



Australian
Competition &
Consumer
Commission

NBN Co Limited 2012 Special Access Undertaking

Consultation Paper

November 2012

© Commonwealth of Australia 2012

This work is copyright. Apart from any use permitted by the Copyright Act 1968, no part may be reproduced without prior written permission from the Commonwealth available through the Australian Competition and Consumer Commission. Requests and inquiries concerning reproduction and rights should be addressed to the Director Publishing, Australian Competition and Consumer Commission, GPO Box 3131, Canberra ACT 2601 or by email to publishing.unit@acc.gov.au.

www.accc.gov.au

Contents

Glossary.....	3
1 Overview of the SAU and key issues	8
1.1 Consultation process	13
1.2 Time limit for ACCC assessment of the SAU	14
1.3 Criteria for assessing the SAU	15
2 Relationship between the SAU, Access Agreements, Standard Forms of Access Agreement and other ACCC powers.....	17
2.1 Consistency between the SAU and ACCC powers in Part XIC	17
2.2 Interaction between ACCC powers, SFAAs and Access Agreements	18
2.3 SAU commitments about SFAAs	21
3 Operation of the SAU	26
3.1 Fixed principles and replacement modules	28
3.2 Midpoint review of Module 1	32
4 Services to which the SAU relates	36
4.1 Limitations on the service descriptions.....	36
4.2 Treatment of the Facilities Access Service	37
4.3 ACCC’s previous specification of minimum elements of a bitstream service ..	38
5 Product development and withdrawal	40
5.1 Product development.....	41
5.2 Product withdrawal	42
5.3 Products exempt from the product development and withdrawal commitments	43
6 Price-related matters	46
6.1 Pricing of individual products	48
6.2 Long-term revenue constraint	60
6.3 Creating incentives for efficient expenditure.....	69
7 Non-price related matters.....	77
7.1 Service levels	78
7.2 Risk management.....	83
7.3 Confidential information and Intellectual Property Rights.....	85
7.4 Dispute management.....	88
7.5 Changes to Points of Interconnect (POIs).....	90
7.6 Information on network and POI rollout.....	91
Appendix A Questions raised in this paper.....	93

Glossary

Access Agreements – An agreement between a carrier (access provider) and an access seeker for the supply of declared services. The requirements for a legally valid Access Agreement are set out in section 152BE of the *Competition and Consumer Act 2010*.

Access Determinations – Written determinations made by the ACCC relating to terms and conditions for access to a declared service.

Access seeker – A content service provider or carriage service provider that makes, or proposes to make, a request to NBN Co for access to its services, as defined in section 152AG of the *Competition and Consumer Act 2010*.

Ancillary Services – NBN Co defines this as the services supplied by NBN Co that facilitate the supply of, and are necessary for the access seeker to acquire, the NBN Access Service, but excludes the Facilities Access Service.

Annual revenue requirements – The amount of revenue that NBN Co would be required to earn to recover its costs in a particular year. Over the SAU term, the annual revenue requirements will provide NBN Co an opportunity to recover all of its costs.

ACCC – Australian Competition and Consumer Commission.

AVC (Access Virtual Circuit) – An Ethernet-based Layer 2 virtual connection that carries traffic to and from an end-user on NBN Co's fibre, wireless, or satellite networks.

Basic Access Offer – NBN Co defines this as its entry-level residential service, including an AVC (12/1 Mbps, Traffic Class 4), a UNI-D and an optional UNI-V.

Binding Rules of Conduct – Written rules made by the ACCC specifying any or all terms and conditions for compliance with Standard Access Obligations or requiring compliance with any or all applicable Standard Access Obligations in a manner specified in the rules. These rules are made when there is an urgent need to do so.

Building block model – A methodology used to calculate NBN Co's annual revenue requirements.

Building block period – The period of the SAU term during which NBN Co's prices will be set to recover its annual revenue requirements. This period follows the initial cost recovery period.

Carriage service – This is defined in section 7 of the *Telecommunications Act 1997* as a service for carrying communications by means of guided and/or unguided electromagnetic energy.

CCA – *Competition and Consumer Act 2010*.

CPI – Consumer Price Index.

Customer – NBN Co defines this as a carrier or carriage service provider that has entered into, or is otherwise subject to, an Access Agreement with NBN Co.

CVC (Connectivity Virtual Circuit) – NBN Co defines this as an Ethernet-based Layer 2 virtual capacity for the transport of customer traffic from multiple end-users within a Connectivity Serving Area on an aggregated basis and presented at the Network-Network Interface at the Point of Interconnect associated with that Connectivity Serving Area.

Data rate – The number of binary bits per second of data passing through an interface during a given time.

Eligible service – This is defined in section 152AL of the *Competition and Consumer Act 2010* as a listed carriage service or a service that facilitates the supply of a listed carriage service where the service is supplied or capable of being supplied by a carrier or carriage service provider (whether to itself or to other persons).

Enhanced Access Offer – NBN Co defines this as its most commonly acquired access service, including an AVC (25/5 Mbps, Traffic Class 4), a UNI-D and an optional UNI-V.

Facilities Access Service – Described by NBN Co as a service that enables a customer to install, operate and maintain its telecommunications equipment at or near a Point of Interconnect for the purpose of interconnecting its network with the NBN Co network.

Gigabit passive optical network – An optical-access system based on internet protocol that lets multiple homes or businesses in a neighbourhood share fibre from a service provider's central office.

Initial cost recovery account – NBN Co describes this as the account used to accumulate any initial unrecovered costs.

Initial cost recovery period – The initial period of the SAU term during which NBN Co will accumulate unrecovered costs, and then recover these costs as demand increases. NBN Co will be allowed to earn more revenue than allowed by its annual revenue requirements to recover these accumulated costs.

Initial Product Roadmap – NBN Co describes this as the document titled 'Initial Roadmap July 2012, version 2' published on NBN Co's website.

Layer 1 – NBN Co describes this as the physical layer of the OSI model.

Layer 2 – NBN Co describes this as the data link layer of the OSI model.

Layer 2 bitstream – A point-to-point data stream with defined interface protocol. It is independent of the underlying network technology and the services running over it.

Layer 3 – NBN Co describes this as the network internet protocol layer of the OSI model.

Listed carriage service – A carriage service of the type listed in section 16 of the *Telecommunications Act 1997*.

Long-term revenue constraint methodology (LTRCM) – The methodology for determining the amount of revenue NBN Co would be able to earn via its prices over the SAU term. The key components are annual revenue requirements, a regulatory asset base and the initial cost recovery account.

Multicast service – A service which enables content to be transmitted simultaneously to multiple parties, but is carried as a single stream as far into the network as possible.

Multilateral SFAA forum – A multilateral forum established by NBN Co to consult with access seekers on changes to the terms and conditions of SFAAs.

NBN Access Service – NBN Co describes this as a Layer 2 service supplied on the NBN Co network between and including: a User Network Interface on a network termination device; and the Network-Network Interface at the point of interconnect associated with the relevant network termination device, for the purpose of enabling an access seeker or another service provider that is a customer of an access seeker to supply carriage or content services.

NBN Co – NBN Co Limited and NBN Tasmania Limited.

Network Design Rules – The document that describes the design of NBN Co's fibre, wireless and satellite networks. This document has a role in determining the amount of capital and operating expenditure that NBN Co may recover via the SAU.

Network Termination Device – The device on the customer end of an access network used to send and receive signals sent across the physical access medium.

NNI (Network-Network Interface) – A physical interface between the NBN Co network and the access seeker's network at the Point of Interconnect.

Non-reference Offer – All of NBN Co's products that are not defined as reference offers or other charges.

Open System Interconnection model (OSI model) – The framework developed by the International Standards Organisation to provide worldwide standards for computer communications.

Other charge – NBN Co defines this as an ancillary charge associated with the supply of a product component, product feature, Ancillary Service or type of Facility Access Service.

PDF Processes – The provisions of Annexure 1 to Schedule 1I of the SAU. These provisions describe how NBN Co will engage with customers via the Product Development Forum on the development and withdrawal of products.

POI (Point of Interconnect) – The geographical point where traffic stops being carried on the network of the access seeker and is given to the network owned by NBN Co to carry.

Product components – NBN Co defines these as the UNI, AVC, CVC, NNI, and any new or varied product components introduced by NBN Co pursuant to the product development provisions in the SAU.

Product Development Forum – NBN Co describes this as the primary forum through which customers may submit new product ideas, provide input on the development of new and existing products, and obtain information from NBN Co on its current and future product offerings.

Product features – NBN Co defines these as the features of a product component that are made available by NBN Co and which are selectable and configurable by the customer in respect of that product component (for example, data transfer rate or traffic class associated with an Access Virtual Circuit).

RAB (Regulatory Asset Base) – Represents the value of capital investments made by NBN Co that it can recover via prices over the SAU term.

Reference Offer – NBN Co's entry-level residential and business grade offers, designed to include all products reasonably necessary to provide a service to end-users over the NBN.

SAU (Special Access Undertaking) – A voluntary undertaking given to the ACCC by a supplier of a telecommunications service specifying the terms and conditions upon which it agrees to supply a listed carriage service or a service which facilitates the supply of a listed carriage service.

SAU term – Refers to the term of NBN Co's Special Access Undertaking. This term commences when the Special Access Undertaking is accepted by the ACCC and ends on 30 June 2040 (also referred to as the '30-year term').

Standard Business Offer – NBN Co defines this as its entry-level business grade service, including an AVC (25/10 Mbps, Traffic Class 4), a UNI-D and an optional UNI-V.

Standard Form of Access Agreement (SFAA) – A document published on the NBN Co website which sets out terms and conditions on which NBN Co is obliged to enter into in an Access Agreement with an access seeker upon request, and declares the services to which it relates.

Statement of Expectations – A statement released by the Australian Government on 17 December 2010, which sets out the Government’s expectations for NBN Co in implementing the NBN policy.

UNI (User-Network Interface) – The physical interface where the end-user’s equipment connects to NBN Co’s network, either a data port (UNI-D) or a voice port (UNI-V).

WACC (Weighted Average Cost of Capital) – A method for calculating the minimum required cost of capital for a company. This method is calculated by using a weighted average of the costs of the sources of funding for a company.

Wholesale Broadband Agreement (WBA) – The WBA sets out comprehensive price and non-price terms in relation to the supply of NBN Co’s services; and the processes for providing NBN Co’s customers with operational and technical information in relation to those services. The WBA is a Standard Form of Access Agreement.

1 Overview of the SAU and key issues

NBN Co Limited and NBN Tasmania Limited ('NBN Co') lodged a Special Access Undertaking ('the SAU') with the Australian Competition and Consumer Commission ('the ACCC') pursuant to section 152CBA in Division 5 of Part XIC of the *Competition and Consumer Act 2010* (CCA) on 28 September 2012. The SAU specifies matters relating to the supply of what NBN Co terms the 'NBN Access Service' and the 'Ancillary Services'. It also specifies commitments relating to the 'Facilities Access Service'.

NBN Co provided a submission and four consultancy reports in support of the SAU to the ACCC. Further, on 1 November 2012, NBN Co provided a written response to a request for clarification of particular matters from the ACCC. These materials, including the ACCC's request for clarification, are available on the ACCC's website.

The SAU lodged by NBN Co has a term of approximately 30 years, with an expiry date of 30 June 2040 ('SAU term').¹ The SAU has a 'modular structure' which means that different matters are locked-in for different periods of time.

Module 0 operates for the full 30-year SAU term. It contains:

- functional descriptions of the services to which the SAU relates;²
- commitments to publish Standard Forms of Access Agreement ('SFAAs') and align them with the SAU;³ and
- commitments relating to the modular structure of the SAU — in particular, the lodgement by NBN Co, and assessment by the ACCC, of 'replacement modules' (outlined below),⁴ and the setting out of fixed principles terms and conditions.⁵

Module 1 operates for approximately 10 years until 30 June 2023 unless it is extended in accordance with clause 4.3 of the Main Body of the SAU.⁶ The extension is for one year only.⁷ Module 1 contains a set of detailed terms addressing:

- the implementation of the services to which the SAU relates;⁸
- 'regulatory recourse';⁹
- the definition of 'reference offers' and 'non-reference offers';¹⁰

¹ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clause 3.

² Ibid, Main Body, Attachments A and B.

³ Ibid, Main Body, clause 6.

⁴ Ibid, Main Body, clause 4.

⁵ Ibid, Main Body, clause 5.

⁶ Ibid, Main Body, clause 4.1(b).

⁷ Ibid, Main Body, clause 4.3(a).

⁸ Ibid, Schedule 1A.

⁹ Ibid, Schedule 1B.

- price controls and the operation of the long-term revenue constraint methodology ('LTRCM') (including prudence and the provision of information relating to pricing matters);¹¹
- non-price terms and conditions (including service level commitments);¹² and
- product development and withdrawal.¹³

It also addresses the lodgement by NBN Co, and assessment by the ACCC, of proposals to change aspects of Module 1 at around year five of the SAU term (at the 'midpoint review' process).¹⁴

Module 2 operates from the expiry of Module 1 until the end of the 30-year SAU term.¹⁵ It sets out, generally at a higher level than in Module 1:

- the implementation of the services to which the SAU relates;¹⁶
- principles for determining the composition of reference offers;¹⁷
- price controls and the operation of the LTRCM;¹⁸
- product development and withdrawal commitments;¹⁹ and
- principles for the establishment of service levels.²⁰

It also establishes 'regulatory cycles' and their relationship to 'replacement modules'.²¹

Replacement modules, if accepted by the ACCC, would operate in turn for three to five year periods commencing at the expiry of Module 1.²² NBN Co would submit these modules as variations to the SAU for ACCC assessment prior to the expiry of the preceding module.²³ The SAU states that replacement module applications must include a proposed term for the replacement module and proposals about:

- which products will be reference offers;

¹⁰ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedules 1C and 1D.

¹¹ Ibid, Schedules 1C, 1D, 1E, 1F and 1G.

¹² Ibid, Schedules 1H and 1J.

¹³ Ibid, Schedule 1I.

¹⁴ Ibid, Schedule 1K.

¹⁵ Ibid, Main Body, clause 4.1(c).

¹⁶ Ibid, Schedule 2A.

¹⁷ Ibid, Schedule 2B.

¹⁸ Ibid, Schedules 2B, 2C and 2D.

¹⁹ Ibid, Schedule 2E.

²⁰ Ibid, Schedule 2F.

²¹ Ibid, Schedule 2A.

²² Ibid, Main Body, clauses 4.5-4.6.

²³ Ibid, Main Body, clause 4.6(a). Under section 152CBG of the *Competition and Consumer Act 2010* (CCA), NBN Co can submit variations to an SAU that is in operation.

- the revenues allowed to be earned by NBN Co; and
- service levels.²⁴

The SAU also states that any other matter may also be addressed in a replacement module.²⁵ The manner in which matters will be dealt with by NBN Co in a replacement module is constrained by the principles in Module 2.²⁶ If a replacement module is accepted by the ACCC, the accepted terms would operate until the expiry of that replacement module.

Further, the SAU provides that every term and condition in Module 0 and Module 2 (collectively) is a fixed principles term and condition for the 30-year SAU term.²⁷

Modules 0, 1 and 2 are included in the SAU for assessment now, whereas the replacement modules will be submitted for ACCC approval as variations to the SAU prior to the expiry of Module 1 and subsequent replacement modules.²⁸

The ACCC seeks views on these ‘operational’ aspects of the SAU in chapter 3 of this consultation paper.

Other key components of the SAU are as follows.

For the full SAU term, NBN Co commits to publishing and maintaining SFAAs for the NBN Access Service and Ancillary Services,²⁹ and to ensuring the SFAA is consistent with the SAU.³⁰ For the first 10 years of the SAU term, NBN Co also commits to:

- ensuring that new SFAAs are consistent with any Access Determinations and Binding Rules of Conduct (‘regulated terms’) that are in operation (subject to the midpoint review);³¹ and
- offering SFAAs with a two-year, ‘co-terminus’ term.³²

The ACCC seeks views on these ‘regulatory recourse’ commitments in chapter 2 of this consultation paper.

NBN Co also makes commitments relating to the consultative processes it will engage in when developing certain new products, enhancing certain products and withdrawing certain products.³³ The ACCC seeks views on these matters in chapter 5 of this consultation paper.

²⁴ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clause 4.6(b)(i)-(iv).

²⁵ Ibid, Main Body, clause 4.6(b)(v).

²⁶ Ibid, Main Body, clauses 4.6-4.9.

²⁷ Ibid, Main Body, clause 5.3.

²⁸ Ibid, Main Body, clause 4.6.

²⁹ Ibid, Main Body, clause 6.3.

³⁰ Ibid, Main Body, clauses 6.1-6.2.

³¹ Ibid, Schedule 1B, clauses 1B.2.2-1B.2.3.

³² Ibid, Schedule 1B, clause 1B.1.3.

³³ Ibid, Schedules 1I and 2E.

The SAU contains a pricing methodology, which includes a constraint on the overall revenues that NBN Co is permitted to recover over the SAU term (that is, the LTRCM).³⁴ The SAU also contains a price control mechanism which prevents NBN Co from increasing the maximum regulated prices that it will include in SFAAs for all of its products by more than CPI-1.5% per annum.³⁵ The SAU allows NBN Co to recover any losses it makes in its early years of operation in later years.³⁶

NBN Co commits to supplying ‘reference offers’, which are products whose prices remain fixed until 30 June 2017, and which cannot be withdrawn whilst they are defined as reference offers.³⁷ The products that are reference offers can be changed over time, subject to ACCC approval, as consumer demands and preferences change.³⁸

The SAU also contains mechanisms aimed at promoting efficient capital and operating expenditure.³⁹

The ACCC seeks views on the price-related aspects of the SAU in chapter 6 of this consultation paper.

The SAU also contains certain non-price commitments. In particular, NBN Co commits to including in SFAAs particular terms and conditions relating to service levels, dispute management, risk management, confidentiality and intellectual property rights.⁴⁰ NBN Co also makes commitments to provide network and Points of Interconnect (‘POI’) rollout information, and commitments relating to the process it will undertake when reviewing and changing the location of POIs.⁴¹ The ACCC seeks views on these matters in chapter 7 of this consultation paper.

The key issues that the ACCC is seeking submissions on are as follows:

- Whether the regulatory recourse commitments provide certainty as to how NBN Co will comply with regulated terms made by the ACCC — NBN Co commits to ensuring that new SFAAs it publishes when current SFAAs expire are consistent with providing access on any regulated terms that exist at the time of publication. However, the SAU provides that NBN Co is not required to amend current SFAAs (or Access Agreements) in this manner. Further, this commitment only applies during Module 1. After this time, NBN Co only commits to ensuring that an SFAA relating to the NBN Access Service or to the Ancillary Services is published, and to ensuring that it is consistent with the SAU.
- Whether the processes for reviewing particular terms at the midpoint of Module 1 and for assessing replacement modules will ensure the SAU remains reasonable and promotes the long-term interests of end-users over the SAU term — in particular,

³⁴ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1F.

³⁵ Ibid, Schedule 1C, clause 1C.4; Schedule 1D, clause 1D.4.

³⁶ Ibid, Schedule 1F, clause 1F.1.3(c).

³⁷ Ibid, Schedule 1C, clause 1C.1.

³⁸ Ibid, Schedule 2B, clause 2B.2.

³⁹ Ibid, Schedules 1E and 2D.

⁴⁰ Ibid, Schedule 1H, clauses 1H.5, 1H.6 and 1H.7; Schedule 1J, clause 1J.2.

⁴¹ Ibid, Schedule 1H, clauses 1H.2, 1H.3 and 1H.4.

the timeframes for making decisions, criteria which the ACCC must have regard to in making decisions, and the implications of ACCC decisions to accept or reject NBN Co's proposals (including the interaction of those decisions with the Part XIC regulatory framework).

- Whether the combined operation of the pricing aspects of the SAU ensures that NBN Co has an incentive to operate and invest efficiently, including in capacity upgrades, as well as encourages efficient use of the NBN. The ACCC is likely to consider:
 - Whether a sufficiently broad range of products are defined as reference offers, and whether the process for changing reference offers over time allows for effective regulatory oversight of those changes.
 - The commitments relating to product withdrawal — whilst NBN Co cannot withdraw reference offers during the period they are defined as reference offers, it can withdraw non-reference offers. The ACCC is seeking views on the extent to which the SAU makes sufficient commitments constraining the withdrawal of non-reference offers on the Initial Product Roadmap.
 - Whether the processes for the setting of initial prices for new products are likely to balance NBN Co's ability to recover its costs and access seekers' efficient use of the network. These prices are not 'approved' or 'rejected' by the ACCC under the SAU and they are not subject to NBN Co's commitments to 'flow through' regulated terms into SFAAs.
 - The 'level' of the price control — whether CPI-1.5% is an appropriate price control for all products, and whether it should be reviewed over time. Related to this, the 'statement of intent' in the SAU that NBN Co will annually review the CVC price with a view to reducing it in nominal terms as demand increases.
 - The interaction between the price control and the revenue cap — for example, whether it is sufficiently clear that, in a scenario where the revenue cap would allow NBN Co to earn more revenue than it would be able to earn given the price control, prices still must not be increased by more than CPI-1.5%.
 - Whether the mechanisms aimed at ensuring NBN Co faces incentives to engage in efficient expenditure are adequate — the definition of 'deemed prudent' expenditure categories; the proposed 'rules-based' approach to determining prudence during the rollout phase (in particular, the *Network Design Rules*); and the roll-forward of the Regulatory Asset Base ('RAB') based on actual capital expenditure (as opposed to capital expenditure forecast at the start of the previous regulatory cycle).
- Non-price terms — whether there is an effective oversight role for the ACCC via the regulatory recourse commitments in the SAU, access seekers' and the ACCC's ability to enforce regulated terms under Part XIC, and/or enforcement of SAU terms. Regarding the substance of the matters addressed in the SAU, whether they provide an appropriate balance of the rights and interests of both parties; and in

addition for service levels, whether they specify adequate levels of performance; whether the appropriate range of aspects of service levels are addressed; and whether the remedies specified provide an incentive for NBN Co to meet the service levels.

The ACCC also notes that, under Part XIC, regulated terms have no effect to the extent to which they are inconsistent with an SAU.⁴² The ACCC will therefore carefully consider whether aspects of the SAU would constrain in an undue manner the effective use of the ACCC's other regulatory powers in the future were the SAU to be accepted.

1.1 Consultation process

The ACCC must accept or reject the SAU based on the criteria for accepting an undertaking set out in section 152CBD of the CCA.⁴³ The ACCC must not accept the SAU unless the ACCC has published the SAU, invited submissions to the ACCC on the SAU, and considered the submissions received within the time limit specified for the consultation when it published the SAU.⁴⁴ In this consultation paper, the ACCC invites submissions on the SAU.

Submissions should:

- be provided electronically (in MS Word or PDF format) that is text-searchable to allow a 'copy and paste' function;
- use a text font size no smaller than 12 pt, Times New Roman;
- be singled-spaced; and
- include a copy of any court decision, tribunal decision, consultant's report or other extraneous material that is relied upon in the submission, with the relevant referenced sections clearly marked.

Written submissions from interested parties should be lodged no later than **11 January 2013**.

All submissions should be forwarded by email to:

General Manager
NBN Engagement and Group Coordination Branch
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3001
Email: richard.home@accc.gov.au
Fax: 03 9663 3699

⁴² CCA, ss. 152AY, 152CBIA, 152CBIB.

⁴³ CCA, s. 152CBC(2).

⁴⁴ CCA, s. 152CBD(2)(d).

Please copy any email correspondence to: analena.gilhome@acc.gov.au.

Enquiries may be directed to Analena Gilhome, Director, NBN Co Access Coordination, on 03 9290 1872 or analena.gilhome@acc.gov.au.

All submissions to this consultation paper will be considered as public submissions and will be published on the ACCC's website. If parties wish to submit commercial-in-confidence material as part of their submission to the ACCC, parties should submit both a public and confidential version of their submission. The public version should clearly identify the confidential material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

Parties are encouraged to restrict confidentiality claims to a minimum and to establish appropriate confidentiality regimes for the disclosure of any information that is claimed to be confidential.

1.2 Time limit for ACCC assessment of the SAU

The ACCC must make a decision to accept or reject the SAU within six months of the lodgement of the SAU with the ACCC,⁴⁵ subject to the ACCC's ability to extend this period.⁴⁶ If the ACCC does not make a decision within this period, it is deemed to have accepted the SAU.⁴⁷

The ACCC may extend, or further extend, the decision-making period by giving written notice to NBN Co.⁴⁸ The time limit is also extended by the duration of any periods during which the ACCC is waiting for NBN Co to respond to an ACCC information request,⁴⁹ or a variation notice,⁵⁰ or the period when the ACCC is undertaking public consultation on the SAU.⁵¹

Following the ACCC's analysis of the SAU and the submissions of interested parties, it intends to publish a draft decision. The ACCC hopes to publish its draft decision in March 2013. The ACCC will invite submissions on its draft decision and may, depending on the issues that are raised in its consultation process, give NBN Co a notice specifying variations to the SAU.⁵² If a notice to vary is given to NBN Co, this will allow NBN Co to make specified changes to the original SAU within the time

⁴⁵ CCA, s. 152CBC(5).

⁴⁶ CCA, s. 152CBC(7).

⁴⁷ CCA, s. 152CBC(5).

⁴⁸ CCA, s. 152CBC(7). Each extension must be for less than three months. The ACCC must explain in its notice why it was unable to make a decision on the SAU during the original decision-making period.

⁴⁹ CCA, s. 152CBB(2).

⁵⁰ CCA, s. 152CBDA(2).

⁵¹ CCA, s. 152CBC(6).

⁵² CCA, s. 152CBDA(2).

period set by the ACCC.⁵³ If NBN Co provides a varied SAU to the ACCC, the ACCC may consult on the varied SAU.⁵⁴

Under these arrangements, it is not possible to give a definitive date by which the ACCC will make its final decision on the SAU. However, the ACCC intends to make its decision as soon as it is practicable to do so, taking into account the scale and complexity of the issues to be assessed, and the proposed duration for the operation of the SAU.

