourage take-up of higher speed broadband plans. In response to the campaign, TPG Telecom **[c-i-c]**.

It is obvious consumers want more for less and some cannot or do not want to pay for more expensive NBN services. Indeed, there are functional limitations with certain NBN technologies, which means a segment of the consumer base will not be able to access services on higher NBN speed tiers at all.[11] These consumers are left with inferior services, unless they are willing to pay more for NBN to upgrade. If those end-users cannot afford higher NBN prices or do not value a NBN100+ service, they are incentivised to use other services or go mobile-only. These outcomes are not in the LTIE.

NBN Co has pointed to the Accenture report to argue AVC-only pricing will mean the removal of data cap plans. However, TPG Telecom expects almost all customers will migrate and switch to unlimited plans. Consumers who retain data capped plans will have high cap limits (e.g. 500 GB) and for usability purposes are effectively unlimited.

Current plans are nearly all unlimited and TPG Telecom is one of the few providers still offering data capped plans. Customers on data limited plans are primarily on legacy plans which are no longer in the market. TPG Telecom has provided to the ACCC a report from the CIE using data from TPG Telecom and its other brands, which found: **[c-i-c]**

Pricing controls allow NBN Co to increase prices year-on-year above inflation

The SAU proposal will see RSPs face higher prices immediately from when WBA5 begins, followed by potential price increases every year. RSPs will be left worse off when compared with WBA4.

We understand NBN Co has based its new pricing construct using usage figures from the average of September to November 2021, projected forward at 11.5% CAGR in usage growth to the estimated start date of June 2023. It is unclear why NBN Co has used 11.5% CAGR when its other documents indicate 15% usage growth.[12]

We also note NBN Co had two promotional campaigns which overlap with this period – the Focus on Fast campaign was active from February to July 2021 with 6 months of trailing discounts and the Superfast plus campaign was active from August 2021 to January 2022, also with 6 months of trailing discounts.

In effect, the starting usage figures used by NBN Co are skewed as it has measured usage at

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[11] In FY24, NBN Co is forecasting 2,894,000 customers will be serviced on FTTN/B technology and 1,175,000 customers will be serviced on FTTC technology. This represents 46% of total forecast NBN Co customers.
[12] NBN Co's *RMID1098 Pricing Review 2022 Consultation Paper* (March 2022) shows usage growth at around 15% per annum (page 5).

a time when promotions were in effect. For instance, the Focus on Fast promotions meant higher usage NBN50 customers would have been temporarily uplifted to NBN250 services. Given the promotions have ended, actual usage for NBN50 customers will now be higher.

Acceptance of NBN Co's proposal will see the ACCC sign off on NBN Co increasing prices every year without NBN Co having to justify the price increases. Specifically:

- For AVC-only products, NBN Co wants sign-off to increase prices by CPI+3% for the first two years, then price increases by CPI or 3% (whichever is higher) thereafter. There appears to be no link between increases above inflation and NBN Co's underlying costs. A baseline of CPI creates additional uncertainty for RSPs in an economic environment where inflation is trending well above 3%.

- For AVC/CVC bundled products, NBN Co's refusal to commit to increasing CVC inclusions beyond 50% of usage growth disincentives use of the NBN. RSPs will face increasing costs if usage of sub-100 Mbps products increases, which will make these services unaffordable for price sensitive customers.

The scale of NBN Co's services means a small price rise of 1% could increase wholesale prices by millions of dollars. **[c-i-c]**

Consumers should not expect to pay more every year for the same service. As a general principle, consumers consume less when prices rise – higher prices mean less demand. It is unclear why NBN Co's model suggests price rises mean demand will remain stable or increase. There is a real risk year-on-year price rises will lead to underuse of the NBN and may result in revenue erosion in the long run.

NBN Co argues prices rises are 'optional' and NBN Co has historically not priced to the maximum regulated rates, as reasons why price rises will not increase to the levels feared by RSPs. Where NBN Co's submission is filled with references to the need to maintain specific credit ratings and meet financial goals, it is reasonable for RSPs to expect NBN Co has every incentive to maximise its revenues. NBN Co has demonstrated it will do this through the proposed pricing model, where it is already seeking to unreasonably impose higher prices than what RSPs would expect under the status quo.