1.3 Criteria for assessing the SAU

The legislative framework for the assessment of the SAU is set out in detail in the ACCC's December 2011 consultation paper about the 2011 NBN Co Special Access Undertaking.⁵⁵

Interested parties should have regard to the statutory criteria in section 152CBD of the CCA, against which the ACCC will assess the SAU, in formulating their submissions.

In particular, it should be noted that section 152CBD of the CCA requires that the ACCC be satisfied of different matters depending on the nature of the specific clauses in the SAU — the ACCC must not accept the SAU unless it is satisfied that:

- the terms and conditions specified in the undertaking about compliance with the Category B Standard Access Obligations ('SAOs') referred to in subsection 152CBA(3A) are consistent with these obligations and are reasonable;⁵⁶
- any conduct specified by the undertaking in relation to access referred to in subsection 152CBA(3B) will promote the long-term interests of end-users, and the related terms and conditions are reasonable;⁵⁷ and
- any conduct specified by the undertaking in relation to certain matters (such as developing new eligible services or enhancing a declared service) referred to in subsection 152CBA(3C) will promote the long-term interests of end-users.⁵⁸

NBN Co states that all the terms and conditions in the SAU are terms and conditions in relation to subsection 152CBA(3A) and should be assessed by the ACCC pursuant to the criteria in subsection 152CBD(2)(b) of the CCA,⁵⁹ — NBN Co submits that the terms and conditions in the SAU are consistent with the Category B SAOs and are

⁵³ CCA, s. 152CBDA(2).

⁵⁴ CCA, ss. 152CBDA(2), 152CBD(6). The ACCC is not required to consult on the varied SAU unless it is satisfied that the changes specified in the notice to vary are not of a minor nature or are likely to have a material adverse effect on the legitimate commercial interests of any person.

⁵⁵ ACCC, *NBN Co Special Access Undertaking Consultation Paper*, December 2011, pp. 6-20. (available at <http://www.accc.gov.au/>)

⁵⁶ CCA, s. 152CBD(2)(b).

⁵⁷ CCA, s. 152CBD(2)(ca).

⁵⁸ CCA, s. 152CBD(2)(cb).

⁵⁹ NBN Co, *Letter to ACCC titled NBN Co Special Access Undertaking (SAU) – request for clarification*, 1 November 2012.

reasonable.⁶⁰ However, NBN Co has also indicated that Schedule 1I of the SAU (the product development and withdrawal provisions, including the PDF Processes), may be characterised as conduct relating to developing new eligible services, enhancing declared services and giving information in relation to those activities under subsection 152CBA(3C) of the CCA, and that the specified conduct will promote the long-term interests of end-users.⁶¹

It should also be noted that:

- the ACCC must not accept the SAU if it is not satisfied that the parts of the SAU specified as a fixed principles term or condition should be specified as such, or the notional fixed period and associated qualifying circumstances should not be specified as such, or if particular circumstances that should be qualifying circumstances are not specified as such;⁶²
- the ACCC must not reject the SAU for a reason concerning price-related terms and conditions if those terms and conditions are reasonably necessary to achieve uniform national pricing of eligible NBN services;⁶³ and
- the ACCC must not reject the SAU for a reason that concerns certain conduct by NBN Co (relating to interconnection and bundling of access services) if that conduct is authorised under Part XIB for the purposes of subsection 51(1) of the CCA.⁶⁴

⁶⁰ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, pp. 180-182.

⁶¹ *Ibid*, p. 182; NBN Co, *Letter to ACCC titled NBN Co Special Access Undertaking (SAU) – request for clarification*, 1 November 2012.

⁶² CCA, s. 152CBD(4).

⁶³ CCA, s. 152CBD(5A).

⁶⁴ CCA, s. 152CBD(5C).

2 Relationship between the SAU, Access Agreements, Standard Forms of Access Agreement and other ACCC powers

The SAU does not contain comprehensive terms and conditions for access to services supplied by NBN Co, and the ACCC notes that Part XIC does not necessarily require the SAU to do so in order for it to be accepted. This chapter discusses how other regulated terms could address matters that are not dealt with by the SAU if it is accepted.

Further information about the telecommunications access regime that applies to NBN Co is set out in chapter 3 of the ACCC's December 2011 consultation paper about the 2011 NBN Co Special Access Undertaking.

2.1 Consistency between the SAU and ACCC powers in Part XIC

Part XIC provides the ACCC with a range of powers for the purpose of furthering the object of the part, which is promoting the long-term interests of end-users. The ACCC is able to directly establish regulated terms and conditions of access to services supplied by NBN Co by two means.

Firstly, the ACCC may make an Access Determination that relates to access to NBN Co's services in certain circumstances.⁶⁵ Secondly, the ACCC may issue Binding Rules of Conduct that specify terms and conditions for compliance with the Category B SAOs or a manner of compliance with the Category B SAOs if it considers that there is an urgent need to do so.⁶⁶

The ACCC is able to exercise these powers to, amongst other things, address matters that are not dealt with by the SAU if it is accepted.

Having said this, if an access seeker enters into an Access Agreement with NBN Co, any Access Determinations or Binding Rules of Conduct have no effect between the access seeker and NBN Co to the extent of inconsistency with the Access Agreement.⁶⁷ Access Determinations and Binding Rules of Conduct are also of no effect to the extent of having the effect (whether direct or indirect) of discriminating between access seekers.⁶⁸

⁶⁵ CCA, s. 152BC.

⁶⁶ CCA, s. 152BD.

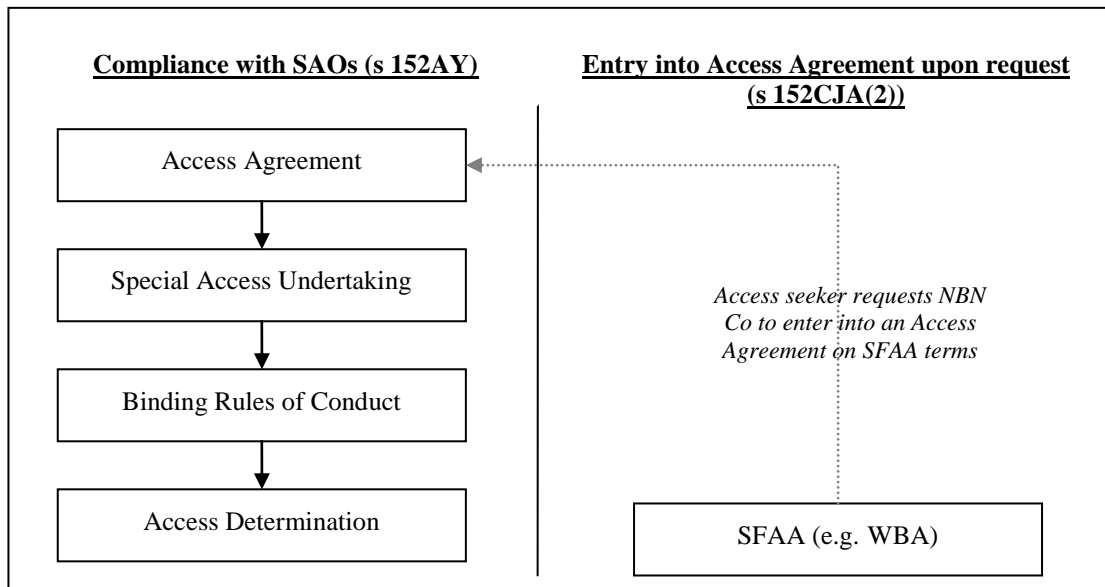
⁶⁷ CCA, ss. 152BCC and 152BDB.

⁶⁸ CCA, ss. 152BCB(4A) and 152BDA(4A). For further information about the ACCC's approach to interpreting the Part XIC anti-discrimination provisions, please refer to the *Part XIC Non-Discrimination Guidelines*, available at <http://www.accc.gov.au/>.

Further, if the ACCC accepts the SAU, Access Determinations and Binding Rules of Conduct will have no effect to the extent of inconsistency with the SAU.⁶⁹

The relationship that Part XIC establishes between the SAU, Access Agreements and other regulated terms, as well as the relationship between these mechanisms and SFAAs, is depicted in Diagram 1 below.

Diagram 1 Part XIC hierarchy and its relationship with the SFAA



The ACCC recognises that the SAU contains a complex set of commitments and that it addresses matters in varying degrees of detail. The ACCC considers that an SAU should not inhibit the ability for Access Determinations or Binding Rules of Conduct to effectively address the matters that are not addressed in detail by the SAU. The SAU assessment process provides an opportunity for all interested parties to closely examine the specific drafting of the SAU and raise any concerns about this matter.

2.2 Interaction between ACCC powers, SFAAs and Access Agreements

Under Part XIC, one way that access seekers may obtain access to services supplied by NBN Co is by means of an Access Agreement that is based on an SFAA.⁷⁰ An SFAA is a standing offer formulated and published by NBN Co that sets out terms and conditions in relation to access to its services.⁷¹ The ACCC notes that an SFAA itself is not an Access Agreement, and does not form part of the Part XIC hierarchy of terms (see Diagram 1 above). However, an access seeker may request NBN Co to enter into an Access Agreement that contains the same terms as those contained in an SFAA, and NBN Co must comply with the request.⁷² NBN Co has published a number of SFAAs,

⁶⁹ CCA, ss. 152AY, 152CBIA and 152CBIB.

⁷⁰ CCA, s. 152CJA(2).

⁷¹ CCA, ss. 152CJA(2) and 152CJF.

⁷² CCA, s. 152CJA(2).

including its Wholesale Broadband Agreement (WBA),⁷³ and a number of access seekers have executed Access Agreements that are based on the WBA that was published in November 2011.

However, Part XIC establishes a number of alternative means by which an access seeker can obtain access to services supplied by NBN Co.

Firstly, an access seeker and NBN Co can negotiate and agree to different terms and conditions in an Access Agreement to those that are contained in an SFAA,⁷⁴ subject to NBN Co's non-discrimination obligations.

Secondly, an access seeker can request NBN Co to supply services on terms and conditions set out in an Access Determination or Binding Rules of Conduct, provided that they are not inconsistent with an accepted SAU or the access seeker's existing Access Agreement if it has one.⁷⁵ Subject to limited exceptions, NBN Co must not refuse to supply services in this fashion,⁷⁶ and an access seeker is not required to enter into an Access Agreement in order to receive supply on these terms (but may agree to do so with NBN Co if it wishes).⁷⁷ Under Part XIC, carriers and carriage service providers can be required to comply with Access Determinations and Binding Rules of Conduct using a number of different enforcement mechanisms, including:

- by access seekers pursuing orders of the Federal Court under section 152BCQ or section 152BDH;
- as compliance with an applicable Access Determination or Binding Rules of Conduct is a carrier licence condition under section 152BCO and section 152BDF, by the ACCC enforcing those carrier licence conditions under the *Telecommunications Act 1997*; and
- by either the ACCC or access seekers pursuing orders of the Federal Court under section 152EG about conduct engaged in for the purpose of preventing or hindering the fulfilment of a requirement imposed by an Access Determination or Binding Rules of Conduct.

⁷³ At the time of publication of this consultation paper, the following SFAAs were also available on NBN Co's website: Satellite Wholesale Broadband Agreement, Wireless Trial Agreement and Testing Terms and Conditions.

⁷⁴ CCA, s. 152CJA(3).

⁷⁵ The ACCC has not made an Access Determination or Binding Rules of Conduct in relation to NBN Co's services at this time.

⁷⁶ CCA, s. 152AXB(2).

⁷⁷ The ACCC considers that, conceptually, Part XIC provides for supply on the terms in an Access Determination or Binding Rules of Conduct as if these terms were in a notional contract between NBN Co and an access seeker — see, for example, private rights for carriers and access seekers to enforce Access Determinations in section 152BCQ, and carrier licence conditions and service provider rules about compliance with Access Determinations under sections 152BCO and 152BCP(2), respectively. Similarly, under section 152BC(3)(g), an Access Determination may require an access seeker to accept and pay for supply on the terms specified by the ACCC if the access seeker requests NBN Co to supply declared services.

A failure to comply with Access Determinations or Binding Rules of Conduct may also involve a failure to comply with applicable Standard Access Obligations, which may similarly be enforced by the ACCC and/or access seekers in a number of different ways.⁷⁸

The ACCC considers that the publication of an SFAA does not alter NBN Co's obligations to comply with Access Determinations and Binding Rules of Conduct. As noted, an SFAA is not an Access Agreement and is therefore not part of the Part XIC hierarchy. This means that while Access Agreements that are based on SFAAs prevail over Access Determinations and Binding Rules of Conduct to the extent of inconsistency, Access Determinations and Binding Rules of Conduct still have effect even where inconsistent with the terms and conditions in an SFAA.⁷⁹

Similarly, NBN Co's obligation to comply with Access Determinations and Binding Rules of Conduct does not depend on the scope of an Access Determination or Binding Rules of Conduct. That is, regardless of whether the ACCC specifies any, or all, of the terms and conditions for compliance with the Category B SAOs, that Access Determination or Binding Rules of Conduct will, subject to the Part XIC hierarchy, still have effect between NBN Co and an access seeker.

Consequently, the ACCC considers that NBN Co must comply with any Access Determinations or Binding Rules of Conduct that have effect regardless of the terms and conditions contained in any SFAA, and that there may be a number of ways in which NBN Co can do so (such as agreeing to include regulated terms in a prospective Access Agreement, or agreeing to remove inconsistent terms in a prospective Access Agreement). Access seekers and the ACCC can seek to ensure that access seekers are able to obtain access on regulated terms by enforcing NBN Co's compliance with its obligations under Part XIC.

It is a commercial decision for an access seeker to request NBN Co to enter into an Access Agreement that is the same as an SFAA. The ACCC expects that access seekers would carefully consider the consequences of the terms and conditions that are to be contained in an Access Agreement prior to executing it, particularly in terms of whether it:

- contains a 'change management' regime that could allow the character of the Access Agreement to be unilaterally altered and in turn inhibit Access Determinations and Binding Rules of Conduct from applying; and/or

⁷⁸ For example, affected persons and the ACCC can seek orders from the Federal Court about compliance with Standard Access Obligations in accordance with section 152BB; compliance with the Standard Access Obligations is a carrier licence condition by virtue of section 152AZ; and the ACCC or access seekers can pursue orders of the Federal Court under section 152EG about conduct engaged in for the purpose of preventing or hindering the fulfilment of a Standard Access Obligation.

⁷⁹ As noted, Access Determinations and Binding Rules of Conduct have no effect for an access seeker to the extent of inconsistency with any Access Agreement it has, and an SFAA is not the same as an Access Agreement. However, NBN Co and access seekers may enter into an Access Agreement on the same terms and conditions as those contained in an SFAA.

- imposes termination and disconnection obligations that could inhibit access seekers from seamlessly transitioning to supply in accordance with Access Determinations or Binding Rules of Conduct after the Access Agreement has expired.

If access seekers do not consider such matters, it may adversely impact upon their ability to obtain access on regulated terms.

2.3 SAU commitments about SFAAs

2.3.1 Regulatory recourse commitments

NBN Co has proposed a number of commitments about SFAAs in the SAU that establish an integrated package of ‘regulatory recourse’ commitments. Some commitments apply during the first 10 years of the SAU term (contained in Module 1), and others apply for the full 30-year SAU term (contained in Module 0).

While the ACCC recognises that there is some overlap between the SAU commitments about SFAAs and NBN Co’s existing obligations to comply with Access Determinations and Binding Rules of Conduct (set out in section 2.2), the ACCC does not consider the commitments should be viewed as a substitute for NBN Co’s existing obligations under Part XIC.

Rather, the ACCC considers that these SAU commitments can be viewed as additional commitments that define how NBN Co will, in the circumstances that are set out in the SAU, make regulated terms available to access seekers who sign a new Access Agreement that is based on an SFAA. That is, NBN Co is making a commitment about one way that access seekers can obtain access on regulated terms, and if an access seeker is satisfied of this means of access on regulated terms, it should not need to rely upon enforcing NBN Co’s obligations to provide access on regulated terms, as discussed above.

The commitments contained in Module 1 of the SAU are summarised as follows:

- NBN Co acknowledges ACCC powers — NBN Co explicitly acknowledges that the ACCC can exercise its Access Determination and Binding Rules of Conduct powers.⁸⁰
- NBN Co to make new SFAAs consistent with regulated terms — if the ACCC establishes regulated terms, NBN Co must ensure that new SFAAs it publishes when current SFAAs expire are consistent with providing access on these regulated terms.⁸¹ Regulated terms include terms established by the ACCC through a ‘Facilities Access Decision’ power that is conferred on the ACCC by the SAU (outlined below).⁸²

⁸⁰ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1B, clause 1B.2.2(a).

⁸¹ *Ibid*, Schedule 1B, clauses 1B.2.2(b)-(d) and 1B.2.3(e)-(g).

⁸² *Ibid*, Schedule 1B, clause 1B.2.3.

- NBN Co to make SFAAs available with a term of up to two years — this creates an obligation for NBN Co to publish SFAAs with a maximum of a two-year, ‘co-terminus’ term.⁸³ NBN Co and access seekers can nonetheless agree to longer term Access Agreements.⁸⁴
- NBN Co to establish and conduct a multilateral SFAA forum — the forum can be used to identify issues that industry has with the SFAAs and develop possible solutions.⁸⁵

The SAU sets out that, at the midpoint review (discussed in further detail in section 3.2), the ACCC will consider proposals from NBN Co about the regulatory recourse arrangements that NBN Co considers should operate for the remainder of Module 1.⁸⁶ The SAU states that the ACCC will consider a proposal for:

- the commitment to ensure that new SFAAs are consistent with regulated terms (the ACCC will have regard to the ‘reasonableness’ criteria in section 152AH of the CCA as well as the ability for access seekers to avail themselves of the regulatory recourse mechanism consistent with the legislative hierarchy and the operation of any changes to the legislative hierarchy),⁸⁷ and
- the operation of the multilateral SFAA forum.⁸⁸

The ACCC can accept or reject NBN Co’s proposals and make substitute terms in respect of the rejected aspects.⁸⁹ The SAU requires that NBN Co complies with the outcomes of the ACCC’s decision for the remainder of Module 1.⁹⁰

The remaining commitments are contained in Module 0 of the SAU, and are as follows:

- NBN Co to produce and maintain SFAAs — this creates an obligation for NBN Co to publish and maintain SFAAs in relation to the supply of the NBN Access Service and Ancillary Services.⁹¹
- NBN Co to ensure SFAAs are consistent with the SAU — this creates an obligation for NBN Co to amend SFAAs to make them consistent with the SAU (including when the SAU is varied over time).⁹²

As noted, the SAU also confers a power on the ACCC to make a decision, called a ‘Facilities Access Decision’, about certain terms and conditions in relation to the ‘Facilities Access Service’.⁹³ The terms and conditions that can be established via such

⁸³ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1B, clause 1B.1.3(a).

⁸⁴ Ibid, Schedule 1B, clause 1B.1.3(a).

⁸⁵ Ibid, Schedule 1B, clause 1B.3.1.

⁸⁶ Ibid, Schedule 1K, clauses 1K.2 and 1K.3.

⁸⁷ Ibid, Schedule 1K, clause 1K.3.1(a)(iii).

⁸⁸ Ibid, Schedule 1K, clause 1K.2.1(a)(iv).

⁸⁹ Ibid, Schedule 1K, clauses 1K.2.3-1K.2.7 and 1K.3.3-1K.3.7.

⁹⁰ Ibid, Schedule 1K, clauses 1K.2.5(b) and 1K.2.7(b); 1K.3.5(b)(iii) and 1K.3.7(b)(iii).

⁹¹ Ibid, Main Body, clause 6.3.

⁹² Ibid, Main Body, clauses 6.1-6.2.

⁹³ Ibid, Schedule 1B, clause 1B.2.3.

a decision appear to be limited to those that are in connection with interconnection obligations under subsection 152AXB(4) of the CCA for the NBN Access Service and Ancillary Services.⁹⁴ This seems to contrast with the SAU permitting NBN Co to include more general terms and conditions about the Facilities Access Service in SFAAs which relate to the NBN Access Service and Ancillary Services.⁹⁵ (This issue is outlined further in section 4.2.) The SAU prescribes the process (including consultation) that must be followed by the ACCC in making a Facilities Access Decision,⁹⁶ and requires NBN Co to ensure that new SFAAs will be consistent with the ACCC's decision.⁹⁷

NBN Co submits that:

- it has adopted an integrated approach to regulatory oversight that recognises the Government's policy intent of promoting commercially agreed outcomes, provides the parties with contractual certainty, and allows NBN Co to respond to changes as necessary by incorporating certain ACCC decisions into SFAAs;⁹⁸
- its commitment to offer SFAAs with two-year terms allows access seekers "to take advantage of ACCC decisions in a timely manner [and] also enables NBN Co to comply with its non-discrimination obligations";⁹⁹ and
- as Access Agreements based on the two-year SFAA will expire at the same time, regardless of when executed, all access seekers will have the ability to obtain regulated terms that it includes in the SFAA at the same time.¹⁰⁰

Further, Ordover and Shampine note that the existing SFAA will not be modified as the parties require contractual certainty for business planning purposes.¹⁰¹

NBN Co further submits that giving effect to Access Determinations, Binding Rules of Conduct or Facilities Access Decisions in the SFAAs "may involve a degree of independent interpretation by NBN Co."¹⁰² However, NBN Co submits that the ACCC would be able to make further regulatory determinations specifying implementation of the initial determination, and so it will have incentives to "ensure its practical implementation...was acceptable to Access Seekers, and consistent with the intent of any ACCC decision."¹⁰³

NBN Co also submits that the multilateral SFAA forum "will ensure open and effective engagement with industry in accordance with NBN Co's non-discrimination

⁹⁴ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1B, clause 1B.2.3(a).

⁹⁵ Ibid, Main Body, clause 6.3.

⁹⁶ Ibid, Schedule 1B, clause 1B.2.3(c).

⁹⁷ Ibid, Schedule 1B, clause 1B.2.3(e)-(g).

⁹⁸ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 145.

⁹⁹ Ibid, p. 145.

¹⁰⁰ Ibid, p. 147.

¹⁰¹ Ordover, D. and Shampine, A., *Expert report*, September 2012, p. 28.

¹⁰² NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 148.

¹⁰³ Ibid, p. 145.

obligations” to reach mutually agreeable terms and conditions, and will also assist the ACCC to identify the terms and conditions for which it may be necessary to make an Access Determination, Binding Rules of Conduct or Facilities Access Decision.¹⁰⁴

Given the ability for access seekers and the ACCC to ensure that access is available on regulated terms that have been made by the ACCC via enforcement mechanisms, it may not be necessary for the SAU to contain commitments for its full 30-year term about how access seekers will be able to obtain access on regulated terms in SFAAs. However, the ACCC’s views on this matter are dependent on the views of interested parties about the efficacy of the aforementioned enforcement mechanisms.

2.3.2 Other SAU commitments about SFAAs

The SAU also contains a number of other commitments in relation to SFAAs. Firstly, NBN Co commits to include certain terms and conditions in SFAAs, such as some of the non-price terms and conditions that are considered in further detail in chapter 7 of this consultation paper. Secondly, NBN Co limits its ability to include certain terms and conditions in SFAAs, such as prices for products that would exceed the prices that are considered in further detail in chapter 6 of this consultation paper.

The ACCC considers that the broad effect of such commitments is to ensure that terms and conditions of the types described in the SAU are included in SFAAs. However, in respect of certain non-price matters, NBN Co considers that the SAU does not require it to comply with the substance of the terms and conditions that it must include in SFAAs — that is, if NBN Co did not comply with the terms that the SAU requires NBN Co to include in the SFAA, this would not represent a breach of the SAU.¹⁰⁵ NBN Co would nonetheless be required to comply with Access Agreements that contained these terms and conditions — NBN Co submits that a breach of the terms incorporated into SFAAs would “be dealt with as a contractual matter between NBN Co and its customers under their Access Agreement [where the Access Agreement is based on those SFAAs]”.¹⁰⁶

1. Are there any provisions of the SAU that are not sufficiently clear, such that for the purposes of section 152AY of the CCA, there may be ambiguity as to:
 - the matters that those provisions relate to (in which case the terms and conditions in an Access Determination or Binding Rules of Conduct on the matter will not have effect); and
 - the matters that those provisions do not relate to (in which case the terms and conditions in an Access Determination or Binding Rules of Conduct on the matter will have effect)?

¹⁰⁴ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 150.

¹⁰⁵ NBN Co, *Letter to ACCC titled NBN Co Special Access Undertaking (SAU) – request for clarification*, 1 November 2012.

¹⁰⁶ *Ibid.*

2. Would access seekers be able to effectively invoke NBN Co's obligations to comply with Access Determinations and Binding Rules of Conduct in the absence of specific SAU commitments about how NBN Co will do so? Why/why not?
3. Would the regulatory recourse commitments in Module 1 lead to effective negotiation between NBN Co and access seekers? Does the combination of these commitments and NBN Co's other obligations to comply with Access Determinations and Binding Rules of Conduct under Part XIC make effective negotiations more likely to occur?
4. Does the proposed Facilities Access Decision process provide for the ACCC to determine all the terms and conditions necessary for the Facilities Access Service? What are the advantages of the SAU including this process to establish these terms and conditions?
5. Does the ACCC's role in the midpoint review mean that the regulatory recourse arrangements are likely to remain reasonable during Module 1?
6. Does the absence of the Module 1 regulatory recourse commitments in Module 2 raise concerns that Access Determinations and Binding Rules of Conduct will not be able to adequately address matters that arise for the remainder of the SAU term?
7. Regarding the SAU commitments about NBN Co including certain terms and conditions in SFAAs, is it important for the SAU to also require NBN Co to comply with the substance of these terms and conditions?

3 Operation of the SAU

As noted in chapter 1 of this consultation paper, the SAU provides that the regulatory framework set out in the SAU operates for approximately 30 years and has a modular structure — each module operates for a varying period of time. NBN Co submits that:

The modular structure is designed to strike a better balance between providing certainty on long term cost recovery arrangements and some flexibility for the other regulatory terms and conditions to evolve as required over time (including an appropriate role for the ACCC in that process, by reviewing and approving those changed arrangements).¹⁰⁷

The effect of the modular approach is that different matters would be locked-in for different periods of time. Key matters that would be locked-in for 30 years via the operation of Modules 0, 1 and 2 include:

- Commitments relating to the modular structure of the SAU — in particular, the lodgement by NBN Co of ‘replacement modules’ at three to five year intervals for assessment by the ACCC as variations to the SAU.
- The fixed principles term and condition, covering all of Modules 0 and 2 collectively, and the qualifying circumstances for the fixed principles term and condition.
- NBN Co’s commitment to publish SFAAs and to ensure consistency of SFAAs with the SAU.
- Service descriptions for the NBN Access Service, Ancillary Services and Facilities Access Service, as well as the specific product components and product features through which NBN Co commits to implement and supply these services.
- Principles for product development and withdrawal (for example, a commitment to establishing a Product Development Forum (‘PDF’) to consult with customers on product development).
- The LTRCM — the RAB roll-forward equation, the initial cost recovery account and the formula for its roll-forward, and the building block components that will be included in the annual revenue requirement calculations (for example, return on capital, return of capital, etc).
- The price control, which prevents the maximum prices that NBN Co will include in SFAAs for all of its products from increasing by more than CPI-1.5% per annum.
- The rules around how NBN Co will set prices for new products.
- The existence of reference offers.

¹⁰⁷ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 44.

- Principles relating to service levels for existing and new products.

Key matters that would be locked-in for the first 10 years via Module 1 include:

- one aspect of regulatory recourse — the obligation to publish SFAAs with two-year, ‘co-terminus’ terms and to ensure that new SFAAs are consistent with any regulated terms that exist at the time of publication;
- the processes for calculating the building block components that will be included in the annual revenue requirement calculations (for example, the methodologies for calculating the return on capital, return of capital, etc);
- the processes NBN Co will apply to determine whether actual expenditure is prudent during the network rollout; and
- the products that make up the reference offers.

Matters that would be reviewed after the first five years at the ‘midpoint review’ of Module 1 include:

- the effectiveness of various multilateral processes; and
- non-price terms and conditions (including service levels), aspects of regulatory recourse and the regulatory reporting requirements.

The midpoint review is discussed further in section 3.2.

Matters that would be reviewed every three to five years after the expiry of Module 1, via the replacement module submission and assessment process include:

- the products that make up the reference offers;
- the values for each building block component that will be included in the annual revenue requirement for each year of the regulatory cycle (for example, operating and capital expenditure forecasts and the weighted average cost of capital, etc); and
- service levels and service level rebates.

The replacement module submission and assessment process is outlined in section 3.1.

NBN Co submits that the provisions of the SAU aim to provide long-term certainty over certain aspects of the SAU while ensuring regular review of other aspects of the SAU.¹⁰⁸

¹⁰⁸ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 51.

3.1 Fixed principles and replacement modules

On expiry of Module 1, the modular approach envisages that the ACCC will review matters that are submitted by NBN Co in a ‘replacement module application’.¹⁰⁹ The ACCC would assess each proposed replacement module against the statutory criteria in section 152CBD of the CCA and make a decision to accept or reject the variation.¹¹⁰

If a proposed replacement module was accepted, it would become part of the SAU.

If a proposed replacement module did not meet the statutory criteria, the ACCC would be able to reject the variation. The SAU sets out various processes governing what would occur if a replacement module was not accepted (‘non-acceptance of replacement module’ provisions).¹¹¹

3.1.1 Implications of Module 0 and Module 2

The ACCC’s assessment of replacement modules would be limited by the ‘fixed principles term and condition’ in the SAU. This is because the ACCC could not reject a variation to the SAU for a reason concerning a term or condition in the SAU that is specified to be a fixed principles term or condition.¹¹² The SAU provides that:

- every term and condition in Module 0 and Module 2 of the SAU (collectively) is a fixed principles term and condition;¹¹³
- the notional fixed period for the fixed principles term and condition commences when the SAU is accepted and continues until the end of the SAU term;¹¹⁴ and
- the qualifying circumstances for the fixed principles term and condition are that the ACCC is satisfied that:
 - there is not a manifest and material error in the fixed principles term and condition; and
 - any information on which the fixed principles term and condition was based was not false or misleading in a material respect.¹¹⁵

Hence, if the SAU was accepted, the ACCC would not be able to reject a proposed replacement module for a reason concerning a term or condition specified in Modules 0 and 2. NBN Co submits that:

¹⁰⁹ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clauses 4.5-4.6.

¹¹⁰ Subsection 152CBG(4) of the CCA provides that the ACCC must assess variations against the same criteria that apply at lodgement of a new SAU.

¹¹¹ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clause 4.10.

¹¹² CCA, s. 152CBAA(6). In addition, the ACCC cannot reject a variation for a reason concerning the period for which the term or condition is fixed, or any associated qualifying circumstances.

¹¹³ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clause 5.3.

¹¹⁴ Ibid, Main Body, clause 5.2.

¹¹⁵ Ibid, Main Body, clause 5.4.

The inclusion of the terms and conditions of Modules 0 and 2 as a fixed principles term or condition is intended to preclude rejection of variations for a reason that concerns terms and conditions already approved by the ACCC for the term of the SAU. NBN Co considers that this approach is appropriate to provide certainty for NBN Co and stakeholders that the terms that have been accepted by the ACCC for the term of the SAU will not be re-assessed. NBN Co considers that this approach will also simplify the ACCC's future assessments of the periodic SAU variations by narrowing the scope of the areas the ACCC needs to consider under section 152CBD of the CCA.¹¹⁶

In addition, any Access Determination or Binding Rules of Conduct made by the ACCC (in place of a rejected replacement module or otherwise) would only be effective to the extent that it was not inconsistent with the terms and conditions in Modules 0 and 2. As outlined in section 2.1, under the Part XIC hierarchy, Access Determinations and Binding Rules of Conduct have no effect to the extent of inconsistency with the SAU. Further, the SAU states that NBN Co acknowledges that if the ACCC rejects a replacement module, the ACCC may make Access Determinations or Binding Rules of Conduct that will have effect to the extent that they are not inconsistent with the principles and conditions set out in Modules 0 and 2.¹¹⁷

The ACCC cannot accept the SAU unless it is satisfied that the terms and conditions specified in Modules 0 and 2 meet the criteria in section 152CBD for the whole of the respective periods that these terms and conditions are specified as a fixed principle by the SAU. Also, the ACCC must reject the SAU if it is not satisfied that any aspect of the fixed principles term and condition should be specified as such, or if it is not satisfied with the fixed period or qualifying circumstances specified.¹¹⁸

3.1.2 Process for assessing replacement modules

The SAU specifies processes around the submission of proposed replacement modules,¹¹⁹ and in the event that a replacement module is not accepted, provisions around how and when any Access Determination or Binding Rules of Conduct made by the ACCC would “apply” (that is, the ‘non-acceptance of replacement module’ provisions).¹²⁰ Nine months prior to the expiry of a module (‘the previous module’), NBN Co will submit a proposed replacement module.¹²¹ NBN Co can update the proposed replacement module up to 20 business days prior to the expiry of the previous module.¹²²

There is a special rule in relation to Module 1. The term of Module 1 is automatically extended for 12 months upon the submission of Module 3,¹²³ unless the ACCC accepts

¹¹⁶ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 36.

¹¹⁷ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clause 4.10(f).

¹¹⁸ CCA, s. 152CBD(4). In relation to qualifying circumstances, the ACCC must be satisfied that the circumstances that are specified should be specified, and that all circumstances that should be specified are specified.

¹¹⁹ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clause 4.6.

¹²⁰ Ibid, Main Body, clause 4.10.

¹²¹ Ibid, Main Body, clause 4.6.

¹²² Ibid, Main Body, clause 4.10(c).

¹²³ Ibid, Main Body, clause 4.3(a)(i).

the proposed replacement Module 3 before the original expiry date of Module 1.¹²⁴ In all other cases, the previous module expires at the end of the term specified in that module (‘the regulatory cycle’).

In general, a proposed replacement module that has been accepted by the ACCC takes effect from the date specified in the replacement module.¹²⁵

The SAU provides that, if a proposed replacement module has not been accepted before the expiry of the previous module:

- some parts of the proposed replacement module (the proposed reference offers, the LTRCM proposal and the proposed service level arrangements) are deemed to “apply” until the end of the proposed term of the replacement module (‘the deemed parts’).¹²⁶ It appears that NBN Co is proposing that the deemed parts effectively become ‘terms of the SAU’ for the purposes of the Part XIC hierarchy.
- any Access Determination or Binding Rules of Conduct made before or within 12 months of the expiry of the previous module will “prevail” over the deemed parts and will “apply” (either from the expiry of the previous module or at the start of the next financial year, depending on when the Access Determination or Binding Rules of Conduct is made).¹²⁷

Unlike the provisions of the SAU that provide that an Access Determination or Binding Rules of Conduct made before or within 12 months of the module will “prevail” over the deemed parts, the SAU does not contain a comparable provision in respect of Access Determinations or Binding Rules of Conduct which relate to the deemed parts and are made more than 12 months after the expiry of the module. However, the SAU states that Access Determinations and Binding Rules of Conduct will only have effect to the extent that they are not inconsistent with the SAU.¹²⁸

One effect of the provisions around non-acceptance of replacement modules is that, if a replacement module is not accepted, the deemed parts may nevertheless apply for a substantial part (if not all) of the regulatory cycle. In contrast, if the ACCC were to reject a variation to a SAU under section 152CBG of the CCA, the terms and conditions in the *original* SAU would remain unchanged and continue in force. The modular structure of the SAU, which provides for the expiry of Module 1 and replacement modules, means that, if the ACCC were to reject the SAU variation (that is, proposed replacement modules), a ‘gap’ would be left in the SAU. The effect of the non-acceptance of replacement provisions is that this ‘gap’ will be filled by the deemed parts (unless an Access Determination or Binding Rules of Conduct is made within the specified timeframes).

NBN Co submits that the processes around submission of replacement modules provide certainty about what arrangements will apply if a proposed replacement module was

¹²⁴ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clause 4.3(b).

¹²⁵ Ibid, Main Body, clause 4.11.

¹²⁶ Ibid, Main Body, clause 4.10(b).

¹²⁷ Ibid, Main Body, clause 4.10(d)-(e).

¹²⁸ Ibid, Main Body, clause 4.10(f).

rejected by the ACCC, so that there are always relevant reference offers and service levels available, and so that the LTRCM operates continuously over time (and on a full financial year basis).¹²⁹

The ACCC notes that the SAU provisions around non-acceptance of replacement modules have complex interactions with the normal operation of the legislative hierarchy in Part XIC and NBN Co's existing obligations under Part XIC to comply with Access Determinations and Binding Rules of Conduct. For example, the provisions:

- appear to place constraints on the timing of when NBN Co will comply with Access Determinations and Binding Rules of Conduct. For example, there is a delay in the availability of terms and conditions in Access Determinations and Binding Rules of Conduct made after the expiry of the previous module.
- do not provide that NBN Co is required to comply with any Access Determinations or Binding Rules of Conduct which cover matters addressing the deemed parts, but which are made more than 12 months after the expiry of a regulatory cycle.
- set out that regulated terms will apply only to the extent that they are not inconsistent with the SAU (including Modules 0 and 2), which appears to impose an additional (albeit the same) requirement of consistency over and above the legislative hierarchy. The effect of this and the deemed parts is that it is possible for both the deemed parts and an Access Determination or Binding Rules of Conduct to be partially in effect at the same time.
- do not appear to contemplate that the ACCC may make more than one regulatory determination, for example, a Binding Rules of Conduct to address urgent matters followed by an Access Determination at a later date.¹³⁰ In particular, if a Binding Rules of Conduct was made after expiry of the previous module, it is possible that the SAU would apply the deemed parts for 12 months, then the Binding Rules of Conduct for up to 12 months, and then revert to the deemed parts for 12 months.
- may not account for circumstances where the ACCC varies regulatory determinations, such as where it varies an Access Determination in accordance with section 152BCN of the CCA.

In addition, the provisions around non-acceptance of replacement modules may reduce NBN Co's incentives to submit reasonable replacement modules, particularly the provision that allows the deemed parts of the proposal to automatically "apply". Further, NBN Co's ability to update a proposed replacement module up to 20 business

¹²⁹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 44.

¹³⁰ Under section 152BDC of the CCA, Binding Rules of Conduct can only operate for a maximum of 12 months.

days prior to the expiry of the then current module could permit NBN Co to propose unreasonable terms at the last minute that could be effective for a full financial year.¹³¹

3.2 Midpoint review of Module 1

NBN Co commits to reviewing specific aspects of Module 1 prior to 1 July 2018.¹³² As part of this process, NBN Co will provide the ACCC with proposals for the operation of various multilateral processes and non-price terms for the remainder of Module 1.¹³³ The SAU confers a power on the ACCC to approve or reject NBN Co's proposals and make its own decisions in their place.¹³⁴ Unlike the replacement module submission and assessment procedure discussed in section 3.1, the midpoint review is not an assessment of a variation to the SAU under section 152CBG of the CCA.

NBN Co proposes that the following matters will be reviewed:

- multilateral processes — the customer engagement processes associated with the approach to prudency, the Product Development Forum processes, the Dispute Management Rules and the multilateral SFAA forum;¹³⁵ and
- non-price terms — non-price terms and conditions (except dispute management), service levels, aspects of regulatory recourse (specifically, the commitment to ensure that new SFAAs are consistent with regulated terms, and the conferral on the ACCC of the power to make Facilities Access Decisions), and the regulatory reporting arrangements (specifically, the commitments to provide information to the ACCC for monitoring NBN Co's compliance with the cost recovery and pricing commitments in Module 1).¹³⁶

The SAU sets out the review procedures that must be followed by NBN Co and the ACCC. The SAU requires NBN Co to provide certain information to the ACCC, including any proposed amendments to the SAU terms,¹³⁷ and specifies timeframes to be followed by the parties and the review criteria that the ACCC must apply.¹³⁸ The same procedures apply to the review of the multilateral processes and the non-price terms, however there are different criteria that the ACCC must consider for each type of review.

For the review of multilateral processes, NBN Co will provide the ACCC with:

¹³¹ Under clause 4.10(e) of the Main Body of the SAU, any Access Determinations or Binding Rules of Conduct made within the first 12 months of the commencement of the replacement module will only “apply” from the commencement of the second financial year of the regulatory cycle.

¹³² NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1K, clauses 1K.2.1(a) and 1K.3.1(a).

¹³³ Ibid, Schedule 1K, clauses 1K.2.1 and 1K.3.1.

¹³⁴ Ibid, Schedule 1K, clauses 1K.2.3-1K.2.7 and 1K.3.3-1K.3.7.

¹³⁵ Ibid, Schedule 1K, clause 1K.2.1.

¹³⁶ Ibid, Schedule 1K, clause 1K.3.1.

¹³⁷ Ibid, Schedule 1K, clauses 1K.2.2(a) and 1K.3.1(a). The SAU also provides that NBN Co may propose that no amendments should be made.

¹³⁸ Ibid, Schedule 1K, clauses 1K.2 and 1K.3.

- information about the operation of each multilateral process since the SAU commencement date; and
- an ‘engagement proposal’ for the operation of the multilateral processes for the remainder of Module 1.¹³⁹

The ACCC is required to make a decision about the extent to which the combined operation of the multilateral processes is resulting in effective engagement between NBN Co and access seekers.¹⁴⁰ The SAU sets out the criteria that the ACCC will have regard to, which includes: the level of access seeker understanding of the processes; whether the parties are devoting sufficient resources to participate in the processes; and the level of consensus or disputation.¹⁴¹

The ACCC is also required to make a decision on whether to accept or reject the ‘engagement proposal’.¹⁴² The SAU does not appear to specify criteria that the ACCC will have regard to in making this decision.

For the review of non-price terms, NBN Co will provide the ACCC with a ‘non-price proposal’ to amend or replace the existing commitments.¹⁴³ The ACCC is required to make a decision on whether to accept the ‘non-price proposal’, having regard to the ‘reasonableness’ criteria in section 152AH of the CCA, as well as specific criteria for each non-price matter.¹⁴⁴

The SAU sets out how the review outcomes will be implemented, including processes to be followed depending on whether the ACCC approves or rejects NBN Co’s ‘engagement proposal’ or ‘non-price proposal’. If the ACCC accepts NBN Co’s proposal, NBN Co will comply with those terms for the remainder of Module 1.¹⁴⁵ If the ACCC rejects NBN Co’s proposal, it is able to submit one more proposal for ACCC assessment.¹⁴⁶ If the ACCC rejects both the first and second proposal, the ACCC may make substitute terms in respect of the rejected aspects for the remainder of Module 1.¹⁴⁷

As noted, the ACCC’s decisions to accept NBN Co’s proposals or to make substitute terms will be made under a power conferred on the ACCC by the SAU. The decisions are not an Access Determination or Binding Rules of Conduct, nor is NBN Co committing to amend the existing terms of the SAU following the review outcomes. Rather, NBN Co is committing to comply with the terms arising from the review outcomes instead of the existing SAU terms for the remainder of Module 1.

¹³⁹ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1K, clause 1K.2.1.

¹⁴⁰ Ibid, Schedule 1K, clause 1K.2.2(a)(i).

¹⁴¹ Ibid, Schedule 1K, clause 1K.2.2(b).

¹⁴² Ibid, Schedule 1K, clause 1K.2.2(a)(ii).

¹⁴³ Ibid, Schedule 1K, clause 1K.3.1.

¹⁴⁴ Ibid, Schedule 1K, clause 1K.3.2.

¹⁴⁵ Ibid, Schedule 1K, clauses 1K.2.5 and 1K.3.5.

¹⁴⁶ Ibid, Schedule 1K, clauses 1K.2.4 and 1K.3.4. If the ACCC rejects part or all of NBN Co’s first proposal, NBN Co will submit a second proposal in respect of the rejected aspects. The ACCC will then consider the second proposal in accordance with the specified review procedures.

¹⁴⁷ Ibid, Schedule 1K, clauses 1K.2.5(a) and 1K.3.5(a).

NBN Co submits that:

- it is appropriate for the ACCC to have “a key oversight role in shaping the ongoing terms and conditions offered for the duration of Module 1”,¹⁴⁸ given “the bespoke and untested nature of some of the processes and terms and conditions.”¹⁴⁹
- for the review of multilateral processes — the ability for the ACCC to make substitute terms “will provide NBN Co with incentives to carry out a thorough review...and submit a proposal that will ensure the continued effective engagement between NBN Co and Access Seekers”¹⁵⁰ and the review mechanism “will provide for a timely and well considered update to multilateral processes in the SAU”.¹⁵¹
- for the review of non-price terms — the specified review criteria are “appropriate” and will provide for a “meaningful review”.¹⁵²

The ACCC intends to consider whether:

- the specified review process is appropriate — in particular, the implications of there being no ability for the ACCC to extend the decision-making timeframe,¹⁵³ and NBN Co’s proposals being deemed accepted if the ACCC does not make a decision within that timeframe;¹⁵⁴
- the specified review criteria could lead to outcomes that preclude the ACCC from maintaining consistency when making Access Determinations and Binding Rules of Conduct — the review criteria should be consistent with the legislative criteria for assessing a SAU variation under Part XIC, that is, ‘reasonableness’ and the ‘long-term interests of end-users’;
- because the time provided for the preparation and assessment of a second proposal could extend beyond 1 July 2018,¹⁵⁵ it is sufficiently clear that the ACCC may still consider NBN Co’s second proposal and (if it rejects that proposal) make substitute terms after that time; and

¹⁴⁸ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 151.

¹⁴⁹ *Ibid*, p. 151.

¹⁵⁰ *Ibid*, p. 153.

¹⁵¹ *Ibid*, p. 153.

¹⁵² *Ibid*, pp. 155-156.

¹⁵³ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1K, clauses 1K.2.3(a) and 1K.3.3(a). Such as when the ACCC is waiting for NBN Co to respond to a request for further information under Schedule 1K, clauses 1K.2.1(b) and 1K.3.1(b), or while the ACCC is conducting consultation on NBN Co’s proposals under Schedule 1K, clauses 1K.2.3(e) and 1K.3.3(d).

¹⁵⁴ *Ibid*, Schedule 1K, clauses 1K.2.6 and 1K.3.6.

¹⁵⁵ The SAU provides that NBN Co will submit its proposals for ACCC consideration no later than 6 months prior to 1 July 2018 (that is, no later than 1 January 2018). The ACCC has 60 business days to consider the proposal. If the ACCC rejects it, NBN Co then has 60 business days to submit a new proposal. Hence, the ACCC may not receive the new proposal until approximately 1 July 2018.

- the implications of the restrictions set out in the SAU on the ACCC’s making of substitute terms are appropriate — for example, the SAU states that those substitute terms will have no effect to the extent of inconsistency with the SAU.¹⁵⁶

Content of the different modules

8. Are matters in the SAU locked-in for the appropriate time period? Are there elements that should be locked-in for longer or shorter periods? Should there be more or less frequent review of particular matters?

Fixed principles and replacement modules

9. Should all the matters specified in Modules 0 and 2 be a fixed principles term and condition? Are the specified notional fixed period and qualifying circumstances for the fixed principles term and condition appropriate? Should there be any other qualifying circumstances?
10. Does the proposed replacement module process adequately balance the objectives of regulatory certainty with regular reviews of the SAU terms and conditions? What are the problems with the operation of the replacement module process (if any)? Are there any specific issues relating to the interaction with the ACCC’s powers to make Access Determinations and Binding Rules of Conduct?
11. Do the processes for submission of proposed replacement modules provide sufficient time for interested parties to participate in ACCC consultation processes about the making of regulated terms?
12. Do the processes for submission of proposed replacement modules provide an incentive for NBN Co to submit reasonable terms and conditions in proposed replacement modules?

Midpoint review

13. Are there any aspects of Module 1 that are not proposed to be reviewed, but which should be? Are there aspects of Module 1 that are proposed to be reviewed but which should not be?
14. Do the review timeframes and criteria, particularly the processes surrounding acceptance or rejection of NBN Co’s proposals, provide sufficient time for interested parties to participate in ACCC consultation processes about the reviews?
15. Is it clear how the ACCC’s decisions apply when the ACCC does not accept NBN Co’s proposals and makes substitute terms?

¹⁵⁶ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1K, clauses 1K.2.7(c) and 1K.3.7(c). The ACCC’s decisions will also have no effect if they have the effect of discriminating between access seekers, or if they are otherwise non-compliant with Part XIC.

4 Services to which the SAU relates

NBN Co has chosen to submit the SAU in respect of the ‘NBN Access Service’ and ‘Ancillary Services’.¹⁵⁷ The SAU also contains commitments relating to the ‘Facilities Access Service’.¹⁵⁸ Module 0 describes these services at a functional level; Module 1 contains terms which describe how the services will be implemented; and Module 2 contains similar terms to those in Module 1, but specified at a lower level of detail.

NBN Co submits that acceptance of the SAU would have the effect of declaring the NBN Access Service as well as Ancillary Services.¹⁵⁹ NBN Co does not consider that acceptance of the SAU would have the effect of declaring the Facilities Access Service.¹⁶⁰

4.1 Limitations on the service descriptions

NBN Co submits that it has developed the service description for the NBN Access Service to be a functional definition that is consistent with the ACCC’s approach when declaring services.¹⁶¹

The ACCC does not consider the service description for the NBN Access Service to be a service description that encompasses all services supplied by NBN Co, because Modules 1 and 2 of the SAU also specify the particular way in which NBN Co will supply the NBN Access Service. That is, for the SAU term, NBN Co submits that the supply of the NBN Access Service is limited to the supply of the product components and associated product features that are specified in the SAU.¹⁶²

Similarly, NBN Co submits that it will offer to supply Ancillary Services through the ‘Platform Interfacing Service’ and the ‘Sandpit Service’ for the duration of Module 1.¹⁶³ Module 2 of the SAU contains a commitment to offer to supply the Ancillary Services in accordance with the SAU.¹⁶⁴

Where the services declared by acceptance of the SAU are subject to such limitations, the Category B SAOs only apply to the limited service.¹⁶⁵ The ACCC does not consider these limitations to be problematic in the NBN context, because the combination of sections 152CJA and 152AL of the CCA has the effect of requiring that all of NBN

¹⁵⁷ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clause 2.1.

¹⁵⁸ Ibid, Main Body, clause 2.2.

¹⁵⁹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 59.

¹⁶⁰ Ibid, p. 79.

¹⁶¹ Ibid, p. 62.

¹⁶² NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1A, clause 1A.1.2.

¹⁶³ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 77.

¹⁶⁴ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 2A, clause 2A.1.

¹⁶⁵ Subsection 152CBA(5) of the CCA states that an undertaking may be subject to limitations that are specified in the undertaking. Under subsection 152AL(8E), where an undertaking is subject to limitations, the service is only a declared service to the extent to which the service falls within the scope of the limitations.

Co's eligible services are declared in order for NBN Co to supply them. As such, services which are not declared by acceptance of the SAU must nonetheless be declared via other means (for example, by NBN Co publishing a SFAA relating to the service or by the ACCC declaring the service).¹⁶⁶

4.2 Treatment of the Facilities Access Service

As noted, NBN Co has chosen to include terms and conditions in the SAU relating to NBN Co's Facilities Access Service. This service includes three separate components — cross-connection, co-location and ODF termination.¹⁶⁷

NBN Co characterises its commitments about the Facilities Access Service as relating to how NBN Co will comply with the interconnection Standard Access Obligation for the NBN Access Service under subsection 152AXB(4) of the CCA, as opposed to being terms and conditions about compliance with the Category B SAOs for a Facilities Access Service in its own right.¹⁶⁸

This is because NBN Co considers that “such services have historically not been considered ‘eligible services’ in their own right (and have not been declared) because they have been considered Ancillary Services acquired for the purpose of receiving supply of declared services”.¹⁶⁹ NBN Co further submits that it has adopted the approach of including terms and conditions in the SAU for the Facilities Access Service without seeking to declare it:

- to provide certainty in relation to services supplied by NBN Co;
- due to NBN Co's Category B SAOs in relation to interconnection;
- having regard to the manner in which Facilities Access has traditionally been regulated; and
- having regard to the extent and nature of NBN Co's own contractual rights in relation to access to Facilities Access.¹⁷⁰

The ACCC disagrees that the Facilities Access Service is not an eligible service. An eligible service is defined in section 152AL of the CCA as either a listed carriage service or a service that facilitates the supply of a listed carriage service. The ACCC considers that all aspects of the Facilities Access Service ‘facilitate supply of a listed carriage service’ (that is, the NBN Access Service). Further, the cross-connection component of the Facilities Access Service fulfils the definition of a ‘listed carriage service’ within the meaning of the *Telecommunications Act 1997*.