[c-i-c]

Discounting practices distort retail markets and fosters pricing uncertainty

Ideally, NBN Co should not be able to discount. The discounting activities currently undertaken by NBN Co create a significant amount of market distortion and allows NBN Co to circumvent regulatory controls. NBN Co's discounting practices are part of the reason why the current SAU requires reform.

The issue with NBN Co's current discounting practices is it has full discretion and power to introduce and withdraw discounts as it likes, and RSPs have no choice but to participate in these NBN Co schemes. This causes consumer confusion with non-stop introductory offers that NBN Co designs to entice consumers to sign up for more expensive NBN plans and hope they forget they will pay for a more expensive plan at the end of the introductory offer period.

Furthermore, the constant stream of PDF consultations, short-term marketing development funds and promotions distort the retail market and require RSPs to invest a significant amount of time, resources and costs to take up NBN Co's offers. The discounting proposal does not address any of these issues.

We understand under the SAU proposal, any increases to CVC beyond 50% growth in usage would be considered 'discounting'. If the ACCC believes the CVC construct should be retained, then at most the only 'discounting' NBN Co can do is to increase CVC inclusions, given this clearly provides consumer benefits. For instance, during the COVID-19 pandemic, NBN Co offered 40% additional capacity at no extra cost in response to exponential increases in usage of the NBN. Such initiatives are in the LTIE.

As is the case today, this discounting proposal could lead to potential price shocks and ultimately to the market being so distorted that no reasonable forecasts on pricing can be made, as RSP decisions are driven by NBN Co's discounting activity.

NBN Co's discounting proposal is complex and introduces significant uncertainty. NBN Co is proposing that it will reduce TC-4 maximum regulated prices if the total value of its TC-4 revenue in a financial year is more than 5% less than the notional TC-4 revenue NBN Co would have earned if it had charged list prices (i.e. without discounts).

The discounting proposal gives NBN Co significant scope to engage in pricing strategies which distort the retail market. For instance, if NBN Co's notional undiscounted TC-4 revenue in a given year is $5 billion, this allows NBN Co to engage in any distorting behaviour it wishes, provided the revenue impact is less than $250 million in a given financial year. The proposal incentivises NBN Co to manipulate its pricing strategy to ensure it does not breach the 5% rule, such as by engaging in short-term pricing strategies.

This uncertainty is amplified where there is no link between the discounted products and the regulated offers which will be reduced if the 5% rule is breached – it is up to NBN Co to pick and choose what prices will increase/decrease as it sees fit.

Benefits of voice-only service for low data usage customers are overstated

Under the SAU variation, NBN Co is introducing a new NBN12 'voice only' service at a lower wholesale price of $12/SIO/month. This voice-only service will be subject to a daily threshold test, and any AVCs which use more than the intended voice-only bandwidth (0.1 Mbps) in peak usage would attract a daily 'additional charge' of $14 pro-rated (equivalent to the proposed price of NBN12 at $26/month).

NBN claims the voice-only service can be used to supply a home internet service. **[c-i-c]** However, it is unclear whether this will be the case.

There are no controls or mechanisms under the SAU to ensure NBN Co has appropriate incentives to poll peak usage correctly, which will ensure RSPs are charged for the voice-only services where applicable. **[c-i-c]**

4. Baseline service quality commitments

Baseline service levels should not be a matter for commercial agreement. Where NBN Co is seeking to immediately increase prices, along with year-on-year price increases, we believe it is reasonable for the SAU to contain minimum service requirements.

Many of the current NBN service quality issues centre around a lack of information from NBN Co. A sample of data from February 2022 shows we have **[c-i-c]**

Of these cases, almost half require a response from NBN Co. We are heavily reliant on NBN Co to fix issues, noting our data shows **[c-i-c]** of tickets involve an issue within the NBN.