¹⁶⁶ CCA, s. 152AL.

¹⁶⁷ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, Attachment B, clause 2.

¹⁶⁸ Ibid, Main Body, Attachment B, clause 1.

¹⁶⁹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 79.

¹⁷⁰ Ibid, pp. 79-80.

4.3 ACCC's previous specification of minimum elements of a bitstream service

For the purposes of assessing the services under the SAU, the ACCC has previously specified the minimum elements of a bitstream access service that it considers, if addressed, are likely to mean that access seekers will be provided with sufficient flexibility and control over the access service to allow any-to-any connectivity, and to enable them to compete effectively and make appropriate decisions in relation to the efficient use of and investment in infrastructure.¹⁷¹ These elements are:

- A Layer 2 bitstream access service, offered at a variety of rates, but including a product that is not throttled as well as a product that is symmetric to the extent that technology permits.
- A service (whether the bitstream or another service) that allows access seekers to provide a voice service and that provides for standard E 164 numbering and addressing.
- A service which offers:
 - a range of data packet priority options;
 - a range of quality of service options to allow retail service providers to offer commercially viable services; and
 - interfaces that permit a retail service provider to control the network and service configuration (including fault status, if relevant) of its own customers.
- POIs which are commercially feasible for service providers and support competition, including competition for backhaul services from the first point of aggregation.
- Interconnection protocols based on well accepted standards for broadband, voice and, if applicable, video, which are sufficiently well described to allow access seekers to design and build their own interconnecting facilities.
- Arrangements for access to buildings, shelters and facilities for interconnection.
- An appropriate process for amending service specifications in later periods as needed or desirable, and adequate notice periods for any change.

The ACCC's view is that, if these minimum elements are addressed, the services in the SAU are likely to promote the long-term interests of end-users.¹⁷²

¹⁷¹ ACCC, *Submission to Department of Broadband, Communications and the Digital Economy "National Broadband network: Regulatory Reform for 21st Century Broadband"*, June 2009, pp. 180-181.

¹⁷² ACCC, *Assessment of FANOC's Special Access Undertaking in relation to the Broadband Access Service – Draft Decision*, December 2007, p.12.

16. Are there any elements of NBN Co's service descriptions that are unclear or incomplete?
17. Does NBN Co's proposed service description for the NBN Access Service describe a service that is 'end-to-end' across the NBN?
18. Are there Ancillary Services supplied by NBN Co which should be included but fall outside the scope of the service descriptions included in the SAU?
19. Is it clear which commitments in the SAU do and do not apply to Ancillary Services and the Facilities Access Service?
20. Do NBN Co's proposed service descriptions meet the minimum elements previously specified by the ACCC for a bitstream access service?

5 Product development and withdrawal

The SAU establishes that, for the full SAU term, NBN Co will — in some circumstances — engage in consultation with its customers to develop new products, and vary or withdraw its existing products.¹⁷³ Module 1 includes 'PDF Processes' which govern NBN Co's consultation with its customers.

The SAU commitments in Module 1 regarding product development and withdrawal will be subject to the midpoint review (discussed in further detail at section 3.2). As part of the midpoint review, NBN Co will provide information to the ACCC about the PDF Processes and any proposals to change the PDF Processes.¹⁷⁴ The SAU confers a power on the ACCC to approve or reject NBN Co's proposal and make its own decision on the PDF Processes in their place.¹⁷⁵ The SAU requires that NBN Co complies with the outcomes of the ACCC's decision for the remainder of Module 1.¹⁷⁶

These SAU commitments relate to important phases of the 'product lifecycle' for NBN Co's products. The ACCC supports the inclusion of principles around product development and withdrawal in the SAU that encourage NBN Co to develop products over time that align with customer demand, in turn encouraging the efficient use of, and investment in, the NBN and downstream infrastructure. Similarly, providing certainty to customers on how and when NBN Co may withdraw its products will promote downstream competition and downstream investment.

It is important to note that the SAU commitments on these matters are not the sole mechanism governing how NBN Co's products may 'come to market', have terms and conditions of supply for them established, or be varied or withdrawn. The SAU commitments relating to product development and withdrawal should be considered in the context of their interaction with:

- other SAU commitments relating to the development of terms and conditions for products, such as the multilateral SFAA forum and NBN Co's other regulatory recourse commitments;
- the broader Part XIC regulatory regime, including the declaration provisions in section 152AL of the CCA and the ACCC's ability to make Access Determinations and Binding Rules of Conduct; and
- the terms and conditions around product introduction, withdrawal, and agreement 'change management' contained in Access Agreements, such as WBA-based Access Agreements.

As noted in chapter 1 of this consultation paper, NBN Co considers that all the terms and conditions in the SAU are terms and conditions in relation to subsection 152CBA(3A) of the CCA. However, NBN Co notes that the ACCC may take the view

¹⁷³ Through the operation of Schedules 1I and 2E of the SAU.

¹⁷⁴ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1K, clause 1K.2.1.

¹⁷⁵ Ibid, Schedule 1K, clauses 1K.2.3-1K.2.7.

¹⁷⁶ Ibid, Schedule 1K, clauses 1K.2.5(b) and 1K.2.7(b).

that some or all of the conduct under Schedule 1I of the SAU (the product development and withdrawal provisions including the PDF Processes in Annexure 1) may fall within ‘specified conduct’ under subsection 152CBA(3C) of the CCA.¹⁷⁷ If the ACCC were to adopt this view, NBN Co considers that the specified conduct in Schedule 1I will promote the long-term interests of end-users for the reasons set out in its supporting submission.¹⁷⁸

5.1 Product development

In circumstances other than those outlined in section 5.3, Modules 1 and 2 of the SAU commit NBN Co to seeking feedback from customers via a Product Development Forum (PDF) when developing new products.¹⁷⁹ Participation in the PDF will be open to all customers that have entered into Access Agreements and, in some circumstances, access seekers that have not signed Access Agreements.¹⁸⁰ The PDF does not appear to be open to participation from end-users or consumer advocacy groups.

NBN Co submits that the product development obligations are intended to ensure that customers are central to NBN Co’s product development and improvement processes and to provide customers with certainty about the way NBN Co will assess and implement product ideas over time.¹⁸¹

The SAU includes the following commitments in both Modules 1 and 2:

- NBN Co must publish and maintain a product roadmap in respect of products, product components and product features.¹⁸²
- NBN Co must implement a PDF to engage with customers on the development or withdrawal of products.¹⁸³ The PDF must identify and record all product ideas from customers, be the primary forum for the development of product ideas, facilitate discussion and allow feedback from customers.¹⁸⁴
- NBN Co must consult through the PDF on the pricing and service levels of new products developed via the PDF.¹⁸⁵

¹⁷⁷ NBN Co, *Letter to ACCC titled NBN Co Special Access Undertaking (SAU) – request for clarification*, 1 November 2012.

¹⁷⁸ Ibid.

¹⁷⁹ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1I, clause 1I.1.3(a); Schedule 2E, clause 2E.1.3(a).

¹⁸⁰ Ibid, Schedule 1I, clause 1I.3.1(b); Schedule 2E, clause 2E.4.1(b). Access seekers may participate in the PDF if NBN Co reasonably considers that the access seeker has a genuine intention to enter into an Access Agreement.

¹⁸¹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 89.

¹⁸² NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1I, clause 1I.2; Schedule 2E, clause 2E.2.

¹⁸³ Ibid, Schedule 1I, clause 1I.3.1(a); Schedule 2E, clause 2E.4.1(a).

¹⁸⁴ Ibid, Schedule 1I, clause 1I.3.1(c); Schedule 2E, clause 2E.4.1(c).

¹⁸⁵ Ibid, Schedule 1I, clauses 1I.3.5-1I.3.6; Schedule 2E, clauses 2E.4.4-2E.4.5.

- The PDF will be open to participation by all customers, and access seekers in some circumstances,¹⁸⁶ subject to their compliance with the ‘PDF Processes’ (explained below).¹⁸⁷ NBN Co and customers must comply with any processes in place that relate to the PDF.¹⁸⁸

Module 1 of the SAU also includes ‘PDF Processes’ which govern how NBN Co will engage with customers via the PDF and consider product ideas proposed by customers.¹⁸⁹ The PDF Processes also set out the confidentiality protections and treatment of intellectual property rights for the purposes of the PDF.¹⁹⁰

NBN Co submits that the PDF commitments ensure that NBN Co’s decisions about product development are subject to scrutiny and feedback from customers throughout the product development cycle.¹⁹¹ NBN Co also submits that the confidential information and intellectual property rights provisions provide an appropriate balance between the interests of customers to protect their confidential information and intellectual property rights and the need for NBN Co to consult transparently and in accordance with its non-discrimination obligations to ensure the development of new products.¹⁹²

Module 2 does not include PDF Processes, however, NBN Co states that it anticipates including them in a replacement module after taking into account the effectiveness of the PDF during Module 1.¹⁹³

5.2 Product withdrawal

For the full SAU term, NBN Co is not permitted to withdraw a product if that product is defined as a ‘reference offer’ in the SAU (these products are described in section 6.1.2).¹⁹⁴ However, NBN Co may withdraw products that are not defined as reference offers provided that it satisfies certain requirements set out in the SAU — these require that NBN Co:

¹⁸⁶ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1I, clause 1I.3.1(b); Schedule 2E, clause 2E.4.1(b).

¹⁸⁷ Ibid, Schedule 1I, clause 1I.3.2; Schedule 2E, clause 2E.4.2.

¹⁸⁸ Ibid, Schedule 1I, clause 1I.3.2; Schedule 2E, clause 2E.4.2.

¹⁸⁹ Ibid, Schedule 1I, Annexure 1. In the PDF, customers may submit product ideas to NBN Co. If NBN Co decides to develop a product idea it must publish a paper summarising the product idea and a plan for consultation. NBN Co may decide not to develop the product idea at any time after making an initial assessment of the product idea. Dispute resolution processes do not apply to decisions not to develop an idea.

¹⁹⁰ A similar set of confidentiality and intellectual property rights provisions apply to ‘business as usual’ activities that occur outside of the PDF Processes (discussed in section 7.3 of this consultation paper). Also, the dispute resolution processes in Access Agreements do apply to disputes arising out of the confidential information and intellectual property provisions in the PDF Processes.

¹⁹¹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 90.

¹⁹² Ibid, pp. 92-93.

¹⁹³ Ibid, p. 95.

¹⁹⁴ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1C, clause 1C.1.2; Schedule 2E, clause 2E.6.1.

- provide written notice to customers of its intention to withdraw the product — between 12 and 24 months depending on the type of product — as well as notice of any arrangements to migrate customers to alternate products;¹⁹⁵
- have regard to a number of factors when considering whether to withdraw the product, such as the level of existing demand, the cost of maintaining and supplying the product and the feasibility, commercial viability and price of alternatives;¹⁹⁶ and
- discuss and consider in good faith any feedback received from its customers, and access seekers in some circumstances,¹⁹⁷ in relation to the withdrawal.¹⁹⁸ However, NBN Co is not required by the SAU to consider feedback from any other interested parties (for example, consumer advocacy groups).

The SAU also precludes NBN Co from withdrawing a product and introducing a new product that is substantially similar to, or comparable with, the withdrawn product for the purposes of circumventing the SAU price controls (these price controls are discussed in section 6.1.3).¹⁹⁹

The circumstances in which the SAU does not commit NBN Co to follow the product withdrawal requirements are outlined in section 5.3 below.

NBN Co submits that that these product withdrawal commitments provide customers with long lead times to prepare for any product withdrawal and with a high degree of input into proposals for withdrawal.²⁰⁰

5.3 Products exempt from the product development and withdrawal commitments

As noted, there are circumstances in which the SAU does not commit NBN Co to complying with the commitments around product development and withdrawal in the SAU. The product development and withdrawal provisions in the SAU, and the PDF Processes, do not apply in the following circumstances — for:²⁰¹

- products covered by, or contemplated within, NBN Co's Initial Product Roadmap;²⁰²

¹⁹⁵ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1I, clause 1I.5.2; Schedule 2E, clause 2E.6.3.

¹⁹⁶ Ibid, Schedule 1I, clause 1I.5.2(b); Schedule 2E, clause 2E.6.3(b).

¹⁹⁷ Ibid, Schedule 1I, clause 1I.3.1(b); Schedule 2E, clause 2E.4.1(b).

¹⁹⁸ Ibid, Schedule 1I, clause 1I.5.2(c); Schedule 2E, clause 2E.6.3(c).

¹⁹⁹ Ibid, Schedule 1I, clause 1I.5.1; Schedule 2E, clause 2E.6.2.

²⁰⁰ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 94.

²⁰¹ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1I, clause 1I.1.3(b); Schedule 2E, clause 2E.1.3(b).

²⁰² 'Initial Product Roadmap' is defined as the document titled 'Initial Roadmap July 2012, version 2' published on NBN Co's website.

- the introduction of a product that NBN Co is obliged to offer as a result of a licence condition;
- a minor variation or enhancement to a product; and
- products that NBN Co is required to withdraw by law or its Shareholder Ministers.

The Initial Product Roadmap includes products defined as ‘broadband and telephony’, ‘multicast’ and ‘business- and enterprise-grade’ services.²⁰³ NBN Co submits that the exclusion of these products from the Initial Product Roadmap is appropriate because NBN Co has already developed these products through a consultative and collaborative product development process.²⁰⁴ It considers that requiring these products to now go through the PDF Processes would be unnecessary and inefficient.²⁰⁵

The ACCC notes that the products within the Initial Product Roadmap are also excluded from the product withdrawal requirements in the SAU. This means that the SAU would not preclude NBN Co from:

- withdrawing these products without prior notification to customers (for example, without providing 12 or 24 months notice);
- withdrawing these products without having regard to the factors listed in the SAU (for example, demand and alternative products) and customer feedback; and
- withdrawing these products, and introducing similar or comparable products, for the purposes of increasing prices above the individual price control.

The ACCC’s preliminary view is that these exemptions may reduce the effectiveness of the commitments by NBN Co to develop products over time that align with customer demand, and in turn reduce their effectiveness in encouraging the efficient use of, and investment in, the NBN and downstream infrastructure. Similarly, the ACCC’s preliminary view is that the exemptions are likely to reduce the effectiveness of the commitments in providing certainty to customers about how and when NBN Co may withdraw its products and in turn the effectiveness of the commitments in promoting downstream competition and investment.

The ACCC does however note the following:

- Regardless of whether or not a product had been developed via the PDF, access seekers could suggest and consult on changes to the terms and conditions for new products via the multilateral SFAA forum. Further, under Part XIC, the ACCC has the power to make an Access Determination or Binding Rules of Conduct on the terms and conditions of new products.²⁰⁶ However, as noted in chapter 2 of this

²⁰³ See ‘Initial Roadmap July 2012, version 2’ as published on NBN Co’s website.

²⁰⁴ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 89.

²⁰⁵ *Ibid.*, p. 89.

²⁰⁶ The ability of the ACCC to set the price of new products is discussed in chapter 21 of this consultation paper.

consultation paper, those terms and conditions would nonetheless be ineffective to the extent that they were inconsistent with the terms of the SAU and Access Agreements.

- Similarly, to the extent that the SAU does not contain commitments around the withdrawal of particular products (for example, those that are on the Initial Product Roadmap), the ACCC has the power to make an Access Determination or Binding Rules of Conduct on the specific terms associated with product withdrawal. Again though, those terms and conditions would be ineffective to the extent that they were inconsistent with the terms of the SAU and Access Agreements.

Further, the ACCC is also able to declare listed carriage services, provided that the ACCC is satisfied that the making of the declaration will promote the long-term interests of end-users.²⁰⁷ If NBN Co refused to introduce a new product following consultation with customers via the PDF, or withdrew a product that access seekers continued to demand, the ACCC has the power to declare the product if it decided that to do so would promote the long-term interests of end-users. NBN Co would then be required to supply the product upon request from an access seeker. Following the declaration, the ACCC must also commence a public inquiry into making an Access Determination.²⁰⁸

21. Do the product development and withdrawal requirements in the SAU encourage the efficient use of, and investment in, the NBN, and do they promote downstream competition and downstream investment? In your response, please consider:

- whether the product development requirements are likely to encourage NBN Co to develop products that align with customer preferences over the SAU term;
- whether the PDF Processes provide for effective and transparent engagement between, and appropriately balance the interests of, NBN Co and its customers (including access seekers);
- whether the product withdrawal requirements provide sufficient certainty as to the availability of products over the SAU term;
- the effect of excluding products on the Initial Product Roadmap from the product development and withdrawal requirements; and
- the interaction with the other SAU commitments relating to the development of terms and conditions for products, and the broader Part XIC regulatory regime (including the declaration provisions and the ACCC's powers to make Access Determinations and Binding Rules of Conduct).

22. Should the SAU require NBN Co to consider the views of end-users in the PDF and before withdrawing products?

²⁰⁷ CCA, s. 152AL(8A).

²⁰⁸ CCA, s. 152BCI.

6 Price-related matters

This chapter seeks views on the SAU commitments regarding how NBN Co will set initial prices for its products and how these prices will vary over the SAU term.²⁰⁹

The SAU contains initial prices for all products for which prices are known at the time of SAU lodgement (some of which are priced at \$0). These initial prices represent the maximum regulated prices that NBN Co will be able to initially include in any SFAA. The initial prices for NBN Co's entry-level products have been set with reference to legacy wholesale prices.

The SAU classifies these initial products as 'reference offers', or 'non-reference offers' and 'other charges'. The initial prices of reference offers are fixed in nominal terms for the first five years of the SAU term, and will then be subject to price controls, which limit the annual price increase for each product.²¹⁰ Non-reference offers will be subject to the price controls from the first year of the SAU term. The other difference between reference and non-reference offers is that reference offers cannot be withdrawn.

For new products introduced during the SAU term, NBN Co will be responsible for setting the initial price, subject to satisfying a number of criteria and consulting with customers. Once set, the new price will be subject to the price controls. The ACCC will not have a role in determining the individual prices of new products under the SAU, except in certain circumstances where NBN Co proposes to charge a price for a product or service that it previously provided at no charge.²¹¹

The SAU also contains a long-term revenue constraint methodology, which is aimed at constraining NBN Co's prices over the SAU term. This long-term revenue constraint methodology will be applied to determine annual revenue requirements and a regulatory asset base (RAB).

As NBN Co's initial entry-level prices have been set with reference to legacy wholesale prices, combined with an initial low take-up of the NBN, NBN Co will initially be unlikely to earn sufficient revenues to meet its annual revenue requirements. Any initial revenue shortfalls will be included in an 'initial cost recovery account'. NBN Co will be permitted to recover more than its annual revenue requirements to reduce these accumulated revenue shortfalls over time.

The price controls will be the only regulatory constraint on NBN Co's prices during this initial cost recovery period. NBN Co will be allowed to recover more revenue than allowed for by its annual revenue requirement if it has revenue shortfalls from previous years to recover. However, the price controls are intended to operate in a way that if setting prices up to the maximum allowed by the price controls prevents NBN Co from earning enough revenue to recover its accumulated revenue shortfalls, it will not be able to increase prices above the price controls. In this situation, NBN Co would need

²⁰⁹ NBN Co's pricing commitments are contained in Schedules 1C, 1D, 1E, 1F, 2B, 2C and 2D of the SAU.

²¹⁰ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1C, clause 1C.3.1.

²¹¹ *Ibid*, Schedule 1C, clause 1C.4.5(b); Schedule 1D, clause 1D.4.3; Schedule 2C, clause 2C.4(b).

to seek a variation of the SAU if it wanted to set higher prices in order to recover its accumulated losses more quickly, because there are no mechanisms in the SAU that would allow NBN Co to exceed the price controls. This may have implications for NBN Co's incentives to invest and incur expenditure in an efficient manner during this period, which will be discussed throughout this chapter.

After NBN Co has recovered any initial revenue shortfalls, the SAU will enter a building block period and NBN Co's prices will be set to recover its annual revenue requirements. It is intended that if setting prices up to the maximum level allowed by the price controls allows NBN Co to earn more than its annual revenue requirements during this period, NBN Co will be required to reduce prices in order to reduce its revenues and comply with the revenue requirements.

The SAU does not include a formal mechanism for the ACCC to review and reset the prices or price structures of existing products over the SAU term. However:

- The SAU requires NBN Co to issue a pricing statement three years prior to the expected extinguishing of the initial cost recovery account that forecasts expected changes in price in the transition to the building block period.²¹²
- At the expiry of Module 1, NBN Co is able to review and reset (subject to the ACCC's approval) the reference offers at the start of each regulatory cycle by submitting a reference offer proposal as part of its replacement module application (discussed in section 6.1.2).²¹³

NBN Co states that the key objectives of its overall pricing approach in the SAU include uniform national wholesale pricing, long-term cost recovery (providing the opportunity to recover prudently incurred costs over time, including an appropriate return on capital), price stability and predictability (striking a balance between pricing certainty for access seekers and pricing flexibility for NBN Co), and encouraging the economically efficient take-up and usage of NBN Co's products.²¹⁴

This chapter is structured as follows:

- section 6.1 discusses NBN Co's proposals for how its prices will be set for individual products over the SAU term (including how reference offers will be set);
- section 6.2 discusses NBN Co's long-term revenue constraint methodology (including the approach to the weighted average cost of capital); and

²¹² Given that NBN Co will likely be recovering more than its annual revenue requirements leading up to this period, this pricing statement is likely to describe the manner in which NBN Co will reduce prices during the transition period in order to smooth any price shocks.

²¹³ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clause 4.7. The replacement module submission and assessment process is discussed further in section 3.1 of this consultation paper.

²¹⁴ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 99.

- section 6.3 discusses NBN Co's proposed incentive mechanisms for efficient expenditure.

6.1 Pricing of individual products

Modules 1 and 2 of the SAU include provisions relating to the maximum prices of individual products that can be included in SFAAs. As discussed above, these provisions operate alongside the long-term revenue constraint methodology in Modules 1 and 2.

NBN Co submits that it faces appropriate incentives in setting prices for new and existing products because it has "aligned interests with customers with regard to development of downstream markets and there is a clear financial benefit to NBN Co from developing new products and pricing them appropriately".²¹⁵

Table 1 summarises NBN Co's pricing approach, product withdrawal processes and the ACCC's role in relation to the reference offers, non-reference offers and other charges.

²¹⁵ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 112.

Table 1 Summary of NBN Co’s pricing approach to pricing of individual products²¹⁶

	Reference offers	Non-reference offers & other charges
Products	<ul style="list-style-type: none"> ▪ Basic Access Offer – 12/1 Mbps AVC & UNI ▪ Enhanced Access Offer – 25/5 Mbps AVC & UNI ▪ Standard Business Offer – 25/10 Mbps AVC (including 500kbps symmetric committed information rate Traffic Class 1) & UNI ▪ Connectivity Virtual Circuit Offer – Traffic Class 1 & Traffic Class 4 CVCs ▪ Network-Network Interface Offer ▪ Platform Interfacing Offer ▪ Sandpit Offer ▪ Facilities Access Service Offer <p>The above products are the reference offers during Module 1. During Module 2, the SAU requires NBN Co to include a reference offer proposal in replacement modules. Via this process NBN Co can, if it chooses, seek to change the reference offers. The SAU sets out the characteristics that the proposed reference offers must have. The ACCC can accept or reject the proposal. If the reference offers change via this process, the old reference offer becomes a non-reference offer.</p>	<ul style="list-style-type: none"> ▪ Asymmetric AVC Offers ▪ Additional Asymmetric AVC Offers ▪ Symmetric Access Capacity Offers ▪ Second UNI-V & AVC Offer ▪ Connectivity Virtual Circuit Offers (traffic class 2 & traffic class 3) ▪ Multicast AVC Offer ▪ Multicast Domain Offer ▪ NBN Co Co-location Offer <p>The ‘other charges’ include charges associated with installations & activations, service modifications, service management & further aspects of the Facilities Access Service.</p> <p>The above products and charges are the non-reference offers that are specified in the SAU for Module 1. New products and charges that are introduced into supply by NBN Co throughout the SAU term will become non-reference offers.</p>
How initial prices are set	In Module 1, the initial prices for the reference offers are specified in the SAU and are as follows:	In Module 1, the initial prices for all non-reference offers & other charges known at the time of SAU lodgement are specified. Some of these prices

²¹⁶ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedules 1C, 1D, 2B and 2C.