There are several areas where NBN Co ought to improve its service quality. Some of the issues are set out below, without providing an exhaustive list:

- *NBN customer portal – improvement of notes*: The NBN portal is used by RSPs to track install orders and lodge faults. When orders or faults are in 'held' status, it is important for NBN Co to supply RSPs with full information about tickets. This enables RSPs to manage customers' queries and to avoid repeat calls, which in turn minimises customers complaints.

  However, our experience is information is not provided to us in a timely manner and several escalations are required before we are given all the required data. We understand NBN Co has attempted to increase the quality of the notes over recent years, however we continue to experience delays in obtaining full information. This makes it difficult to manage customer queries and provide a minimum level of service which a reasonable consumer should expect.

  The following TPG Telecom data (compiled in February 2022, based on a sample of cases) shows **[c-i-c]**

- *Remediation cases – faults*: For complex cases, such as when a customer has no connection, it is important for temporary restoration to be implemented where possible. This enables a customer to continue to work while waiting for the issue to be permanently fixed. The issue is there is no consistency around when NBN Co implements a temporary restoration and when it does not. Our experience is this varies between technician to technician. We also have no means to validate whether a temporary restoration has in fact been implemented.

  [c-i-c]

  TPG Telecom is maximising efforts to reduce the number of complaints, yet the lack of information and communication from NBN Co fundamentally makes it difficult to manage customer queries and complaints.

- *Outages – unplanned (also known as infrastructure restoration tickets)*: We rely on NBN Co's published outages information to notify our customers of outages. NBN Co publishes hundreds of unplanned outage tickets every day. Each ticket relates to anywhere between a handful of services to hundreds of services. For TPG Telecom, **[c-i-c]** services would be down each month, for periods ranging from minutes to sometimes hours.

  However, NBN Co does not publish this information quick enough and does not provide sufficient time for us to notify consumers. For instance, this means we could be answering and troubleshooting calls from customers about their NBN service being down, only to be told an hour later there is a known NBN Co outage. The consumer is left with an impression there is an issue with their RSP, when in fact the root of the problem is NBN Co's inability to quickly notify RSPs of unplanned outages. NBN Co ought to implement close to real time outage notification.

  The following data **[c-i-c]**

- *Service Health Summary reports:* A known issue is NBN Co cannot deliver the speeds on the sticker of its products. There is a mismatch between what NBN Co calls its service, what consumers understand as NBN speed tiers and what RSPs purchase from NBN. For instance, for an NBN100 service, RSPs actually purchase a product with a speed range of '25 Mbps to 100 Mbps'.

  RSPs are left with the responsibility of ensuring consumers receive what NBN says it can deliver, despite the issues stemming from how NBN has built its network. To ensure consumers get what they are paying for, and to comply with regulatory obligations, RSPs rely on NBN Co's daily service health summaries.

  It is unclear why the regulatory regime does not require NBN Co to meet minimum speed requirements for services it offers. We believe NBN Co ought to be responsible for ensuring minimum speeds can be delivered.

The Statutory Infrastructure Provider (**SIP**) regime is not the appropriate means to impose minimum services level expected of NBN Co. The purpose of the SIP regime is to ensure all Australians have basic broadband access. NBN Co is the default SIP in all of Australia, but in some geographic areas another provider may be declared an SIP.[13] The SIP regime therefore does not impose universal obligations on NBN Co in all areas where it is present.

The SIP regime requires the SIP to connect and supply services to deliver minimum

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[13] We note 24 providers are declared SIPs in certain geographic areas, including PIPE Networks Pty Limited and TransACT Capital Communications Pty Limited. See https://www.acma.gov.au/sip-register.

25/5 Mbps peak speeds, with limited performance requirements. The Government has consulted on proposed SIP standards, rules and benchmarks.[14] Any improvement in the SIP standards, rules and benchmark would therefore be subject to Government decisions, noting the SIP requirements would apply to all SIP providers, not just NBN Co.

5. Proposed revenue constraints

Revenue cap imposes no direct and meaningful constraint

We understand the purpose of a building block model (**BBM**) is to provide a regulated provider such as NBN Co the opportunity to recover its efficient costs, including a return on investments, over a period of time. The BBM provides a link between the regulated providers' costs, revenue requirement and access charges. This ensures the right regulatory framework is in place to promote efficient investment and prevent monopoly rents being charged, which will promote the LTIE.

NBN Co's BBM does not achieve this purpose. Under NBN Co's proposal there is no relationship between the BBM and regulated prices, price increases and price paths.

Further, NBN Co's BBM does not model the potential impact of its proposed unders and overs mechanism. When the unders and overs mechanism is taken into consideration, the ACCC and industry is left with a revenue cap which imposes no direct or meaningful constraint.

The report from the CIE states that over the period from 2024 to 2040, expected revenue is 12% or $12 billion lower than allowable revenue under the BBM. Based on the projections developed by NBN Co, the allowable revenue from the BBM does not impact on prices within the term of the SAU.[15] This means the BBM does not act as a major part of the proposed regulatory system, under NBN projections.

The unders and overs mechanism means that:

- if NBN Co's revenues fall under the revenue cap, 50% of the difference between its revenue and revenue cap can be added to the subsequent regulatory period, with interest charged at the WACC. By doing this, NBN Co is seeking to again earn interest on its losses, even when the ICRA currently earns interest at the WACC.

- if NBN Co's revenues exceed the revenue cap, 50% of the difference between its revenue and revenue cap is deducted from ABBRR. This renders the revenue cap ineffective, as the SAU grants NBN Co a right to retain a portion of excess revenue and there is no incentive for it to meet the revenue cap. It also allows NBN Co to recover more revenue than needed to meet its efficient costs.

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[14] See https://www.infrastructure.gov.au/have-your-say/public-consultation-draft-standards-rules-and-benchmarks-statutory-infrastructure-providers-sips.
[15] The CIE, *Implications of NBN's proposed building block model* (19 July 2022).

The unders and overs mechanism effectively allows NBN Co to have multiple chances to recover its accumulated losses, with interest applied at several points:

- the ABBRR earns interest at the WACC;
- 50% of any under recovery of the revenue cap will earn interest at the WACC; and
- the ICRA has been earning interest at the WACC and under the new proposal and will continue to earn interest at CPI.

It is not in NBN Co's legitimate commercial interest to be able to impose a rate of return at multiple points in the long-term regulatory framework. This disincentivises NBN Co from making efficient investment decisions, as it guarantees NBN Co will receive a return even if it makes poor investment decisions, because it will be able to recover a portion of these costs through the unders and overs mechanism.

The unders and overs mechanism will greatly impact the revenue cap and the constraints placed on NBN Co in the future. If the revenue cap will not function as intended, it is even more important to ensure the pricing controls are reasonable.

ICRA has not set appropriate incentives for efficient investment

The existing framework enables NBN Co to operate without any effective regulatory constraints. This is in part because the ICRA has allowed NBN Co to accumulate all past losses, without those costs being subject to an efficiency test. We believe the ICRA should not have been allowed to accrue to the levels that it has and has set the wrong incentives for NBN Co to spend efficiently.

We do not want 'crystallisation' of the ICRA to mean an endorsement of all of NBN Co's past expenditure. There is no evidence to demonstrate the ICRA has constrained NBN Co's past expenditure, given past losses can be capitalised and recovered in the future, while earning interest at the WACC.

The ICRA is currently sitting at over $38 billion. Under the BBM, NBN Co proposes to recover around $15.3 billion during the term of the SAU. This leaves at least $22.7 billion (in 2014$) which will be dealt with from 2041, noting this amount will increase by CPI and may be subject to any cost allocation reductions.

NBN Co proposes to 'backload' the drawdown of the ICRA, such that the amount of the drawdown will increase through the term of the SAU. We are concerned this proposal creates an unfair scenario where future consumers face higher costs than current users, leading to underuse of the NBN in the longer term. This may benefit a future acquirer of NBN Co but does not benefit consumers in the term of the SAU.

There is a significant amount of uncertainty about what will happen under the proposed regulatory controls in the longer term. We foresee a potential outcome where the inclusion of the ICRA in later years, combined with the unders and overs mechanism, results in NBN Co's revenue cap being at such a high level that it will impose no direct constraint.