Table 1 Summary of NBN Co’s pricing approach to pricing of individual products²¹⁶

	Reference offers	Non-reference offers & other charges
	<ul style="list-style-type: none"> ▪ Basic Access Offer – \$24 per month ▪ Enhanced Access Offer – \$27 per month ▪ Standard Business Offer – \$53 per month ▪ CVC Offer – \$20 per Mbps per month ▪ NNI offer – \$200 (1000Base LX); \$200 (1000Base T); \$400 (10GBase LR); \$500 (1000Base EX); and \$1000 (10GBase ER) per month. ▪ Platform Interfacing Offer – \$0 ▪ Sandpit Offer – \$0 ▪ Facilities Access Service Offer – \$0 (cross-connect); and \$0 (ODF termination) per month. <p>NBN Co submits that prices have been set with reference to current prices in the market. In Module 2, if the reference offer is changed, the new reference offer’s price will be that product’s price before it became a reference offer.</p>	<p>are \$0.</p> <p>In both Module 1 and Module 2, NBN Co will set initial prices for new non-reference offers & other charges subject to having regard to certain ‘pricing principles’ in the SAU, including (amongst others):</p> <ul style="list-style-type: none"> ▪ the importance of maintaining affordability to drive take-up rates; and ▪ NBN Co’s long-term cost recovery. <p>NBN Co must publish a pricing rationale statement describing how the initial price for the new product has been set.</p>
Introducing a price if previously zero-priced	<p>NBN Co can introduce a new price under certain circumstances. If NBN Co introduces a price for a zero-priced reference offer (or an ‘other charge’ that is associated with a reference offer) and the ACCC subsequently makes an Access Determination or Binding Rules of Conduct relating to that price, the SAU commits NBN Co to including the regulated price in the next SFAA. This is the case in both Module 1 and Module 2.</p>	<p>NBN Co can introduce a price under certain circumstances. That new price must be set having regard to certain ‘pricing principles’ in the SAU, as above. If NBN Co introduces a price for a zero-priced non-reference offer (or an ‘other charge’ for a non-reference offer), and the ACCC subsequently makes regulated terms relating to that new charge, the SAU does not commit NBN Co to including the regulated price in the next SFAA. This is the case in both Module 1 and Module 2.</p>

Table 1 Summary of NBN Co’s pricing approach to pricing of individual products²¹⁶

	Reference offers	Non-reference offers & other charges
Constraint on prices over time	<p>Prices for reference offers will remain unchanged for the initial five years of the SAU term. After the first five years, the CPI-1.5% price control will apply.</p> <p>NBN Co will annually review the CVC price with a view to reducing the CVC price in nominal terms as demand increases. During Module 1, NBN Co will provide customers with a CVC rebate equal to the charges that would otherwise apply for up to 150Mbps of CVC capacity.</p> <p>NBN Co may increase the maximum regulated price of reference offers above what would otherwise be permitted under the price control if a new tax is introduced or if there is an increase in an existing tax.</p>	<p>All non-reference offers are subject to a CPI-1.5% price control.</p> <p>NBN Co may increase the maximum regulated price of non-reference offers above what would otherwise be permitted under the price control if a new tax is introduced or if there is an increase in an existing tax.</p>
Ability to withdraw	<p>Cannot be withdrawn for as long as they are defined as reference offers. If a reference offer becomes a non-reference offer, it can be withdrawn.</p>	<p>Can be withdrawn. Non-reference offers that are subject to the product development & withdrawal processes in the SAU may be withdrawn at any time subject to certain criteria set out in the SAU (outlined in section 5.2). The SAU is silent on the withdrawal of non-reference offers that are not subject to the product development & withdrawal processes.</p>
Role of ACCC	<p>The ACCC will consider the initial prices of the reference offers when assessing the SAU. It will also consider the price control.</p> <p>The ACCC will review & approve/reject any proposed changes to the composition of reference offers.</p> <p>In Module 1, the SAU commits NBN Co to including in new SFAAs any regulated terms made in relation to new charges associated with a previously zero-priced reference offer, or an ‘other charge’ associated with a reference offer.</p>	<p>The ACCC will consider the initial prices of non-reference offers & other charges when assessing the SAU. It will also consider the price control.</p> <p>The ACCC does not have a role in assessing or approving prices for new non-reference offers or other charges introduced during the SAU term.</p> <p>The SAU does not commit NBN Co to including in new SFAAs any regulated terms made in relation to new charges associated with a previously zero-priced non-reference offer, or an ‘other charge’ associated with a non-reference offer.</p>

The rest of this section is structured as follows:

- section 6.1.1 discusses NBN Co's price structures;
- section 6.1.2 discusses reference offers;
- section 6.1.3 discusses initial prices and price controls;
- section 6.1.4 discusses initial prices for new products; and
- section 6.1.5 discusses other issues associated with pricing of individual products.

6.1.1 Price structures

One of the key objectives in setting regulated prices is to ensure that a regulated business can be expected to recover its long-term efficient costs over time. However, the prices for the individual services provided by a regulated business can be structured in a variety of ways and can have different effects on use of and investment in infrastructure and on downstream competition.

NBN Co proposes to provide the NBN Access Service through four main product components: the UNI, AVC, CVC and NNI. The SAU also covers certain ancillary, facilities access and other services.

NBN Co submits that a key element of its overarching pricing strategy is the two-part pricing approach comprising the AVC charge and the CVC charge.²¹⁷ It states that average revenue per user will initially be driven mostly by AVC revenue, but over time it will be driven to a greater degree by CVC revenue as usage of the NBN increases.²¹⁸ NBN Co submits that this pricing strategy should allow it to balance, over time, the competing needs of maintaining high rates of take-up of the NBN (through affordable AVC prices) with high rates of usage of the NBN (through affordable CVC prices).²¹⁹

The two-part tariff element of NBN Co's price structure, and its ability to change prices within the price controls (discussed in section 6.1.3), are likely to have important implications for the use of and investment in the NBN and for competition in downstream markets, both initially and over the duration of the SAU term. Other aspects of NBN Co's price structures, such as relative price levels between AVC products of different data rates and traffic classes, and relative price levels between unicast and multicast services, are also likely to have important implications over the SAU term.

In terms of efficient use of the NBN, customer behaviour (of both access seekers and end-users) will be driven to some extent by prices for individual products. For example,

²¹⁷ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 100.

²¹⁸ *Ibid*, p. 100.

²¹⁹ *Ibid*, p. 100.

the relative prices of NBN Co's various AVC products will have an important role in the choice of data rate and traffic class for customers. The relative price levels between unicast and multicast services will be a factor in deciding how certain content will be delivered to end-users. Further, the level of the CVC charge is likely to be a significant factor in determining the amount of capacity used by access seekers, which will have implications for service quality. The use of NBN Co's services will then have implications for NBN Co's investments, as the infrastructure required will depend on the extent and type of use of the NBN.

In terms of impacts on downstream competition, the price structures may impact on access seekers' choice as to whether they connect directly to each Point of Interconnect or whether they connect indirectly through a wholesale access provider. This may depend on the costs associated with connecting directly to a Point of Interconnect, which will largely be influenced by NBN Co's prices (particularly, NNI and CVC charges). NBN Co's minimum CVC purchase requirements and proposal to sell higher levels of CVC capacity in increments of either 50Mbps or 100Mbps may also be a factor.

A key principle in setting prices for individual services to achieve efficient outcomes is that each price should be based on the cost of providing the service to which the price relates. However, this principle is often difficult to apply in practice for regulated businesses and it is often difficult to identify a single efficient price for an individual product. Further, there are certain aspects of the SAU and NBN Co's operating environment that are likely to create further difficulties in applying this principle in practice.

Firstly, similar to other network industries, a significant proportion of NBN Co's costs are likely to be fixed costs (that is, they will not vary with use of the NBN) or shared costs (that is, the costs of particular network elements that can be used to provide a range of individual products). Both fixed and shared costs make it difficult to attribute costs to individual products and to identify a single efficient price for each product.

Secondly, NBN Co is proposing an initial cost recovery account that will result in it earning less revenue than the annual revenue requirement in the initial stages of the SAU (see section 6.2). That is, its prices will collectively be set at less than the cost reflective level. After this initial stage, the initial cost recovery account will allow it to earn more revenue than the annual revenue requirement. That is, its prices will collectively be set at more than the cost reflective level. The spreading of cost recovery over an extended period in this manner adds an additional layer of complexity to the cost reflective principle and how it relates to efficiency.

Thirdly, NBN Co's proposed price structures are a key component of its overall pricing strategy to achieving full cost recovery and revenue sufficiency. If certain aspects of NBN Co's price structures were varied to achieve a certain objective (for example, promoting efficient use), this may have implications for NBN Co's cost recovery, which may, in turn, require other aspects of the price structures to be varied.

The ACCC will have regard to the matters discussed above in its assessment of NBN Co's proposed price structures, including how price structures may change under the SAU during the SAU term. As part of its assessment, the ACCC will also consider the

reasonableness of NBN Co's CVC pricing statement of intent (discussed further in section 6.1.3).

6.1.2 Reference offers

As noted in section 6.1, reference offers are products that cannot be withdrawn during the period in which they are defined as reference offers. Module 1 sets out the initial products that will be reference offers and the prices for those products.²²⁰

Modules 0 and 2 set out the processes by which reference offers will be reviewed and updated over the SAU term. The reference offers will be reviewed by NBN Co having regard to certain criteria, including demand for each of the reference offers, and whether the offers are reasonably necessary to provide a service over the NBN.²²¹ NBN Co will submit a reference offer proposal to the ACCC prior to the beginning of each regulatory cycle as part of its replacement module application.²²² If the ACCC rejects NBN Co's reference offer proposal, it may specify the products that will comprise the reference offers in an Access Determination or Binding Rules of Conduct.²²³

The price for new reference offers will be based on the price of those offers before they became reference offers. Once a current reference offer ceases to be a reference offer it may be withdrawn from supply, subject to the product withdrawal provisions in the SAU (see section 5.2).

NBN Co submits that the intent of the reference offers is to provide greater stability and predictability for access seekers regarding a selection of products that will be most significant for end-users to connect to the NBN.²²⁴ NBN Co further submits that the process for updating the reference offers over time ensures that it is clear what the reference offers are intended to provide and avoids an unduly mechanistic approach to updating the offers over the SAU term.²²⁵

Synergies notes that the process for updating reference offers over time can be expected to deliver efficient outcomes because it "fosters dynamic efficiency by subjecting hitherto guaranteed...offers to consideration for withdrawal if they are no longer appropriate, and replacing them with superior more widely accepted services".²²⁶

The inclusion of reference offers in the SAU, to provide certainty over the supply of and prices for services that are required to provide entry-level residential and business grade services to end-users, has merit. In particular, the ACCC considers it is important that the reference offers include services comparable to those that can currently be supplied over the legacy network. It is also important that the reference offers promote price stability in the transition to the NBN.

²²⁰ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1C, clauses 1C.2-1C.3.

²²¹ Ibid, Schedule 2B, clause 2B.2.

²²² Ibid, Main Body, clause 4.6(b)(ii).

²²³ Ibid, Main Body, clause 4.10.

²²⁴ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 102.

²²⁵ Ibid, p. 104.

²²⁶ Synergies, *Advice on NBN Co's Special Access Undertaking*, September 2012, p. 6.

The reference offers are also important for providing an ‘anchoring’ effect for prices of new products. That is, to the extent that there is substitutability between reference offers and new products introduced by NBN Co, the prices of the reference offers are likely to act as a constraint on the prices for new products. The Enhanced Access Offer is likely to be particularly important for providing an anchoring effect on prices for new products introduced by NBN Co.

It is also important that the process for updating reference offers over time achieves a reasonable balance between providing certainty for access seekers and NBN Co over the composition of reference offers and providing sufficient flexibility to ensure the reference offers continue to represent NBN Co’s core and “reasonably necessary” offers. This is important because it will provide access seekers with certainty that NBN Co’s entry-level and most commonly acquired products will continue to be supplied and updated as necessary over time.

The ACCC sees merit in the processes proposed by NBN Co for reviewing and updating reference offers over time. For example, the ACCC has a role in reviewing any proposed changes to the reference offers over the SAU term. However, in deciding whether to approve any NBN Co reference offer proposal as part of the replacement module assessment process, the ACCC would be required to have regard to the criteria in Module 2 for reviewing and re-setting the reference offers.²²⁷

6.1.3 Initial prices for existing products and price controls

As noted in section 6.1, Module 1 sets out the maximum regulated price that can be included in an SFAA for all products for which prices are known at the time of SAU lodgement. Both Modules 1 and 2 lock-in a CPI-1.5% price cap and hence maximum regulated price paths for the full 30-year SAU term.

Module 1 contains a ‘statement of intent’ that NBN Co will annually review the CVC price with a view to reducing the CVC price as demand increases. The SAU states that in its review, NBN Co will consider the level of demand for CVC capacity and information published in its most recent *Corporate Plan*.²²⁸ Module 2 does not include a statement of intent in relation to CVC pricing.

NBN Co submits that its overall pricing approach strikes a balance between providing pricing certainty for access seekers and providing pricing flexibility for NBN Co, having regard to the need to account for evolving technology, applications and demand.²²⁹ In particular, NBN Co submits that the level of the initial prices set out in the SAU are designed to allow customers to provide a smooth transition for end-users to the NBN and to develop compelling offers that make use of the NBN’s greater capability relative to the legacy network.²³⁰

²²⁷ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clause 4.7(a).

²²⁸ *Ibid*, Schedule 1C, clause 1C.4.2(d).

²²⁹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 99.

²³⁰ *Ibid*, p. 108.

In addition, NBN Co notes that the initial prices set out in the SAU are the result of an extended process of consultation with customers.²³¹ NBN Co further submits that stakeholders have had ample opportunity to make their views known, and that NBN Co has remained open to considering the need for changes when legitimate issues have become apparent.²³²

In relation to the level of the price control, Synergies notes that the CPI-1.5% price control will ensure that “the future price paths for the reference offers...are likely to result in prices that remain within the range that would normally be considered efficient”.²³³

The larger the range of services for which initial prices are specified upfront at the beginning of the SAU term, the greater the certainty access seekers will have about initial prices and price paths over the SAU term. Greater certainty around initial prices and price paths is likely to promote efficient investments by access seekers.

On the other hand, given the proposed 30-year term of the undertaking, there is some uncertainty about how demand and customer preferences will change over the SAU term. NBN Co’s proposal to specify many prices upfront (and for these prices to be subject to the CPI-1.5% price control over the SAU term) will limit NBN Co’s ability to vary price relativities over time to reflect changes in demand and consumer preferences. However, the ACCC notes that NBN Co will have some ability to change price relativities within the bounds of the CPI-1.5% price control (for example, by decreasing some prices and increasing others by the amount allowed by the price control).

The ACCC in its assessment will consider whether the inclusion of initial prices in the SAU, together with the level of the CPI-1.5% price control, achieves an appropriate balance between providing certainty to access seekers over price paths over time and allowing NBN Co to adjust the level and relativities of its prices as customer preferences, demand and costs change.

The CPI-1.5% price control will result in prices decreasing in real terms over time, which reflects the pricing intentions set out in NBN Co’s *Corporate Plan*.²³⁴ It is unclear to what extent the level of the price control has been informed by NBN Co’s forecasts of expenditure and demand over the SAU term.

The ACCC considers that certain elements of NBN Co’s price control represent strong future pricing commitments, particularly the inability to reopen the price controls unless the SAU is varied. Further, the price control imposes a longer-term pricing commitment on NBN Co compared to other regulated industries, where price controls are generally reviewed every five years. In addition, the ACCC considers that the commitments in the SAU around initial prices and the price controls may provide incentives for NBN Co to invest and incur expenditure in an efficient manner (as discussed further in section 6.3).

²³¹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 110.

²³² *Ibid*, p. 110.

²³³ Synergies, *Advice on NBN Co’s Special Access Undertaking*, September 2012, p. 5.

²³⁴ NBN Co, *Corporate Plan 2012-15*, 6 August 2012, p. 9.

The ACCC notes that NBN Co's statement of intention in relation to CVC pricing is not a commitment to decrease CVC prices but to review CVC prices, which may not result in CVC prices decreasing. As part of its assessment of price structures, the ACCC will consider whether it is reasonable to have a statement of intention to decrease CVC prices as opposed to a firm commitment. The ACCC will also consider whether the absence of a commitment around CVC pricing in Module 2 is reasonable.

6.1.4 Initial prices for new products

Modules 1 and 2 set out equivalent processes by which NBN Co may determine initial prices for new products. While NBN Co must consult with customers through the Product Development Forum on initial prices for all new products that are not excluded from the product development and withdrawal provisions in the SAU (see section 5.3), NBN Co itself will make the final decision about the level of initial prices for new products. NBN Co must have regard to a broad set of initial pricing principles when setting initial prices for new products.²³⁵

The regulatory recourse provisions in the SAU will not apply to initial prices for new products or new charges that are not associated with reference offers.²³⁶ Therefore, if the ACCC makes an Access Determination or Binding Rules of Conduct on an initial price or new charge that is not associated with reference offers, NBN Co is not required to include the determined provisions into its SFAAs. However, it otherwise must comply with the Access Determination or Binding Rules of Conduct to the extent that it is not inconsistent with the SAU or Access Agreements.²³⁷ If NBN Co introduces a new charge for a currently zero-priced reference offer or a new 'other charge' for a reference offer, the regulatory recourse provisions in the SAU will apply.²³⁸

NBN Co submits that excluding most initial prices for new products from the regulatory recourse provisions in the SAU is appropriate because it faces strong incentives to price its services efficiently, given its long-term revenue sufficiency risk and how forecasts are used in the long-term revenue constraint methodology.²³⁹

NBN Co further submits that, while price anchoring is not intended to provide NBN Co with appropriate pricing incentives, it will nonetheless constrain NBN Co's pricing of new products.²⁴⁰

Synergies notes that the pricing principles to which NBN Co must have regard when setting initial prices for new products "circumscribe the factors that would need to be

²³⁵ The initial pricing principles include: uniform national wholesale pricing; the *Statement of Expectations*; the nature and extent of market demand; the relationship between the new offer or charge and other offers and charges; the importance of affordability to drive take-up rates; NBN Co's long-term cost recovery; and the projected timeframe for recovery of initial losses.

²³⁶ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1B, clause 1B.1.2.

²³⁷ NBN Co's obligations to comply with Access Determinations and Binding Rules of Conduct are discussed in chapter 2 of this consultation paper.

²³⁸ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1C, clause 1C.4.5(b); Schedule 1D, clause 1D.4.3(b).

²³⁹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 98.

²⁴⁰ *Ibid*, p. 113.

considered in establishing an efficient price...[and] limit the scope for NBN Co to set prices for new offers that differ substantially from those that would be considered efficient”²⁴¹.

A degree of flexibility in the setting of new prices may be appropriate to allow NBN Co to set price levels and structures that facilitate the recovery of its efficiently incurred costs, while taking into account demand conditions. Further, if NBN Co introduces higher speed AVC products, its pricing might be constrained by the substitutability between those products and lower speed AVC products. However, it is not yet known how substitutable existing products will be for new products introduced later in the SAU term.

The ACCC will need to be satisfied that NBN Co faces sufficient incentives to set initial prices for new products that are both reflective of customers' willingness to pay and that allow NBN Co to recover its efficiently incurred costs over the duration of the SAU term.

6.1.5 Other issues

6.1.5.1 Tax change event

Modules 1 and 2 specify that, if there is a 'tax change event', NBN Co may increase the maximum regulated price of reference and non-reference offers above what would otherwise be permitted under the price control.²⁴² Under Module 1, NBN Co may increase the maximum regulated price of its products by an amount estimated by NBN Co to be "reasonably apportioned" to that imposed or increased as a result of the tax change event.²⁴³ Under Module 2, in addition to increasing its maximum regulated prices, NBN Co may also amend its annual revenue forecasts and its forecast real annual building block revenue requirement in response to a tax change event.²⁴⁴

Although NBN Co's proposed method for dealing with tax change events appears capable of allowing NBN Co to recover any higher costs associated with tax change events, there are also likely to be other methods for dealing with such events that do not involve changing the price controls. For example, pass-through mechanisms are often used to allow regulated businesses to recover certain cost increases (those that are outside of their control) incurred in one period in future periods. In NBN Co's case, a similar mechanism may be able to be implemented through the initial cost recovery account. In considering the tax change event provisions, the ACCC will consider whether it is reasonable for NBN Co to increase prices by more than the price control because of a tax change event, or whether it is reasonable to defer recovery of higher costs associated with tax change events.

²⁴¹ Synergies, *Advice on NBN Co's Special Access Undertaking*, September 2012, p. 6.

²⁴² A tax change event refers to a new tax, an increase in the level of a tax or any amount charged to NBN Co by a third party that is a result of a tax.

²⁴³ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1C, clause 1C.5; Schedule 1D, clause 1D.5.

²⁴⁴ *Ibid*, Schedule 2C, clause 2C.3.

6.1.5.2 Frequency of price changes

The SAU sets out the rules around the maximum regulated prices that may be included in an SFAA. However, it does not include commitments around how frequently or by how much prices may be changed under Access Agreements. Without commitments on these matters in the SAU, the conditions around how frequently prices can be changed under an Access Agreement will be set out in those Access Agreements.

The frequency with which NBN Co may change its prices under Access Agreements will have implications for price stability and therefore the degree of certainty that access seekers are provided with as to the cost of key inputs to their business. This will in turn have implications for their decision-making with respect to their investments in downstream markets.

Price structures

23. Do NBN Co's proposed price structures promote efficient use of and investment in infrastructure, and do they promote competition in downstream markets? In your response, please have regard to:
- the nature of NBN Co's costs, which are largely fixed and shared costs;
 - the initial under-recovery and subsequent over-recovery of costs; and
 - the effect of the proposed price structures on NBN Co's ability to recover its efficient costs.

Reference offers

24. Do the initial set of reference offers in Module 1 represent the products required to allow access seekers to provide entry-level residential and business grade services to end-users?
25. Is the process for updating the reference offers throughout Module 2 likely to ensure that NBN Co's reference offers continue to represent those products that are required to provide entry-level residential and business grade services to end-users?

Initial prices and price controls

26. Does NBN Co's proposed approach strike an appropriate balance between locking-in price paths to provide certainty and allowing for price levels and structures to be reviewed over time?
27. Does the level of the initial prices for reference offers provide for a smooth migration of access seekers to the NBN?
28. Does the level of the CPI-1.5% price control raise any concerns?
29. Should there be an opportunity for NBN Co's maximum regulated prices to be 're-balanced' over time as customer preferences change?

30. Does the statement of intention on CVC prices provide access seekers with sufficient certainty over price paths over time? Should there be an opportunity for CVC prices to be reviewed as part of a broader ‘re-balancing’ of prices?

Initial prices for new products

31. Does the SAU provide NBN Co with incentives to set prices for new products that are both reflective of customers’ willingness to pay and allow NBN Co to recover its efficiently incurred costs?
32. Do the initial pricing principles provide an appropriate constraint on NBN Co in its setting of initial prices for new products?
33. Will the processes by which NBN Co will consult with customers on prices for new products ensure that prices are set reasonably over the proposed term of the SAU?

Other issues

34. Is the process by which NBN Co may increase prices above what is permitted under the price controls in response to a tax change event reasonable?
35. Are there any concerns with NBN Co’s ability to change prices of individual products more than once in a single year?

6.2 Long-term revenue constraint

The SAU contains a long-term revenue constraint methodology that will determine the amount of revenue NBN Co would be able to earn via its prices over the full SAU term. The key components of the long-term revenue constraint are annual revenue requirements, a regulatory asset base (RAB) and an initial cost recovery mechanism.

The annual revenue requirements represent the amount of revenue that NBN Co would be required to earn to recover its costs in a particular year. Over the SAU term, the annual revenue requirements will provide NBN Co with an opportunity to recover all of its costs. NBN Co’s actual ability to recover all of its costs will rely on growth in user demand for NBN Co’s services,²⁴⁵ and the constraints from the SAU price controls.

The costs that the annual revenue requirements will recover each year are referred to as ‘building block’ components. These building block components consist of:

- operating expenditure in that year;

²⁴⁵ The revenue forecasts in NBN Co’s *Corporate Plan 2012-15* contain assumptions on the required growth in demand for NBN Co’s higher data rate services and data usage to meet the internal rate of return of the NBN investment. See NBN Co, *Corporate Plan 2012-15*, 6 August 2012, pp. 61-69.

- regulatory depreciation, which represents a return to NBN Co each year of a portion of its capital investments — depreciation is used to control the timing of the recovery of these capital investments over time and therefore prices over time;
- a rate of return on capital, which represents the costs to NBN Co of financing capital investments (for example, the costs of financing debt and the expected rate of return required by shareholders);
- a construction-in-progress allowance, which represents the costs to NBN Co of financing network assets during their construction; and
- an allowance for tax.

The RAB represents the value of capital investments made by NBN Co that it can recover via access prices over time.²⁴⁶ If NBN Co incurs capital expenditure on network assets, this expenditure is added to the RAB when the assets are placed in service and will be recovered by NBN Co over the life of the asset. Each year, a portion of this expenditure is recovered through regulatory depreciation (by including it in the annual revenue requirement) and the same amount is deducted from the RAB. This ‘RAB roll-forward’ process continues until the value of each asset is fully recovered by NBN Co.²⁴⁷

The initial cost recovery account mechanism is a key mechanism of the long-term revenue constraint methodology, as it will allow NBN Co to defer the recovery of initial revenue shortfalls. Normally, a regulated business would be expected to set prices to recover its annual revenue requirements in each given year. However, NBN Co is setting its initial prices with reference to the prices of legacy services to encourage customers to migrate to the NBN. These prices, combined with an initial low take-up of the NBN, mean that NBN Co will initially be unable to earn sufficient revenues to meet its annual revenue requirements. These initial revenue shortfalls will be rolled-forward into an initial cost recovery account to be recovered later in the SAU term. NBN Co submits that it anticipates that the initial cost recovery account will grow significantly for at least the next ten years.²⁴⁸

This long-term revenue constraint methodology contains some elements that will last for the full 30-year SAU term, via the combined operation of Modules 0, 1 and 2. The elements that are locked-in include:

- the calculation of the RAB and the RAB roll-forward equation — the initial value of the RAB will be zero and it will then be rolled-forward each year of the SAU by adding NBN Co’s actual capital expenditure in each year of the SAU (however this

²⁴⁶ The SAU adopts a single RAB that covers the value of NBN Co’s fibre, wireless and satellite networks. This contrasts to adopting separate RABs for different networks and asset types.

²⁴⁷ This RAB roll-forward process means that the value of NBN Co’s assets in the RAB will not be recalculated over time by the ACCC. There are alternative asset valuation approaches which periodically recalculate the RAB, such as replacement cost or optimised asset valuation approaches.

²⁴⁸ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 114.

capital expenditure is subject to some expenditure requirements and incentive mechanisms as discussed in section 6.3);

- the adoption of the initial cost recovery account (the way in which the value of the account is calculated will change over the SAU term, as discussed below); and
- the building block components of the annual revenue requirements.

The way in which the annual revenue requirements and the initial cost recovery account will be calculated will change over the SAU term. During Module 1, the annual revenue requirements will be determined annually by NBN Co, by applying prescribed methodologies for each cost component. The initial cost recovery account will then be updated based on the difference between these annual revenue requirements and NBN Co's actual revenues in each year. During Module 2, NBN Co's annual revenue requirements will be determined ex-ante, based on forecasts of revenue and expenditure approved by the ACCC, which are then locked-in for three to five years. The initial cost recovery account will then be updated based on the difference between these forecast annual revenue requirements and the forecast revenues that NBN Co expects to earn.