Efficiency of NBN Co's expenditure requires assessment

The inefficient expenditure incurred by NBN Co means RSPs are now being unfairly tasked with convincing current and future customers to pay unaffordable prices in order to underwrite those costs. This is particularly unreasonable where cost paths seem to be driven by NBN Co's need to meet financial targets, rather than being linked to a BBM.

While we support an ex-post review of NBN Co's capex, the Expenditure Objectives set by NBN Co are incredibly broad and do not appear to impose any real constraint on its capital expenditure.

For example, the Expenditure Objectives include '*maintaining a national network coverage that provides ubiquitous access to all Australian residential and business premises'*. A simple means to test whether this is appropriate is to answer the question in reverse – what capex, if any, would be excluded under this Expenditure Objective?

Further, if NBN Co is seeking to introduce a cost allocation mechanism to separate residential and enterprise costs, it is unclear why 'business premises' (i.e. '*maintaining a national network coverage that provides ubiquitous access to all Australian residential and business premises*') would be included in the Expenditure Objectives.

There is merit in testing both NBN Co's past and future capex. We do not want an outcome where '*meeting and managing the expected demand for products and services during the Regulatory Cycle'* allows NBN Co to expend unnecessary capex to gold plate its network for services which end-users will not buy or will not buy within a reasonable forecast amount of time.

For instance, it is unclear why NBN Co's forecast financial information does not match what it has announced to the market regarding NBN upgrades:

- NBN Co has said by the end of 2023, up to 8 million premises in total will be eligible to access nbn Home Ultrafast, offering wholesale download speeds of 500 Mbps to close to 1 Gbps as part of a $4.5 billion investment plan. NBN Co has announced that 50,000 FTTN premises are eligible to be upgraded to full fibre. This figure will increase to 230,000 eligible premises by mid-2022 and approximately 600,000 premises by the end of 2022.[16]

- Despite these public announcements, NBN Co's forecast financial information shows between now and mid-2025, only an additional 1.008 million premises will take up FTTP technology and take up of Home Ultrafast services will only grow by a small amount of 105,000 premises in the same period.

[16] See NBN Co, *NBN Co offers further fibre upgrades as part of $4.5 billion plan* (22 March 2022), available at https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-co-offers-further-fibre-upgrades-as-part-of-four-and-half-billion-plan.

In addition, there is no justification to limit a review of NBN Co's expenditure to capex. Opex is a key component of NBN Co's past expenditure, representing a total of $28 billion since 2008-09. Opex accounts for 42% of NBN Co's costs. This is a significant amount of expenditure which to date has not been subject to any real efficiency test, and for which NBN Co now seeks to fully recover.

Careful interrogation of cost allocation required

NBN Co has been able to opaquely leverage its residential monopoly to expand into enterprise services, while the presence of the ICRA means it has had limited incentive to ensure efficient investment decisions are made. This is demonstrated by non-sensical decisions to inefficiently overbuild infrastructure, such as duplicating dark fibre and data centres connections.

NBN Co has only released a 'cost allocation manual' and 'cost allocation principles'. Given it has not provided public breakdowns of how the costs will be separated in practice, we are unable to fully test whether the cost allocation is reasonable.

Care is required when considering NBN Co's cost allocations because NBN Co has every incentive to claim a higher proportion of costs are attributed to monopoly services and shared costs, rather than competitive services. Given this, appropriate and specific controls must be imposed, beyond general cost allocation principles and a high-level cost allocation manual.

The solution is to remove any ability for NBN Co to self-determine how costs are attributed, contrary to what NBN Co has proposed. The starting assumption must be that any costs which remotely can be attributed to competitive services should be allocated as such. This minimises the chance current and future residential end-users are unfairly tasked with underwriting NBN Co's expansion into competitive markets.

The rules that NBN Co has itself set for cost allocations demonstrates the issue at hand. For instance, if a shared piece of infrastructure is used to provide two separate services to two customers (one being residential and one being enterprise), then the cost of the infrastructure should be shared equally between the two services. If costs are attributed based on revenue or provisioned bandwidth, then in a scenario where only a residential customer takes up a service but an enterprise customer does not, it should not automatically mean that the entire cost of the infrastructure should be attributed to the residential customer.