NBN Co states that under the long-term revenue constraint methodology it will be allowed to recover its prudently incurred costs over time (inclusive of an appropriate return on capital), but no more.²⁴⁹ NBN Co also states that it has adopted a building block approach to calculating its annual revenue requirements that is consistent with that commonly used in utility regulation.²⁵⁰

The ACCC's preliminary view is that it is not unreasonable in concept for NBN Co to adopt a RAB roll-forward, initial cost recovery mechanism and a building block model to calculate annual revenue requirements. However, in assessing the reasonableness of the SAU, the ACCC will consider whether the proposed methodologies for calculating the building block components, and the RAB roll-forward, will encourage efficient investment in, efficient use of, and the economically efficient operation of, the NBN.

This remainder of this section is structured as follows:

- section 6.2.1 discusses how annual revenue requirements are calculated during the network rollout period (Module 1); and
- section 6.2.2 discusses how annual revenue requirements are calculated in the subsequent periods (Module 2 and the replacement modules).

²⁴⁹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 113.

²⁵⁰ *Ibid*, p. 117.

6.2.1 Calculating annual revenue requirements during Module 1

During the network rollout (that is, Module 1), NBN Co's annual revenue requirements will be determined by applying methodologies set out in the SAU for determining the building block components. The value of these components will then be added together to determine the annual revenue requirement for that year. This process is 'self-administering', in that NBN Co will be responsible for applying these methodologies each year and determining the values of its annual revenue requirements.

The ACCC will not have an explicit role to approve NBN Co's annual revenue requirements during Module 1. However, NBN Co must report the values of the annual revenue requirements, including the values of the building block components and the RAB, to the ACCC each year.²⁵¹ NBN Co states that this information will provide the ACCC with clear and transparent oversight of NBN Co's compliance with its cost recovery commitments in Module 1.²⁵²

The methods for calculating the components of the annual revenue requirements are:

- values for operating expenditure are based on NBN Co's actual operating expenditure (however, this expenditure must comply with a number of expenditure requirements as outlined in section 6.3.1);²⁵³
- values for the rate of return on capital are based on a weighted average cost of capital (WACC) (calculated as the ten-year government bond rate plus 350 basis points) applied to the value of the RAB at the end of each year;²⁵⁴
- values for regulatory depreciation are based on a straight-line approach using asset lives, determined in a manner consistent with NBN Co's audited accounts — this means that an equal portion of each asset will be recovered each year;²⁵⁵
- values for the tax allowance are based on NBN Co's taxable profit (calculated as revenue minus operating and interest expenditure, and tax depreciation) and must be equal to or greater than zero;²⁵⁶ and

²⁵¹ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1G, clause 1G.1.

²⁵² NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 156.

²⁵³ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1F, clause 1F.7.

²⁵⁴ Ibid, Schedule 1F, clause 1F.6. The ACCC notes that the process by which NBN Co will determine the WACC in Module 1 differs from the approach usually taken by the ACCC in telecommunications and other regulated industries. The ACCC generally adopts an approach based on the weighted average of the cost of debt and the cost of equity, and reviews and updates the WACC every three to five years. NBN Co's WACC in Module 1 does not separate out the cost of debt and equity, and is not periodically reviewed by the ACCC.

²⁵⁵ Ibid, Schedule 1F, clause 1F.8.1.

²⁵⁶ Ibid, Schedule 1F, clauses 1F.8.2-1F.8.3.

- values for the annual construction-in-progress allowance are based on a lump sum that reflects the WACC applied to the value of assets under construction, prior to the assets being placed-in-service and added to the RAB.²⁵⁷

The approach to setting annual revenue requirements in Module 1 differs from other common regulatory frameworks, where regulated businesses are required to submit proposed annual revenue requirements to the regulator for approval. This is similar to the approach adopted in Module 2 (discussed in section 6.2.2). In contrast, NBN Co will determine its annual revenue requirements during Module 1 by applying the detailed methodologies in the SAU and will be able to recover these revenues without prior regulatory approval.

In considering the processes for determining annual revenue requirements in Module 1, the ACCC will consider whether the methodology for calculating each building block component reasonably reflects the relevant cost component, such as NBN Co's financing, tax and construction-in-progress costs (NBN Co's commitments around operating and capital expenditure are discussed in section 6.3.1). The ACCC will also consider whether it is reasonable for NBN Co to calculate annual revenue requirements without any explicit role for the ACCC to review or approve these calculations.

36. Are the methods for calculating the building block components of the annual revenue requirement likely to result in values that reasonably reflect the cost of each component over the term of Module 1? In particular:

- Is it appropriate that the WACC is calculated by applying 350 basis points to the ten-year government bond rate? Is the 350 basis point risk margin likely to reasonably reflect NBN Co's systematic risk over the term of Module 1? Should the WACC methodology be reviewed by the ACCC during Module 1?
- Is the methodology for calculating the tax allowance likely to result in values that reasonably reflect NBN Co's tax liability over the term of Module 1?
- Is the methodology for calculating the annual construction-in-progress allowance likely to result in values that reasonably reflect NBN Co's financing costs associated with assets in construction?

37. Is it appropriate for NBN Co to calculate annual revenue requirements without any explicit role for the ACCC to review or approve these calculations?

38. Should the reporting requirements provide the ACCC with any additional information to help assess NBN Co's compliance with these methodologies?

²⁵⁷ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1F, clause 1F.9.

6.2.2 Calculating annual revenue requirements during Module 2 and the replacement modules

As noted, during Module 2, NBN Co's annual revenue requirements will be determined ex-ante based on forecast annual revenue requirements approved by the ACCC. This is similar to more standard utility-style regulation.

The process for submitting and assessing revenue and expenditure forecasts is outlined in Table 2 below. Broadly, Module 0 requires NBN Co to submit forecasts as part of replacement module applications. The content of these forecasts must be consistent with a number of requirements and principles contained in Module 2. The length of the replacement module (that is, the regulatory cycle), and consequently the length of the revenue forecasts, will be determined by NBN Co as between three and five years.

The ACCC will assess NBN Co's revenue forecasts as part of its overall assessment of each replacement module.²⁵⁸ If the ACCC rejects NBN Co's revenue forecasts, it will be able to specify the forecasts that will apply to NBN Co in the regulatory cycle via an Access Determination or Binding Rules of Conduct, and these ACCC determined forecasts will not apply if they are inconsistent with the SAU.²⁵⁹

In Module 2, NBN Co is allowed to earn revenues above its forecast annual revenue requirements to recover the initial revenue shortfalls incurred in Module 1. Once these initial revenue shortfalls are recovered, the building block period begins and NBN Co will be allowed to earn revenues up to its forecast annual revenue requirements. Any under- or over-recovery by NBN Co of the forecast annual revenue requirements may be carried forward into the following regulatory cycle.

²⁵⁸ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clauses 4.6(b)(iii) and 4.8.

²⁵⁹ *Ibid*, Main Body, clause 4.10(d)-(e).

Table 2 Process for submitting and assessing NBN Co’s revenue forecasts in the Module 2²⁶⁰

<p>How are forecast revenues and revenue requirements submitted?</p>	<p>NBN Co must submit a ‘LTRCM’ proposal as part of each replacement module application, that contains:</p> <ul style="list-style-type: none"> ▪ forecast annual revenue requirements (both real and nominal) for each year of the regulatory cycle; ▪ forecasts of the individual components of these annual revenue requirements; ▪ forecasts of the actual revenue it expects to earn for each year of the regulatory cycle during the initial cost recovery period; and ▪ a description of the incremental tax effect.
<p>What must be included in forecast annual revenue requirements and forecast expenditure?</p>	<p>The forecast annual revenue requirements must include:</p> <ul style="list-style-type: none"> ▪ forecast operating expenditure; ▪ forecast nominal regulatory depreciation, calculated using a straight-line approach, the forecast RAB and the remaining asset lives; ▪ a rate of return on capital, calculated based on a nominal vanilla WACC applied to the forecast RAB in each year, with the cost of equity calculated using the capital asset pricing model; and ▪ a tax allowance. <p>The forecasts must also be calculated such that the expected net present value of NBN Co’s current and future cash flows is zero.</p> <p>The forecasts of operating expenditure and capital expenditure (in the forecast RAB) must reflect the expected value of prudent and efficient expenditure, having regard to a number of factors. These factors include <i>the Network Design Rules</i>, deemed prudent categories of expenditure and the level of expenditure in the previous</p>

²⁶⁰ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clauses 4.6, 4.8 and 4.10; Schedule 2D, clauses 2D.2 and 2D.6.

	regulatory cycle.
How does the ACCC assess forecasts and what happens if the ACCC rejects a forecast?	The ACCC will assess the LTRCM proposal as part of its overall assessment of each replacement module application. If the ACCC rejects a forecast submitted by NBN Co, it will be able to specify the revenue and expenditure forecasts that apply to NBN Co via an Access Determination or Binding Rules of Conduct, subject to these instruments being consistent with the SAU.

NBN Co submits that the building block components to be included in its annual revenue requirement forecasts are deliberately non-exhaustive, which will enable possible future inclusions, such as efficiency incentives schemes.²⁶¹ It also states that the requirement that revenue forecasts meet an overall expectation of zero net present value means that any future additions will not result in a positive net present value and therefore provide windfall gains to NBN Co.²⁶²

In assessing the reasonableness of the SAU, the ACCC will need to be satisfied that the application of the long-term revenue constraint methodology will not result in an expectation that NBN Co will under- or over-recover its costs.

In making decisions on replacement modules, Access Determinations or Binding Rules of Conduct, the ACCC considers that it should be able to make decisions that respond to changes in economic conditions and regulatory best practice, as well as the experience in applying the provisions over the SAU term. In this respect, the ACCC notes that Modules 0 and 2 resemble aspects of the National Electricity Rules (NER), which are currently under review by the Australian Energy Markets Commission (AEMC).²⁶³ In assessing the SAU, the ACCC will consider any issues raised in the AEMC review of the NER and the outcomes of this review.

39. Are there any elements of the processes contained in Modules 0 and 2 for developing, submitting and assessing revenue forecasts that raise concerns?
40. Are the criteria contained in Module 2 for developing forecasts of each building block component and the forecast RAB reasonable? In your response, please consider:
- the criteria for developing capital and operating expenditure forecasts (discussed in section 6.3.2);
 - the criteria for developing forecast depreciation, including the use of a straight-line approach;
 - the criteria for determining the forecast WACC, including the use of the capital asset pricing model and a benchmarking approach; and
 - the criteria for determining the tax allowance.

²⁶¹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 117.

²⁶² *Ibid*, p. 117.

²⁶³ AEMC, *Draft Rule Determinations (NER and NGR)*, 23 August 2012. Some of the aspects of the National Electricity Rules and National Gas Rules under review are: the approach to assessing and amending expenditure forecasts; the approach to determining the WACC; and the application of capital expenditure incentive mechanisms.

6.3 Creating incentives for efficient expenditure

The SAU contains commitments for determining the efficient levels of expenditure NBN Co can recover through its long-term revenue constraint methodology.

Throughout Module 1, the SAU adopts a compliance-based approach in which NBN Co is allowed to recover all actual expenditure that satisfies a number of rules contained in the SAU. During Module 2, the SAU adopts a more standard utility-style approach to expenditure. NBN Co submits that these processes should operate together so that over the 30 years of the SAU term, it is commercially rational for NBN Co to make prudent and efficient expenditure decisions.²⁶⁴ NBN Co also states that it faces a number of pre-existing efficiency incentives during the network rollout period that will reduce the reliance on the expenditure commitments to promote efficient expenditure.²⁶⁵

Although the SAU contains explicit commitments around how NBN Co will incur expenditure during the SAU term, other aspects of the SAU may also provide incentives for prudent and efficient expenditure by NBN Co. For example, commitments in the SAU around product development and minimum service levels can also provide incentives for prudent and efficient investment, by ensuring that NBN Co makes investments to provide services at a level of quality that customers demand and that cost savings are not made at the expense of service quality.

NBN Co's operating environment and commitments around prices in the SAU (both initial prices and price controls) may also provide incentives for efficient expenditure. NBN Co will be making significant upfront capital investments during its network construction period and will face uncertainty around future product take-up rates and revenue levels. In this context, if NBN Co over-invests or incurs expenditure in an inefficient manner, this will increase the likelihood that it will be unable to recover its initial investment via its prices over the SAU term. The ACCC's preliminary view is that this revenue and take-up uncertainty will provide NBN Co with some incentives to invest efficiently and keep initial operating costs at an efficient level.

The ACCC indicated a similar view on the effect of long-term price controls on NBN Co's incentives to invest efficiently in its final determination on the authorisation application lodged by NBN Co for its HFC Subscriber Agreement with Optus.²⁶⁶

This section is structured as follows:

- section 6.3.1 discusses the compliance-based approach to determining expenditures during the network rollout period (Module 1);

²⁶⁴ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 50.

²⁶⁵ *Ibid.*, pp. 120-121.

²⁶⁶ ACCC, *Final determination on the Application for Authorisation lodged by NBN Co in respect of provisions of the HFC Subscriber Agreement entered into with SingTel Optus Pty Ltd and other Optus Entities*, 19 July 2012, para 3.158.

- section 6.3.2 discusses the incentive-based approach to determining expenditures in the subsequent periods (Module 2 and the replacement modules);
- section 6.3.3 discusses the *Network Design Rules* and the processes for updating these rules over time; and
- section 6.3.4 discusses the ‘deemed prudent’ categories of expenditure.

6.3.1 Expenditure during Module 2 and the replacement modules — standard utility-style approach

During the network rollout period (that is, Module 1), NBN Co will be allowed to include into its RAB and annual revenue requirements all actual capital and operating expenditure that satisfies a number of prudency requirements contained in the SAU.²⁶⁷ This process is ‘self-administering’ in that NBN Co will be responsible for applying these prudency requirements in the SAU. The role of the ACCC is to enforce NBN Co’s compliance with these requirements on an ex-post basis.

The SAU exempts certain categories of expenditure from these prudency requirements by including ‘deemed prudent categories’ of expenditure (these categories are discussed in more detail in section 6.3.4 below).

The SAU requires NBN Co to submit to the ACCC annual compliance reports that certify that NBN Co has complied with the prudency requirements.²⁶⁸ The SAU also confers powers on the ACCC to request additional information from NBN Co that is reasonably necessary for it to assess the matters contained in the compliance reports.²⁶⁹

NBN Co submits that the combination of the prudency requirements in the SAU and a number of pre-existing efficiency incentives means that NBN Co will face appropriately strong incentives to incur expenditure on a prudent basis during the network rollout period. Firstly, NBN Co states that it is subject to extensive and rigorous cost control, accountability and transparency requirements.²⁷⁰ Secondly, NBN Co states that throughout the network rollout it will face significant ongoing risk as to the sufficiency of its long-term revenues and it will therefore be commercially rational

²⁶⁷ Capital expenditure will be prudent if NBN Co satisfies the Prudent Design Condition (capital expenditure that is materially consistent with or within the scope of the *Network Design Rules* and any permitted variations); and the Prudent Cost Condition (capital expenditure that is incurred using competitive tendering and procurement processes that comply with the *NBN Co Procurement Rules*). Operating expenditure will be prudent if NBN Co ensures that the operating expenditure is incurred in a manner that seeks to achieve value for money and the lowest total cost of ownership; and NBN Co manages and controls operating expenditure in a manner consistent with the *Statement of Expectations* and other legal, policy, regulatory or Shareholder Minister requirements.

²⁶⁸ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1G, clauses 1G.2.1 and 1G.2.3.

²⁶⁹ Ibid, Schedule 1G, clauses 1G.2.1 and 1G.2.3.

²⁷⁰ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, pp. 120-121.

for NBN Co to only incur prudent and efficient expenditure.²⁷¹ These views are supported by NBN Co's expert reports.²⁷²

The ACCC notes that, in most contexts, allowing a regulated business to recover its actually incurred expenditure does not generate strong incentives on the business to be efficient. This is because if the business incurs higher expenditure than it expected in any given period it will be able to recover the additional expenditure from customers. Conversely, if it incurs lower expenditure than expected, these savings are passed through to customers rather than being retained by the business. Together these do not promote financial incentives on the business to seek cost savings or invest more efficiently because it is not rewarded for doing so.

As noted earlier, the ACCC recognises that NBN Co may face other incentives to be efficient outside of the expenditure commitments in Module 1 in the SAU. If these pre-existing incentives are effective, it may not be necessary for the prudency requirements to generate all the incentives on NBN Co to be efficient during the network rollout. The ACCC's preliminary view therefore is that NBN Co's proposed approach, combined with reporting requirements, may be appropriate during the network rollout period.

However, the effectiveness of NBN Co's proposed approach is likely to depend on the level of prescription or flexibility within the prudency requirements in Module 1. If the ACCC considers that NBN Co has incurred inefficient expenditure that does not satisfy the prudency requirements, it will be able seek enforcement action for a breach of the SAU. In this regard, the ACCC recognises that there is a trade-off between having more detailed and restrictive requirements compared to more flexibility. For example, highly restrictive requirements on capital expenditure may not be appropriate during the network rollout given that NBN Co will face uncertainty over expenditure levels and demand profiles. If the requirements are too restrictive, this may reduce NBN Co's incentives to, or prevent it from, making investments during the network rollout that may otherwise be considered efficient. Conversely, if the requirements are defined too broadly, this may allow expenditure that would otherwise be considered inefficient to satisfy the requirements, thereby reducing NBN Co's incentives to invest efficiently.

The ACCC therefore seeks views on the level of prescription in the prudency requirements and whether they achieve an appropriate balance between prescription and flexibility. Two important elements of the rules are the *Network Design Rules* and the deemed prudent categories, and these are discussed separately in sections 6.3.3 and 6.3.4 below.

41. Is NBN Co's proposed approach to determining expenditure levels during the network rollout period reasonable? In your response, please consider:

- the nature and strength of the incentives on NBN Co created by its operating environment (for example, revenue uncertainty) and the effect of SAU price

²⁷¹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 46.

²⁷² Synergies, *Advice on NBN Co's Special Access Undertaking*, September 2012, p. 64 and pp. 76-77; Ordovery, D. and Shampine, A., *Expert report*, September 2012, pp. 19-20.

controls; and

- whether the prudency requirements in Module 1 achieve the appropriate balance between prescription and flexibility.

6.3.2 Expenditure during Module 2 and the replacement modules — standard utility-style approach

Following the network rollout (that is, Module 2 and replacement modules), NBN Co adopts a more standard utility-style approach based on forecasts of expenditure. The implementation of these expenditure forecasts is described in section 6.2.2.

Essentially, the forecast-based approach to expenditure aims to generate financial incentives on NBN Co to incur efficient expenditure, as follows.

In terms of creating incentives to incur efficient operating expenditure, setting NBN Co's annual revenue requirements based on operating expenditure forecasts can create incentives on NBN Co to not overspend and to engage in cost saving measures. If NBN Co incurs more operating expenditure than forecasted, it will not be able to pass these additional costs on to customers. Conversely, if NBN Co reduces operating expenditure throughout the regulatory cycle, it will be able to retain these cost savings. The ACCC notes that the use of expenditure forecasts to create financial incentives can sometimes create incentives on a regulated business to inflate its expenditure forecasts.

In terms of creating incentives for efficient capital expenditure, NBN Co's RAB is updated each year based on NBN Co's actually incurred capital expenditure. If NBN Co spends more capital expenditure in each year than its forecast, it may begin recovering this additional expenditure from the start of the next regulatory cycle. However, because NBN Co will not be able to recover the financing costs associated with the additional expenditure throughout the regulatory cycle in which it was incurred (that is, by applying a WACC to this additional expenditure in the year it was incurred), this will create some incentives to not over-invest.²⁷³

The strength of this incentive will largely depend on the length of the regulatory cycle (that is, how long NBN Co will need to wait to begin recovering the additional financing costs). Generally speaking, longer regulatory cycles create stronger incentives to invest efficiently because the additional financing costs for cost overruns will be absorbed by NBN Co for a longer period. In this respect, the ACCC notes that NBN Co will be responsible for determining the length of each regulatory cycle during Module 2 (between three and five years via the replacement module submission and assessment process), and therefore NBN Co will have some control of the strength of the incentive for efficient capital expenditure.

NBN Co submits that its approach in Module 2 will provide financial incentives for expenditure efficiency that are in addition to the ongoing incentives arising from the

²⁷³ The roll-forward of the RAB based on actual incurred capital expenditure is one aspect of the NER that is currently under review by the AEMC (as discussed in section 0). As noted, the ACCC will consider the outcome of this review in its assessment of the SAU.

uncertainty over NBN Co's long-term revenue sufficiency.²⁷⁴ The Ordover and Shampine report similarly states that the SAU provides appropriate incentives to achieve efficient levels of costs with the construction and operation of the network and reasonable safeguards against over-investment.²⁷⁵

As noted above, NBN Co's operating environment and the price commitments in the SAU can also create additional incentives for prudent and efficient expenditure. As NBN Co will be recovering its significant revenue shortfalls during this period, NBN Co may only be able to fully recover these shortfalls if users continue to demand and migrate to higher value services with greater usage. Additional expenditure incurred during this period may delay the recovery of these revenue shortfalls as NBN Co will be required to recover both the revenue shortfalls plus the additional expenditure. This may reinforce incentives for NBN Co to keep additional expenditure to efficient levels.

42. Does the proposed approach in Module 2 and the replacement modules encourage efficient investment in, and the economically efficient operation of, the NBN? In your response, please consider:

- the criteria and process for developing forecasts of capital and operating expenditure, including NBN Co's incentives to inflate forecasts;
- the strength of the incentives created by the RAB roll-forward methodology, including NBN Co's ability to recover its actual capital expenditure;
- the implications of NBN Co determining the length of the regulatory cycle; and
- any additional incentives created by the SAU and NBN Co's operating environment.

6.3.3 Network Design Rules

The *Network Design Rules* have an important role in determining efficient expenditure levels in the SAU, although this role changes over the SAU term. In Module 1, capital expenditure that is consistent with these rules will satisfy the prudent design condition and NBN Co is allowed to recover this expenditure (subject to price controls and procurement rules in the SAU). In Module 2 and the replacement module process, the *Network Design Rules* will be a relevant factor in developing expenditure forecasts and therefore will also be relevant for the extent to which the ACCC can reject a replacement module and make substitute expenditure forecasts via an Access Determination or Binding Rules of Conduct.

The ACCC notes that once the SAU is in place, the ACCC (or another third party) cannot initiate a review of the *Network Design Rules*. As such the ACCC is using this opportunity to seek industry views on the *Network Design Rules* and the process for updating these rules over time.

²⁷⁴ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 121.

²⁷⁵ Ordover, D. and Shampine, A., *Expert report*, September 2012, p. 18.

The *Network Design Rules* provide an overview of NBN Co's initial physical network architecture and the high level design of the fibre, wireless and satellite networks.²⁷⁶ NBN Co states that the document describes the high-level solution that has been developed by NBN Co to comply with the coverage objectives established by the Government's *Statement of Expectations*.²⁷⁷

The SAU permits NBN Co to update the *Network Design Rules* over the SAU term. If NBN Co updates the *Network Design Rules*, it must provide the updated rules to the ACCC.²⁷⁸ During Module 1, NBN Co can update the *Network Design Rules* under the following three circumstances:

- Firstly, NBN Co can update the rules based on a network design change that is in connection with a 'permitted variation' that is listed in the SAU.²⁷⁹
- Secondly, NBN Co can update the rules based on a change to the Government's *Statement of Expectations* or any Shareholder Minister, legal, policy, regulatory or administrative requirement that has the effect of varying the network design scope. These changes do not require ACCC or customer endorsement.²⁸⁰
- Thirdly, NBN Co can update the *Network Design Rules* by following a customer endorsement process set out in the SAU. Broadly, this process requires NBN Co to consult with customers via the PDF on a proposed network design change and give these customers an opportunity to object to the proposal. If customers object and NBN Co wishes to proceed with the network change, NBN Co must seek an ACCC decision to accept or reject the network change proposal via a dispute resolution process set out in the SAU. This customer endorsement process is reviewed at the midpoint review of Module 1 (which is discussed in further detail at section 3.2).

Following the network rollout period (that is, Module 2), the *Network Design Rules* can be updated in more limited circumstances, as set out in the SAU.²⁸¹

NBN Co has submitted a report prepared by Analysys Mason which concludes that NBN Co's fibre, fixed wireless and satellite networks reflect an efficient and prudent design, and that NBN Co has adopted a prudent and efficient methodology to determine the boundary between premises serviced by fibre and those serviced by fixed wireless. The Analysys Mason report is available on the ACCC website. The Synergies report

²⁷⁶ The *Network Design Rules* begin with a high-level overview of the different network elements of the NBN. These network elements are the access network (including transport and aggregation), network management, control, national connectivity, lawful interception and IT platforms. The physical architecture of the access (fibre, wireless and satellite), transport and aggregation networks are then described in detail throughout the remainder of the document. The other network elements, including network management and IT platforms, are not described in any detail.

²⁷⁷ NBN Co, *Network Design Rules*, 18 September 2012, p. 1.

²⁷⁸ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1E, clause 1E.6.4(a); Schedule 2D, clause 2D.8.3(c).

²⁷⁹ *Ibid*, Schedule 1E, clause 1E.6.4(a)(i)(A). The list of permitted variations is contained in clause 1E.6.2 and described in section 6.3.4 of this consultation paper.

²⁸⁰ *Ibid*, Schedule 1E, clauses 1E.6.4(a)(i)(C) and 1E.6.4(a)(i)(D).

²⁸¹ *Ibid*, Schedule 2D, clause 2D.8.3.

also states that the inclusion of the customer engagement and endorsement process in the SAU in relation to changes to the *Network Design Rules* is appropriate.²⁸²

The ACCC recognises that some aspects of the *Network Design Rules* are based on an initial network design scope that is required by the Government. This includes the scope of the network footprint (for example, fibre to 90% of premises) and the choice of fibre technology (for example, gigabit passive optical network). The ACCC does not propose to assess the Government's network design requirements as part of its assessment of the SAU.