Another example is using revenue to allocate costs. It is unclear why revenue is the right means to allocate costs in the first place, such as to divide shared opex. During the build phase of any new service, revenue is not being generated, yet resources are needed to manage the build and construction. In this scenario, NBN Co is proposing to allocate all opex to residential services, while in reality it is also incurring opex to build out its enterprise service, despite those enterprise services not yet generating revenue.

At the bare minimum, the SAU variation ought to provide a means for RSPs to comment on costs allocated in the ICRA and RAB for enterprise services and allow RSPs to comment on how NBN Co has applied the cost allocation principles in practice. For instance, allocating 99% of costs to residential services would necessarily raise questions about whether the cost allocation is right.

Given NBN Co has been able to leverage its monopoly in residential services to cross-subsidise its expansion into competitive services, we do not support a regulatory model which imposes no constraints on how NBN Co participates in competitive services. The presence of NBN Co in enterprise markets has already distorted incentives to invest. NBN Co operates on an internal rate of return threshold of 3.7%,[17] which is well below commercial rates faced by its competitors. NBN Co has a major unfair advantage compared to private operators with whom it is supposed to compete on a level playing field.

Without regulation, NBN Co will have been able to use funds subsidised by consumers to build out its enterprise network and now will be able to capture uncapped profits from competitive services. Regulation is important where NBN Co clearly intends to bolster its presence in enterprise markets, given it has predicted take-up of Enterprise Ethernet services will grow "rapidly" and Enterprise Ethernet is "*becoming a more mature product from a pricing and capability perspective, with platforms to support scale take-up*".[18]

One solution is to impose separate governance and business line restrictions on NBN Co's residential and enterprise businesses. This will add much needed transparency to NBN Co's operations.

NBN Co is already seeking to preserve its position and prevent infrastructure-based competition in enterprise markets. **[c-i-c]**

Additional SAU proposals

We are concerned the SAU variation contains many mechanisms which are primarily intended to bolster NBN Co's ability to meets it financial objectives, rather than a means for NBN Co to recover its efficiently incurred costs. For example:

- **WACC:** We do not support any proposal which allows NBN Co to re-engineer the WACC formula such that it is higher than it is today. It does not make sense that NBN Co operates with an internal rate of return of 3.7%,[19] yet the WACC is significantly higher, and will be even higher under the SAU proposal. This means NBN Co can make poor investment decisions that meet its low internal rate of return, while simultaneously being able to recover all of these costs, plus interest at a higher WACC amount than today.

- **Proposed financeability test:** We cannot see an obvious link between the

[17] NBN Co, *Corporate Plan 2021*, page 54.
[18] NBN Co, *nbn Special Access Undertaking Variation 2022 – Supporting submission: Public version* (March 2022), page 273.
[19] NBN Co, *Corporate Plan 2021*, page 54.

introduction of a financeability test and the LTIE test. If the ACCC considers a financeability test is appropriate, such test must recognise that NBN Co is unlike other entities who operate in a competitive market. For instance, the revenue cap includes an allowance for NBN Co to drawdown a portion of the ICRA, yet this is not reflected in the proposed financeability test. We have raised concerns about the effectiveness of the revenue cap above. If NBN Co has an automatic right to lift the revenue cap if the financeability test is not met, then this could make the revenue cap even more ineffective.

- **Cost pass-through events:** The cost pass-through mechanism proposed by NBN Co could result in RSPs being placed in in a poor bargaining position when negotiating new Wholesale Broadband Agreements. This is because NBN Co can impose price increases without any commensurate improvement in service quality, and at the same time any agreement by NBN Co to improve service quality would trigger a cost pass-through event. The ACCC is also placed in a difficult position, because NBN Co may not proceed with service quality improvements if the ACCC does not approve the cost pass-through application, even if those improvements provide benefits to NBN Co.

  In addition, every other telecommunications provider faces costs associated with regulatory and legal decisions, yet most providers have limited ability (if any) to pass through these costs to consumers. We see no basis for NBN Co to be able to obtain a regulatory and competitive advantage in this respect.