43. Do the Network Design Rules reflect prudent and efficient network design? In your response, please consider:

- the network design requirements specified by the Government;
- whether the scope of the *Network Design Rules* is appropriate, including whether it contains all the network elements necessary to provide a reasonable basis for assessing all of NBN Co's capital expenditure during the network rollout; and
- whether the *Network Design Rules* are described in sufficient detail that an independent person can determine whether NBN Co's capital expenditure complies with these rules.

44. Are the various circumstances in which NBN Co can update the Network Design Rules reasonable?

6.3.4 Deemed prudent expenditure and permitted variations

The SAU exempts certain categories of capital and operating expenditure from the prudency commitments set out in the SAU by including 'deemed prudent' categories of expenditure.²⁸³ In Module 1, NBN Co does not need to satisfy the prudency rules for these categories of expenditure.²⁸⁴ In Module 2, NBN Co must have regard to these deemed prudent categories when developing expenditure forecasts.

Module 1 also includes a number of 'permitted variations' categories of expenditure.²⁸⁵ Expenditure that is consistent with these permitted variations categories will satisfy the prudent design condition.²⁸⁶ Therefore, permitted variations categories operate in a

²⁸² Synergies, *Advice on NBN Co's Special Access Undertaking*, September 2012, p. 73.

²⁸³ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1E, clause 1E.3.2; Schedule 1F, clause 1F.7.2. The deemed prudent categories include: the first release sites and interim arrangements; the contracts between NBN Co and Telstra and NBN Co and Optus; operating expenditure in connection with urgent and unforeseen events; and expenditure from the cost commencement date and SAU commencement date.

²⁸⁴ Ibid, Schedule 1E, clause 1E.3.1(b); Schedule 1F, clause 1F.7.2(a).

²⁸⁵ Ibid, Schedule 1E, clause 1E.6.2. The permitted variations include: capital expenditure on network maintenance and security; urgent and unforeseen expenditure; capital expenditure below a minor expenditure limit (initially \$100 million) and network changes to comply with Shareholder Minister, legal, regulatory or administrative requirements.

²⁸⁶ Ibid, Schedule 1E, clause 1E.5(b).

similar manner to the deemed prudent categories, except that the expenditure must still satisfy the prudent cost condition (for example, using competitive tendering and procurement).

NBN Co submits that the deemed prudent capital expenditure relates primarily to initial and interim arrangements that NBN Co has already entered into, as well as the arrangements that it has negotiated with Telstra and Optus.²⁸⁷ It also states that the permitted variations give NBN Co an appropriate degree of flexibility to improve and alter the design of the NBN as the network is being rolled out.²⁸⁸

The ACCC's preliminary view is that the use of deemed prudent or permitted variations categories of expenditure is not in itself unreasonable. However, the ACCC notes that these categories appear to be defined broadly and allow a broad range of expenditure to be excluded from the expenditure commitments in the SAU. If the categories are too broadly defined, this may allow NBN Co to recover certain expenditure that may otherwise be considered inefficient, thereby reducing NBN Co's incentives to invest efficiently and incur only efficient expenditure. This is of particular importance during the network rollout period, when expenditure is assessed solely on compliance with the prudence rules in the SAU.

The ACCC recognises that some of the deemed prudent and permitted variations categories reflect network design requirements specified by the Government (including the initial network design and changes in this design over time) and are associated with pre-existing NBN Co commitments. As outlined earlier, the ACCC does not propose to assess the efficiency of network design parameters specified by the Government. However, the ACCC considers that the inclusion of the Government directions as deemed prudent or permitted variations means that the SAU may not prevent NBN Co from implementing Government directions inefficiently.

45. Are there deemed prudent and permitted variations categories that should not be included in the SAU?
46. Are the categories sufficiently defined to ensure that they encompass only efficient expenditure?

²⁸⁷ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 217.

²⁸⁸ *Ibid*, p. 217.

7 Non-price related matters

This chapter seeks views on the non-price related aspects of the SAU. The SAU addresses a range of non-price matters in Module 1. The only non-price matter dealt with in Module 2 is service levels (in the form of general principles).

The SAU provides that NBN Co must address service levels in its replacement module applications.²⁸⁹ NBN Co may choose whether or not to also address other non-price matters in replacement modules.²⁹⁰ If the ACCC were to accept a replacement module that addressed non-price matters, SFAAs would need to be consistent with the terms in the replacement module — this is because the SAU commits NBN Co to ensuring that the terms of SFAAs are consistent with the terms of the SAU.²⁹¹

During Module 1, NBN Co commits to including the terms specified in Annexures to Schedule 1H and Schedule 1J in SFAAs, for the following non-price matters:

- service levels;
- risk management;
- confidentiality and intellectual property rights for ‘business as usual’ activities,²⁹² and
- dispute management rules.²⁹³

NBN Co has noted that the drafting for some of these matters — in particular, risk management and service levels — is still being finalised via NBN Co’s Contract Development Process (‘CDP’),²⁹⁴ and may change.

NBN Co states that:

- the ACCC and/or access seekers will be able to seek legal action against NBN Co for breach of the SAU if it does not incorporate and maintain the terms and conditions in the Annexures in SFAAs;
- any breaches of the terms in the Annexures that are incorporated into any SFAA “will be dealt with as a contractual matter between NBN Co and its customers under their Access Agreement, rather than as a breach of the SAU”; and

²⁸⁹ NBN Co, *Special Access Undertaking*, 28 September 2012, Main Body, clause 4.6(b)(iv).

²⁹⁰ Ibid, Main Body, clause 4.6(b)(v).

²⁹¹ Ibid, Main Body, clause 6.

²⁹² That is, activities other than product development. The confidentiality and intellectual property rights aspects of product development are addressed in the PDF Processes in Annexure 1 of Schedule 1I of the SAU, which is discussed in chapter 5 of this consultation paper.

²⁹³ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1J, clause 1J.2(a); Schedule 1H, clauses 1H5.1, 1H.6 and 1H.7.

²⁹⁴ NBN Co established the CDP to commercially negotiate the terms of the next WBA with access seekers. The CDP utilises bilateral and multilateral engagements to enable NBN Co and access seekers to resolve ‘key issues’ with NBN Co’s current Wholesale Broadband Agreement.

- if the ACCC makes an Access Determination or Binding Rules of Conduct setting out different terms and conditions to those specified in the Annexures, it “will have no effect to the extent to which it is inconsistent with the terms set out in the SAU (including Annexures)” due to the operation of the legislative hierarchy.²⁹⁵

Module 1 also includes standalone commitments relating to:

- the publication of network rollout information and POI rollout progress information;²⁹⁶ and
- the opening, closure and relocation of POIs.²⁹⁷

During Module 1, non-price matters in the SAU are subject to changes arising out of the midpoint review (either via the review of multilateral processes or the review of non-price terms). As outlined in section 3.2, any changes require the ACCC’s approval. The review processes and the implications of the ACCC’s decisions are outlined in section 3.2 and throughout the relevant sections of this chapter.

In addition, for those non-price commitments that specify terms to be included in SFAAs (that is, service levels; dispute management rules; confidentiality and intellectual property rights for ‘business as usual’ activities; and risk management), the content that is actually included in SFAAs (as opposed to the content in the Annexures to Schedule 1H and Schedule 1J) is subject to changes arising out of the multilateral SFAA forum.²⁹⁸ According to the SAU, these changes also require the ACCC’s approval.²⁹⁹ Where changes arise via this method, a scenario would arise whereby the provisions in the SFAA differ from those in the Annexures.

47. The SAU requires NBN Co to include the terms and conditions in Annexures 1 to 3 of Schedule 1H and Annexure 1 of Schedule 1J in SFAAs. Should the SAU require NBN Co to comply with the substance of these terms and conditions? That is, should the terms in the Annexures be enforceable under the SAU as well as under contract?
48. Does the ACCC’s role in the midpoint review and in approving changes arising out of the multilateral SFAA forum provide assurance that the non-price terms and conditions are likely to remain reasonable during Module 1?

7.1 Service levels

The SAU contains a range of specific service level commitments and rebates in Module 1. In Module 1, NBN Co commits to include the service level provisions set out in

²⁹⁵ NBN Co, *Letter to ACCC titled NBN Co Special Access Undertaking (SAU) – request for clarification*, 1 November 2012.

²⁹⁶ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, clauses 1H.2-1H.3.

²⁹⁷ *Ibid*, Schedule 1H, clause 1H.4.

²⁹⁸ *Ibid*, Schedule 1J, clause 1J.2(c); Schedule 1H, clauses 1H.5.1, 1H.6 and 1H.7.

²⁹⁹ *Ibid*, Schedule 1B, clause 3.1(e)(i).

Schedule 1J of the SAU in its SFAAs.³⁰⁰ These provisions are reviewed at the midpoint review. The SAU also contains high level commitments in Module 2 about maintaining service levels for existing products and developing service levels for new products.³⁰¹ NBN Co has committed to include a proposal in respect of service levels and service level rebates in replacement module applications.³⁰²

The service level regime adopted by NBN Co could have implications for whether efficient investment in infrastructure is promoted, as well as whether the efficient operation of networks is encouraged. Commitments to meet particular service levels and penalties for not meeting them could encourage investment (for example, in capacity) and maintenance that is required to meet the service levels on an ongoing basis.

The service level regime could also have implications for the promotion of competition. NBN Co's services are an obligatory input for end-to-end products offered by access seekers to end-users. There is therefore the potential for NBN Co's services to become a bottleneck that degrades the overall quality of an access seeker's product offering. If access seekers have access to inputs of similar, if not better, quality as those they purchase today, at broadly the same price, providers that have invested in their own infrastructure (such as core networks), are less likely to have the quality of their end-to-end product offerings to end-users negatively impacted. This could enable those providers who have undertaken investment in their own infrastructure to effectively compete in downstream markets on the basis of differentiating service quality factors.

Efficient use of telecommunications networks could also be promoted if access seekers are able to access services of a similar quality, at a similar price, to what they are able to purchase today. Any degradation in quality arising at a particular price point as a result of the transition to the NBN may lead to a reduction in demand for services and, in turn, less efficient usage of telecommunications networks.

In addition, given that the services delivered over the NBN are a key input into downstream markets for the provision of broadband and telephony services, access seekers require certainty over service levels, and information about those service levels, to ensure they are able to accurately advertise their product offerings to end-users. It is therefore important that each service level clearly indicates how it will be measured and what will be done if NBN Co fails to meet the specified standard.

7.1.1 Module 1 service level commitments

As noted, a range of service levels are included in Annexure 1 to Schedule 1J, including:

- Connections — this covers end-user connections, priority assistance connections as well as kept connection appointments.

³⁰⁰ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, clause 1H.7.

³⁰¹ Ibid, Schedule 2F.

³⁰² Ibid, Main Body, clause 4.9.

- Service experience — this covers access component modifications, connectivity component modifications, end-user fault rectification and kept fault rectification.
- The Facilities Access Service — this covers Facilities Access Service orders processing as well as Facilities Access Service orders completion.
- Availability — this covers network performance and availability as well as NBN Co Platform Interfacing Service availability.

Annexure 1 sets out four ‘tiers’ of service levels, with different remedies applying to each tier.³⁰³ These tiers are ‘Service Levels’, ‘Service Level Targets’, ‘Performance Objectives’ and ‘Operational Targets’. Different remedies apply to each tier, including ‘corrective action’, ‘commercial rebates’ or ‘CSG compensation’.

At the midpoint review, NBN Co will provide the ACCC with a revised set of service level commitments and service level rebates.³⁰⁴ In making its decision on whether to accept or reject NBN Co’s proposal, the SAU specifies that the ACCC must have regard to the reasonableness criteria in section 152AH of the CCA, as well as the extent of NBN Co’s compliance with the regime, the extent to which service levels have supported access seekers meeting retail-level regulatory requirements, and comparable Australian and international standards.³⁰⁵ The ACCC can accept or reject NBN Co’s proposed terms and make substitute terms in respect of the rejected aspects.³⁰⁶ The SAU requires that NBN Co complies with the outcomes of the ACCC’s decision instead of the terms in Annexure 1 of Schedule 1J for the remainder of Module 1.³⁰⁷ The manner in which NBN Co can do this is outlined in section 3.2.

NBN Co submits that its proposed service levels achieve a range of goals, such as providing clarity and certainty over service performance, assisting customers to meet their downstream regulatory obligations, and creating incentives for NBN Co “to investigate where it has underperformed, and devise measures to prevent future under-performance”.³⁰⁸ In addition, NBN Co submits that the provisions in the SAU include reporting measures that will provide transparency on NBN Co’s overall performance.³⁰⁹

The ACCC notes the following with respect to the service level commitments and remedies in Module 1:

- Different service level commitments apply to fibre, wireless and satellite services.
- How capacity utilisation is allocated between access seekers is not described.

³⁰³ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1J, Annexure 1.

³⁰⁴ Ibid, Schedule 1K, clause 1K.3.1.

³⁰⁵ Ibid, Schedule 1K, clause 1K.3.2(b).

³⁰⁶ Ibid, Schedule 1K, clauses 1K.3.3-1K.3.7.

³⁰⁷ Ibid, Schedule 1K, clauses 1K.3.5(b)(i) and 1K.3.7(b)(i).

³⁰⁸ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 82.

³⁰⁹ Ibid, p. 82.

- The proposed ‘corrective action remedy’, which applies where NBN Co fails to achieve a Service Level, Service Level Target or Performance Objective, specifies a number of steps that NBN Co will take. However, it does not make an explicit commitment to rectify the problem within a certain period of time or as soon as is reasonably practicable.³¹⁰
- Regarding the commercial rebate remedy that is available in the limited circumstances where NBN Co fails to meet the end-user connections service level and the enhanced-12 fault rectification service level:³¹¹
 - The ACCC will need to consider whether NBN Co would be able to recover from access seekers the costs of paying commercial rebates via the SAU pricing methodology, and if so, whether this would weaken the incentives that the commercial rebate mechanism creates.
 - To receive a rebate for an end-user not being connected within the specified timeframe, the SAU requires that access seekers submit forecasts to NBN Co; the rebate amount paid by NBN Co is then proposed to be adjusted based on the accuracy of the forecast.³¹² In its assessment, the ACCC will consider whether a forecast mechanism is appropriate for a service level regime.
 - To receive a rebate, an access seeker must apply for a rebate “in accordance with the claims process set out in the NBN Co Operations Manual”.³¹³ In its assessment, the ACCC will consider whether it is possible that this process could be changed in an unreasonable manner over time.

7.1.2 Service levels following expiry of Module 1

NBN Co has made a commitment to include a proposal in respect of Service Levels and Service Level Rebates in replacement modules.³¹⁴ This proposal must be consistent with general principles outlined in Module 2.³¹⁵ There are separate general principles for existing products and for new products.

Regarding the principles for existing products, Module 2 states that the service levels and rebates will be “specified, varied or updated in further detail”:

- to the extent necessary to promote efficient take-up and usage;
- to maintain service levels and service level rebates on terms that are the same or better than those that applied in the preceding SFAA; and

³¹⁰ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 2F.

³¹¹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 85.

³¹² NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1J, Annexure 1, clause 24.2(g).

³¹³ *Ibid*, Schedule 1J, Annexure 1, clause 24.1(b)(i).

³¹⁴ *Ibid*, Main Body, clause 4.9.

³¹⁵ *Ibid*, Main Body, clause 4.9(b).

- having regard to:
 - the likely cost impacts on NBN Co and its customers, and
 - any relevant retail-level regulatory requirements that customers must comply with.³¹⁶

Regarding the principles for new products, Module 2 sets out that the service levels that will apply to a new product component, product feature, Ancillary Service or type of Facilities Access Service:

- will be specified by NBN Co when the particular product is introduced; and
- must be consistent with promoting efficient take-up and usage, must have regard to the likely cost impacts on NBN Co and its customers and must have regard to any relevant retail level regulatory requirements that customers are required to comply with.³¹⁷

Regarding the service levels for new products, the SAU does not commit NBN Co to including service levels for new products in replacement modules, nor to adopting service levels for existing products as a baseline for the new service levels where appropriate.

Also of note, any Access Determination or Binding Rules of Conduct made relating to service levels would be ineffective to the extent it was inconsistent with Module 2.³¹⁸

Module 1 commitments

49. Would the proposed service level commitments enable access seekers to offer services to end-users of the same (or better) quality as they are being supplied today, for a comparable price? In your response please consider both residential and business grade services, and all dimensions of service levels.
50. Do the proposed remedies create sufficient incentives for NBN Co to meet its proposed service level commitments and address issues that arise in a timely manner?
51. Is each metric expressed in a manner that is sufficiently clear? Is the manner in which each metric is measured clearly described?
52. Will the commitments enable access seekers to meet their downstream regulatory obligations?
53. Is the midpoint review process likely to ensure that the service level regime remains reasonable during Module 1?

³¹⁶ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 2F, clause 2F.2.1.

³¹⁷ Ibid, Schedule 2F, clause 2F.2.1.

³¹⁸ Ibid, Main Body, clause 4.10(d)-(f).

Modules 0 and 2 and replacement module commitments

54. Will NBN Co's commitments in Module 2, and the service level regimes that will be included in replacement modules, result in the development of a service level regime that promotes the long-term interests of end-users and is reasonable over time?

7.2 Risk management

NBN Co has committed to include the risk management provisions set out in Annexure 3 to Schedule 1H of the SAU in its SFAAs.³¹⁹

The risk management regime is governed by the terms in Annexure 3. NBN Co states that “[a] codified liability regime is an appropriate regime to give the parties certainty as to their scope of liability and to try and minimise the likelihood of becoming involved in litigation.”³²⁰ In developing these terms, NBN Co states that it has sought “to achieve an appropriate allocation of risk that is fair and reasonable and reflects the activities and responsibilities for NBN Co and its Customers, thereby providing certainty, clarity and transparency for all parties.”³²¹

Annexure 3 sets out the liabilities (including exclusions and limitations) of each party to the other, the indemnities that are given by a party to the other, requirements in relation to the parties' relationships with certain third parties (such as downstream customers), insurance requirements, and how the parties will deal with any force majeure events.³²² In relation to liability, each party is liable to pay the other party for losses arising in connection with a range of matters, such as a failure to perform contractual obligations, or in respect of negligent or wilful acts or omissions causing death or personal injury or damage to tangible property, or acts or omissions constituting fraud.³²³ In relation to indemnities, each party will pay to the other party on demand an amount equal to all losses suffered or incurred as a result of the first party's actions where the losses arise from any breach of the confidentiality provisions of the parties' Access Agreement; any third party claims alleging an infringement of that third party's intellectual property rights; any death or personal injury of any person to the extent that it is caused or contributed to by a negligent act or omission or any wilful acts or omissions that cause or contribute to that death or personal injury in connection with the parties' Access Agreement; or any damage to tangible property in connection with the parties' Access Agreement.³²⁴

³¹⁹ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, clause 1H.7.

³²⁰ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 143.

³²¹ *Ibid*, p. 143.

³²² NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, Annexure 3, clause 1.

³²³ *Ibid*, Schedule 1H, Annexure 3, clause 2.1. Annexure 3 also sets out the limitations on each party's liability, such as annual caps on liability amounts, as well as uncapped liability categories. Further, there is no liability for indirect losses arising in connection with the parties' Access Agreement, and there are exclusions of liability in certain circumstances.

³²⁴ *Ibid*, Schedule 1H, Annexure 3, clauses 3.1-3.4.

There are general exclusions of NBN Co's liability in relation to downstream customers, for example, for customer losses caused or contributed to by downstream customers, or for activities in connection with the supply of customer products to downstream customers.³²⁵ There are also indemnities that only apply to NBN Co, for example, customers are required to indemnify NBN Co against downstream customer claims, such as claims for downstream customer loss, to the extent the claim is caused or contributed to by the customer.³²⁶

The SAU sets out that, at the midpoint review, the ACCC will consider a 'non-price proposal' from NBN Co that includes the risk management terms that NBN Co considers should operate for the remainder of Module 1.³²⁷ The SAU states that in considering the proposal the ACCC will have regard to the 'reasonableness' criteria in section 152AH of the CCA, as well as:

- the manner in which NBN Co has complied with the non-price terms and conditions described in Schedule 1H from the SAU commencement date to assess the manner in which NBN Co will be likely to comply with the proposed terms;
- good industry practice in comparable industries applicable to wholesale contracting in Australia; and
- comparable international standards applicable to non-price terms and conditions in circumstances substantially similar to NBN Co's circumstances.³²⁸

The ACCC can accept or reject NBN Co's proposed terms and make substitute terms in respect of the rejected aspects.³²⁹ The SAU requires that NBN Co complies with the outcomes of the ACCC's decision instead of the risk management terms in Annexure 3 for the remainder of Module 1.³³⁰ The manner in which NBN Co can do this is outlined in section 3.2.

The ACCC in its assessment will consider whether the proposed risk management regime adequately allocates risk between NBN Co and its customers, that is, whether the risk allocation model places risk with the party which has the ability to manage that risk. The ACCC will consider matters such as the incentives provided for NBN Co to establish robust operational processes to manage risks under its control if it were to impose comprehensive liability exclusions, and the implications for NBN Co's customers when entering into downstream customer contracts.

55. Do the risk management terms balance the parties' interests and enable them to efficiently operate and invest in their respective networks, services and facilities?

³²⁵ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, Annexure 3, clause 2.7.

³²⁶ Ibid, Schedule 1H, Annexure 3, clause 3.5.

³²⁷ Ibid, Schedule 1K, clause 1K.3.

³²⁸ Ibid, Schedule 1K, clause 1K.3.2(a).

³²⁹ Ibid, Schedule 1K, clauses 1K.3.3-1K.3.7.

³³⁰ Ibid, Schedule 1K, clauses 1K.3.5(b)(i) and 1K.3.7(b)(i).

56. Is it clear to whom and in what circumstances the risk management provisions in Annexure 3 to Schedule 1H apply?

57. Is the midpoint review process likely to ensure that the risk management terms remain reasonable during Module 1?

7.3 Confidential information and Intellectual Property Rights

The confidentiality and intellectual property rights (IPR) provisions set out in Schedule 1H only apply to ‘business as usual’ activities, that is, activities other than product development. The confidentiality and IPR aspects of product development are contained in the ‘PDF Processes’, which is discussed in chapter 5 of this consultation paper.

7.3.1 Confidential information

NBN Co has committed to include the confidentiality provisions in Annexure 2 to Schedule 1H of the SAU in its SFAAs.³³¹

Annexure 2 sets out the circumstances in which NBN Co and its customers can use and disclose the confidential information of the other party,³³² data security and privacy obligations,³³³ and obligations in respect of downstream customer information.³³⁴ NBN Co states that it has increased the number of disclosure rights that are reciprocal and narrowed the scope of non-reciprocal disclosure rights “to the extent this is appropriate and reasonable”.³³⁵

Annexure 2 provides that each party may use confidential information for the purposes of exercising its rights and performing its obligations under any SAU or the parties’ Access Agreement, or for the supply of customer products as contemplated by the parties’ Access Agreement.³³⁶ Annexure 2 also states that confidential information may be disclosed to various third parties in certain circumstances, such as for purposes connected to the parties’ Access Agreement, by consent or where required by law.³³⁷ NBN Co has additional rights to use and disclose confidential information in certain circumstances.³³⁸ In addition, customers are required to provide specific consents for

³³¹ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, clause 1H.6.

³³² Ibid, Schedule 1H, Annexure 2, clause 1.

³³³ Ibid, Schedule 1H, Annexure 2, clause 2.

³³⁴ Ibid, Schedule 1H, Annexure 2, clause 3.

³³⁵ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 142.

³³⁶ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, Annexure 2, clause 1.2(a).

³³⁷ Ibid, Schedule 1H, Annexure 2, clause 1.2(b).

³³⁸ Ibid, Schedule 1H, Annexure 2, clauses 1.3, 1.5 and 1.6. For example, for purposes relating to the NBN Co network and systems and operational matters, or for compliance with NBN Co’s legal or regulatory obligations.

NBN Co to use and disclose certain information.³³⁹ Further, customers are required to procure and make available downstream customer information to NBN Co.³⁴⁰

The SAU sets out that, at the midpoint review, the ACCC will consider a ‘non-price proposal’ from NBN Co that includes the confidentiality terms that NBN Co considers should operate for the remainder of Module 1.³⁴¹ The criteria that the ACCC will have regard to in making its decision are the same as those outlined in the discussion of the midpoint review of the risk management terms in section 7.2, as are the implications of the outcomes of the review.

The ACCC in its assessment will consider whether the proposed confidentiality regime adequately balances the interests of both NBN Co and its customers. The ACCC may consider matters such as whether NBN Co requires certain information to be able to undertake planning and maintenance of its network or for the provisioning of services; and whether the obligations to provide information to NBN Co may have impacts on a customer’s ability to effectively conduct its business operations.

The ACCC notes that NBN Co is not currently providing retail services, that is, it is not competing with its customers in downstream markets, and so is unlikely to have an incentive to intentionally use and disclose commercially sensitive information to the detriment of particular customers in downstream markets.

58. Do the confidentiality terms balance the parties’ interests and enable them to efficiently operate and invest in their respective networks, services and facilities?
59. Is it clear to whom and in what circumstances the confidentiality provisions in Annexure 2 to Schedule 1H apply?
60. Is the midpoint review process likely to ensure that the confidentiality terms remain reasonable during Module 1?

7.3.2 Intellectual property rights

NBN Co has committed to include the IPR provisions in Annexure 2 to Schedule 1H of the SAU in its SFAAs.³⁴²

Annexure 2 sets out the circumstances in which NBN Co and customers may use certain IPRs. NBN Co states that its approach “provides for an appropriate and

³³⁹ Ibid, Schedule 1H, Annexure 2, clauses 1.9 and 1.10. For example, information to which confidentiality obligations apply under section 152AYA of the CCA.

³⁴⁰ Ibid, Schedule 1H, Annexure 2, clause 3.2. For example, customers must include terms and conditions in downstream contracts that allow NBN Co to use and process downstream customer details in accordance with the parties’ Access Agreement. Customers must also provide downstream customer details to NBN Co on request, and obtain consents and give notifications necessary for NBN Co to use this information.

³⁴¹ Ibid, Schedule 1K, clause 1K.3.

³⁴² Ibid, Schedule 1H, clause 1H.6.

commercially workable balance between providing Customers control over their IPR and protecting NBN Co from IPR infringement claims.”³⁴³

In relation to NBN Co IPRs, NBN Co grants customers a licence to use NBN Co IPRs in order to use any ordered products and to perform its obligations and exercise its rights under the parties’ Access Agreement.³⁴⁴ In relation to customer IPRs, NBN Co may only use customer IPRs internally to perform its obligations and exercise its rights under the parties’ Access Agreement and any SAU.³⁴⁵ If NBN Co wishes to use customer IPRs for other purposes, it will need to commercially negotiate a licence with the customer.³⁴⁶ Both parties are responsible for procuring any third party IPRs reasonably required to perform its obligations under the parties’ Access Agreement.³⁴⁷ If a customer submits materials to NBN Co in which a third party holds IPRs, it must indemnify NBN Co on demand the amount of any losses suffered or incurred by NBN Co in connection with ‘permitted uses’ of those materials by NBN Co.³⁴⁸

The SAU sets out that, at the midpoint review, the ACCC will consider a ‘non-price proposal’ from NBN Co that includes the IPR terms that NBN Co considers should operate for the remainder of Module 1.³⁴⁹ The criteria that the ACCC will have regard to in making its decision are the same as those outlined in the discussion of the midpoint review of the risk management terms in section 7.2, as are the implications of the outcomes of the review.

The ACCC in its assessment will consider whether the proposed IPR regime adequately balances the interests of both NBN Co and its customers. The ACCC may consider matters such as the degree of certainty NBN Co requires about the licensing arrangements for the use of IPRs in order to factor in licensing costs and manage the risk of IPR claims. The ACCC may also consider the degree of clarity required by access seekers about the circumstances in which they can use NBN Co IPRs, and their ability to control the circumstances in which they can license IPRs.

61. Do the IPR terms balance the parties’ interests and enable them to efficiently operate and invest in their respective networks, services and facilities?

62. Is it clear to whom and in what circumstances the IPR provisions in Annexure 2 to Schedule 1H apply?

³⁴³ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 142.

³⁴⁴ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, Annexure 2, clause 5.2(a). Annexure 2 states that customers may sub-license these rights to downstream customers, however, customers remain liable for the actions of downstream customers.

³⁴⁵ *Ibid*, Schedule 1H, Annexure 2, clause 5.3(a). This restriction does not apply to the use of customer IPRs under the PDF Processes.

³⁴⁶ *Ibid*, Schedule 1H, Annexure 2, clause 5.5. Annexure 2 sets out the process that the parties will follow: NBN Co will provide written notice to the customer, who will have six weeks to identify the customer’s and any third party IPRs, and indicate if it is willing to enter negotiations for NBN Co’s use of those IPRs.

³⁴⁷ *Ibid*, Schedule 1H, Annexure 2, clause 5.7.

³⁴⁸ *Ibid*, Schedule 1H, Annexure 2, clause 5.6.

³⁴⁹ *Ibid*, Schedule 1K, clause 1K.3.

63. Is the midpoint review process likely to ensure that the IPR terms remain reasonable during Module 1?

7.4 Dispute management

NBN Co has committed to include the dispute management provisions set out in Annexure 1 to Schedule 1H of the SAU ('Dispute Management Rules') in its SFAAs.³⁵⁰

NBN Co submits that it has included these commitments to "ensure that there is a robust, speedy, open and non-discriminatory process for the resolution of disputes that might arise between NBN Co and its customers and for the implementation of dispute outcomes."³⁵¹

The SAU commitments have a two-part structure. Firstly, NBN Co commits to include the specified Dispute Management Rules in any SFAA.³⁵² Secondly, it commits to resolving disputes in accordance with the Dispute Management Rules, to the extent applicable,³⁵³ and in a manner that ensures it is capable of complying with its non-discrimination obligations.³⁵⁴

The Dispute Management Rules provide that neither NBN Co nor its customers may commence any court proceedings in relation to a dispute, except in accordance with the Dispute Management Rules.³⁵⁵ However, the Dispute Management Rules provide that court proceedings may only be commenced in limited circumstances.³⁵⁶ The Dispute Management Rules specify a three-step dispute resolution approach:

- resolution through the parties' specified points of contact;³⁵⁷
- expert determination;³⁵⁸ and
- panel arbitration.³⁵⁹

The latter two steps are managed by the resolution advisor for the relevant Access Agreement.³⁶⁰ The resolution advisor also appoints the panel of three arbitration pool

³⁵⁰ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, clause 5.1.

³⁵¹ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 139.

³⁵² NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, clause 5.1.

³⁵³ Ibid, Schedule 1H, clause 5.2(a).

³⁵⁴ Ibid, Schedule 1H, clause 5.2(b).

³⁵⁵ Ibid, Schedule 1H, Annexure 1, clause 9.1(a).

³⁵⁶ Ibid, Schedule 1H, Annexure 1, clause 9.1.

³⁵⁷ Ibid, Schedule 1H, Annexure 1, clause 2.1(a).

³⁵⁸ Ibid, Schedule 1H, Annexure 1, clause 2.1(c). The expert determination rules are set out at clause 16 of Annexure 1.

³⁵⁹ Ibid, Schedule 1H, Annexure 1, clause 2.2(a).

³⁶⁰ Ibid, Schedule 1H, Annexure 1, clause 11.1(a). The resolution advisor is a third party who is involved in the management of the dispute resolution process. The dispute management provisions require the nomination of a resolution advisor, within 20 days of the execution of an Access Agreement.

members ('pool members') who conduct the arbitration.³⁶¹ If the dispute affects the interests of third parties, the panel will invite other NBN Co customers to join the dispute.³⁶²

The Dispute Management Rules set out the process for the nomination and termination of resolution advisors and pool members.³⁶³ Resolution advisors and pool members may be terminated on the grounds of reasonable danger of bias, ill health and incapacity or continuing non-compliance with the Dispute Management Rules.³⁶⁴ However, the ACCC notes that only NBN Co can terminate a resolution advisor or pool member.³⁶⁵ On the other hand, the ACCC may veto a termination.³⁶⁶

The SAU sets out that, at the midpoint review, the ACCC will consider an 'engagement proposal' from NBN Co about the dispute management terms that NBN Co considers should operate for the remainder of Module 1. (The 'engagement proposal' will also include proposals about the operation of the other multilateral processes set out in the SAU.) The ACCC must make a decision on that engagement proposal — it may accept or reject all or part of the engagement proposal;³⁶⁷ and can make substitute terms in place of the rejected aspects.³⁶⁸ The SAU requires that NBN Co complies with the outcomes of the ACCC's decision instead of the dispute management terms in Annexure 1 for the remainder of Module 1.³⁶⁹ The manner in which NBN Co can do this is outlined in section 3.2.

The ACCC in its assessment will consider whether the proposed dispute management regime adequately balances the interests of both parties.

64. Does the SAU ensure that customers will have access to a dispute resolution process for resolving contractual disputes that is independent and free from bias?
65. Are the Dispute Management Rules sufficient to resolve disputes between NBN Co and its customers? Should the parties have full access to court proceedings to resolve disputes?
66. Is the midpoint review process likely to ensure mean that the dispute management terms remain reasonable during Module 1?

³⁶¹ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, Annexure 1, clause 2.2(a). The dispute management provisions require arbitration to be conducted under the procedural rules in the *Commercial Arbitration Act 2010* (NSW).

³⁶² Ibid, Schedule 1H, Annexure 1, clause 7.3(d).

³⁶³ Ibid, Schedule 1H, Annexure 1, clauses 11.1, 12.1 and 13.

³⁶⁴ Ibid, Schedule 1H, Annexure 1, clause 13.1(a).

³⁶⁵ Ibid, Schedule 1H, Annexure 1, clauses 13.1(a) and 13.2(b)(iii).

³⁶⁶ Ibid, Schedule 1H, Annexure 1, clause 13.1(c).

³⁶⁷ Ibid, Schedule 1K, clause 1K.2.3(b).

³⁶⁸ Ibid, Schedule 1K, clause 1K.2.7(a).

³⁶⁹ Ibid, Schedule 1K, clauses 1K.2.5(b) and 1K.2.7(b).

7.5 Changes to Points of Interconnect (POIs)

The SAU sets out NBN Co's commitments in relation to the changing of POI locations, including a process for ACCC approval of proposed changes to POIs.³⁷⁰

The SAU states that NBN Co may open, relocate or close established POIs if it has the ACCC's prior approval.³⁷¹ NBN Co submits that conferring a power on the ACCC to approve NBN Co's decisions in relation to POIs will ensure that POIs are located appropriately.³⁷² NBN Co also submits that the SAU commitments are additional to any commitments specified in SFAAs in relation to providing notice prior to the opening, closure or relocation of a POI.³⁷³

The SAU requires that the ACCC approve or reject a request from NBN Co to open, close or relocate a POI within 60 business days.³⁷⁴ If the ACCC does not make a decision during this timeframe, the request is deemed to be approved.³⁷⁵ The SAU also provides that the ACCC must update the 'POI List' (that is, the list of POIs prepared and published by the ACCC under section 151DB of the CCA) to reflect the outcome of this process.³⁷⁶

NBN Co submits that this process is consistent with the ACCC's role in relation to making and maintaining a list of POIs under section 151DB of the CCA,³⁷⁷ and that the requirement for the ACCC to update the POI list ensures that NBN Co's authorisation under section 151DB of the CCA is maintained.³⁷⁸

The SAU also requires NBN Co to close temporary POIs when NBN Co reasonably considers that they are no longer required.³⁷⁹ NBN Co must have regard to:

- whether an established POI is available to serve the premises served by the temporary POI;
- the number of customers that will need to migrate from the temporary to the established POI; and
- the number of premises served by the temporary POI.³⁸⁰

³⁷⁰ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, clause 1H.4.

³⁷¹ Ibid, Schedule 1H, clause 1H.4.1(a). NBN Co must provide at least 12 months' notice prior to the relocation or closure of a POI, except in the case of emergency.

³⁷² NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 138.

³⁷³ Ibid, pp. 138-139.

³⁷⁴ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, clause 1H.4.3. The ACCC may extend the period by 20 business days if necessary, and may also undertake consultation on the request.

³⁷⁵ Ibid, Schedule 1H, clause 1H.4.3(c).

³⁷⁶ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, clause 1H.4.4.

³⁷⁷ NBN Co, *Supporting Submission: NBN Co Special Access Undertaking*, 28 September 2012, p. 139.

³⁷⁸ Ibid, p. 139.

³⁷⁹ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, clause 1H.4.5(a).

³⁸⁰ Ibid, Schedule 1H, clause 1H.4.5(a).

NBN Co must provide access seekers with at least six months notice of the proposed closure.³⁸¹

The SAU sets out that, at the midpoint review, the ACCC will consider a ‘non-price proposal’ from NBN Co that includes terms about the processes relating to changing the location of POIs.³⁸² The criteria that the ACCC will have regard to in making its decision are the same as those outlined in the discussion of the midpoint review of the risk management terms in section 7.2, as are the implications of the outcomes of the review.

The ACCC in its assessment will consider whether the processes relating to changing POIs will enable it to properly consider a request from NBN Co to open, close or relocate a POI, including whether the single opportunity to extend the decision-making timeframe allows for sufficient time for the ACCC to consult with industry and for access seekers to make submissions to the consultation process.

67. Do the timeframes for the processes surrounding ACCC approval of changes to POIs give stakeholders sufficient opportunity to make submissions to the consultation process?
68. Is the midpoint review process likely to ensure that the terms relating to the changing of POI locations remain reasonable during Module 1?
69. Are NBN Co’s proposed practices for providing information adequate for access seekers, particularly in regard to the notice periods for the closure of temporary POIs?

7.6 Information on network and POI rollout

The SAU commits NBN Co to publish information on the progress of the rollout of the NBN Co fibre and wireless networks and the status of established POIs during Module 1.³⁸³

The SAU sets out that, at the midpoint review, the ACCC will consider a ‘non-price proposal’ from NBN Co that includes terms about the provision of network and POI rollout information that NBN Co considers should operate for the remainder of Module 1.³⁸⁴ The criteria that the ACCC will have regard to in making its decision are the same as those outlined in the discussion of the midpoint review of the risk management terms in section 7.2, as are the implications of the outcomes of the review.

The ACCC considers that provision of rollout information should give access seekers clarity and certainty as to the progress of the rollout of the network, in order to enable

³⁸¹ NBN Co, *Special Access Undertaking*, 28 September 2012, Schedule 1H, clause 1H.4.5(b).

³⁸² Ibid, Schedule 1K, clause 1K.3.

³⁸³ Ibid, Schedule 1H, clauses 1H.2-1H.3. This includes commitments to publish 3-year and 1-year fibre network construction rollout plans, monthly ready for service rollout plans for fibre and wireless networks, and a weekly list of ‘NBN Serviceable’ premises.

³⁸⁴ Ibid, Schedule 1K, clause 1K.3.

them to efficiently plan for operations and investment in downstream services, networks and facilities.

70. Will the rollout information commitments assist access seekers in planning for the efficient operation of, and investment in, downstream services, networks and facilities? Is the specified information and frequency of publication of this information sufficient for these purposes?

71. Is the midpoint review process likely to ensure that the terms relating to publication of rollout information remain reasonable during Module 1?

Appendix A Questions raised in this paper

Chapter 2 – Relationship between the SAU, Access Agreements, Standard Forms of Access Agreement and other ACCC powers

1. Are there any provisions of the SAU that are not sufficiently clear, such that for the purposes of section 152AY of the CCA there may be ambiguity as to:
 - the matters that those provisions relate to (in which case the terms and conditions in an Access Determination or Binding Rules of Conduct on the matter will not have effect); and
 - the matters that those provisions do not relate to (in which case the terms and conditions in an Access Determination or Binding Rules of Conduct on the matter will have effect)?
2. Would access seekers be able to effectively invoke NBN Co's obligations to comply with Access Determinations and Binding Rules of Conduct in the absence of specific SAU commitments about how NBN Co will do so? Why/why not?
3. Would the regulatory recourse commitments in Module 1 lead to effective negotiation between NBN Co and access seekers? Does the combination of these commitments and NBN Co's other obligations to comply with Access Determinations and Binding Rules of Conduct under Part XIC make effective negotiations more likely to occur?
4. Does the proposed Facilities Access Decision process provide for the ACCC to determine all the terms and conditions necessary for the Facilities Access Service? What are the advantages of the SAU including this process to establish these terms and conditions?
5. Does the ACCC's role in the midpoint review mean that the regulatory recourse arrangements are likely to remain reasonable during Module 1?
6. Does the absence of the Module 1 regulatory recourse commitments in Module 2 raise concerns that Access Determinations and Binding Rules of Conduct will not be able to adequately address matters that arise for the remainder of the SAU term?
7. Regarding the SAU commitments about NBN Co including certain terms and conditions in SFAAs, is it important for the SAU to also require NBN Co to comply with the substance of these terms and conditions?

Chapter 3 – Operation of the SAU

Content of the different modules

8. Are matters in the SAU locked-in for the appropriate time period? Are there elements that should be locked-in for longer or shorter periods? Should there be more or less frequent review of particular matters?

Fixed principles and replacement modules

9. Should all the matters specified in Modules 0 and 2 be a fixed principles term and condition? Are the specified notional fixed period and qualifying circumstances for the fixed principles term and condition appropriate? Should there be any other qualifying circumstances?
10. Does the proposed replacement module process adequately balance the objectives of regulatory certainty with regular reviews of the SAU terms and conditions? What are the problems with the operation of the replacement module process (if any)? Are there any specific issues relating to the interaction with the ACCC's powers to make Access Determinations and Binding Rules of Conduct?
11. Do the processes for submission of proposed replacement modules provide sufficient time for interested parties to participate in ACCC consultation processes about the making of regulated terms?
12. Do the processes for submission of proposed replacement modules provide an incentive for NBN Co to submit reasonable terms and conditions in proposed replacement modules?

Midpoint review

13. Are there any aspects of Module 1 that are not proposed to be reviewed, but which should be? Are there aspects of Module 1 that are proposed to be reviewed but which should not be?
14. Do the review timeframes and criteria, particularly the processes surrounding acceptance or rejection of NBN Co's proposals, provide sufficient time for interested parties to participate in ACCC consultation processes about the reviews?
15. Is it clear how the ACCC's decisions apply when the ACCC does not accept NBN Co's proposals and makes substitute terms?

Chapter 4 – Services to which the SAU relates

16. Are there any elements of NBN Co's service descriptions that are unclear or incomplete?
17. Does NBN Co's proposed service description for the NBN Access Service describe a service that is 'end-to-end' across the NBN?

18. Are there Ancillary Services supplied by NBN Co which should be included but fall outside the scope of the service descriptions included in the SAU?
19. Is it clear which commitments in the SAU do and do not apply to Ancillary Services and the Facilities Access Service?
20. Do NBN Co's proposed service descriptions meet the minimum elements previously specified by the ACCC for a bitstream access service?

Chapter 5 – Product development and withdrawal

21. Do the product development and withdrawal requirements in the SAU encourage the efficient use of, and investment in, the NBN and do they promote downstream competition and downstream investment? In your response, please consider:
 - whether the product development requirements are likely to encourage NBN Co to develop products that align with customer preferences over the SAU term;
 - whether the PDF Processes provide for effective and transparent engagement between, and appropriately balance the interests of, NBN Co and its customers (including access seekers);
 - whether the product withdrawal requirements provide sufficient certainty as to the availability of products over the SAU term;
 - the effect of excluding products on the Initial Product Roadmap from the product development and withdrawal requirements; and
 - the interaction with the other SAU commitments relating to the development of terms and conditions for products, and the broader Part XIC regulatory regime (including the declaration provisions and the ACCC's powers to make Access Determinations and Binding Rules of Conduct).
22. Should the SAU require NBN Co to consider the views of end-users in the PDF and before withdrawing products?

Chapter 6 – Price-related matters

Price structures

23. Do NBN Co's proposed price structures promote efficient use of and investment in infrastructure and do they promote competition in downstream markets? In your response, please have regard to:
 - the nature of NBN Co's costs, which are largely fixed and shared costs;
 - the initial under-recovery and subsequent over-recovery of costs; and

- the effect of the proposed price structures on NBN Co's ability to recover its efficient costs.

Reference offers

24. Do the initial set of reference offers in Module 1 represent the products required to allow access seekers to provide entry-level residential and business grade services to end-users?
25. Is the process for updating the reference offers throughout Module 2 likely to ensure that NBN Co's reference offers continue to represent those products that are required to provide entry-level residential and business grade services to end-users?

Initial prices and price controls

26. Does NBN Co's proposed approach strike an appropriate balance between locking-in price paths to provide certainty and allowing for price levels and structures to be reviewed over time?
27. Does the level of the initial prices for reference offers provide for a smooth migration of access seekers to the NBN?
28. Does the level of the CPI-1.5% price control raise any concerns?
29. Should there be an opportunity for NBN Co's maximum regulated prices to be 're-balanced' over time as customer preferences change?
30. Does the statement of intention on CVC prices provide access seekers with sufficient certainty over price paths over time? Should there be an opportunity for CVC prices to be reviewed as part of a broader 're-balancing' of prices?

Initial prices for new products

31. Does the SAU provide NBN Co with incentives to set prices for new products that are both reflective of customers' willingness to pay and allow NBN Co to recover its efficiently incurred costs?
32. Do the initial pricing principles provide an appropriate constraint on NBN Co in its setting of initial prices for new products?
33. Will the processes by which NBN Co will consult with customers on prices for new products ensure that prices are set reasonably over the proposed term of the SAU?

Other issues

34. Is the process by which NBN Co may increase prices above what is permitted under the price controls in response to a tax change event reasonable?

35. Are there any concerns with NBN Co's ability to change prices of individual products more than once in a single year?

Long-term revenue constraint

36. Are the methods for calculating the building block components of the annual revenue requirement likely to result in values that reasonably reflect the cost of each component over the term of Module 1? In particular:
- Is it appropriate that the WACC is calculated by applying 350 basis points to the ten-year government bond rate? Is the 350 basis point risk margin likely to reasonably reflect NBN Co's systematic risk over the term of Module 1? Should the WACC methodology be reviewed by the ACCC during Module 1?
 - Is the methodology for calculating the tax allowance likely to result in values that reasonably reflect NBN Co's tax liability over the term of Module 1?
 - Is the methodology for calculating the annual construction-in-progress allowance likely to result in values that reasonably reflect NBN Co's financing costs associated with assets in construction?
37. Is it appropriate for NBN Co to calculate annual revenue requirements without any explicit role for the ACCC to review or approve these calculations?
38. Should the reporting requirements provide the ACCC with any additional information to help assess NBN Co's compliance with these methodologies?
39. Are there any elements of the processes contained in Modules 0 and 2 for developing, submitting and assessing revenue forecasts that raise concerns?
40. Are the criteria contained in Module 2 for developing forecasts of each building block component and the forecast RAB reasonable? In your response, please consider:
- the criteria for developing capital and operating expenditure forecasts (discussed in section 6.3.2);
 - the criteria for developing forecast depreciation, including the use of a straight-line approach;
 - the criteria for determining the forecast WACC, including the use of the capital asset pricing model and a benchmarking approach; and
 - the criteria for determining the tax allowance.

Creating incentives for efficient expenditure

41. Is NBN Co's proposed approach to determining expenditure levels during the network rollout period reasonable? In your response, please consider:
- the nature and strength of the incentives on NBN Co created by its operating environment (for example, revenue uncertainty) and the effect of SAU price controls; and
 - whether the prudence requirements in Module 1 achieve the appropriate balance between prescription and flexibility.
42. Does the proposed approach in Module 2 and the replacement modules encourage efficient investment in, and the economically efficient operation of, the NBN? In your response, please consider:
- the criteria and process for developing forecasts of capital and operating expenditure, including NBN Co's incentives to inflate forecasts;
 - the strength of the incentives created by the RAB roll-forward methodology, including NBN Co's ability to recover its actual capital expenditure;
 - the implications of NBN Co determining the length of the regulatory cycle; and
 - any additional incentives created by the SAU and NBN Co's operating environment.
43. Do the *Network Design Rules* reflect prudent and efficient network design? In your response, please consider:
- the network design requirements specified by the Government;
 - whether the scope of the *Network Design Rules* is appropriate, including whether it contains all the network elements necessary to provide a reasonable basis for assessing all of NBN Co's capital expenditure during the network rollout; and
 - whether the *Network Design Rules* are described in sufficient detail that an independent person can determine whether NBN Co's capital expenditure complies with these rules.
44. Are the various circumstances in which NBN Co can update the *Network Design Rules* reasonable?
45. Are there deemed prudent and permitted variations categories that should not be included in the SAU?
46. Are the categories sufficiently defined to ensure that they encompass only efficient expenditure?

Chapter 7 – Non-price related matters

47. The SAU requires NBN Co to include the terms and conditions in Annexures 1 to 3 of Schedule 1H and Annexure 1 of Schedule 1J into SFAAs. Should the SAU require NBN Co to comply with the substance of these terms and conditions? That is, should the terms in these Annexures be enforceable under the SAU as well as under contract?
48. Does the ACCC's role in the midpoint review and in approving changes arising out of the multilateral SFAA forum provide assurance that the non-price terms and conditions are likely to remain reasonable during Module 1?

Service levels – Module 1 commitments

49. Would the proposed service level commitments enable access seekers to offer services to end-users of the same (or better) quality as they are being supplied today, for a comparable price? In your response please consider both residential and business grade services, and all dimensions of service levels.
50. Do the proposed remedies create sufficient incentives for NBN Co to meet its proposed service level commitments and address issues that arise in a timely manner?
51. Is each metric expressed in a manner that is sufficiently clear? Is the manner in which each metric is measured clearly described?
52. Will the commitments enable access seekers to meet their downstream regulatory obligations?
53. Is the midpoint review process likely to ensure that the service level regime remains reasonable during Module 1?

Service levels – Modules 0 and 2 and replacement module commitments

54. Will NBN Co's commitments in Module 2, and the service level regimes that will be included in replacement modules, result in the development of a service level regime that promotes the long-term interests of end-users and is reasonable over time?

Risk management

55. Do the risk management terms balance the parties' interests and enable them to efficiently operate and invest in their respective networks, services and facilities?
56. Is it clear to whom and in what circumstances the risk management provisions in Annexure 3 to Schedule 1H apply?

57. Is the midpoint review process likely to ensure that the risk management terms remain reasonable during Module 1?

Confidential information and Intellectual Property Rights

58. Do the confidentiality terms balance the parties' interests and enable them to efficiently operate and invest in their respective networks, services and facilities?
59. Is it clear to whom and in what circumstances the confidentiality provisions in Annexure 2 to Schedule 1H apply?
60. Is the midpoint review process likely to ensure that the confidentiality terms remain reasonable during Module 1?
61. Do the IPR terms balance the parties' interests and enable them to efficiently operate and invest in their respective networks, services and facilities?
62. Is it clear to whom and in what circumstances the IPR provisions in Annexure 2 to Schedule 1H apply?
63. Is the midpoint review process likely to ensure that the IPR terms remain reasonable during Module 1?

Dispute management

64. Does the SAU ensure that customers will have access to a dispute resolution process for resolving contractual disputes that is independent and free from bias?
65. Are the Dispute Management Rules sufficient to resolve disputes between NBN Co and its customers? Should the parties have full access to court proceedings to resolve disputes?
66. Is the midpoint review process likely to ensure that the dispute management terms remain reasonable during Module 1?

Changes to Points of Interconnect (POIs)

67. Do the timeframes for the processes surrounding ACCC approval of changes to POIs give stakeholders sufficient opportunity to make submissions to the consultation process?
68. Is the midpoint review process likely to ensure that the terms relating to the changing of POI locations remain reasonable during Module 1?
69. Are NBN Co's proposed practices for providing information adequate for access seekers, particularly in regard to the notice periods for the closure of temporary POIs?

Information on network and POI rollout

70. Will the rollout information commitments assist access seekers in planning for the efficient operation of, and investment in, downstream services, networks and facilities? Is the specified information and frequency of publication of this information sufficient for these purposes?
71. Is the midpoint review process likely to ensure that the terms relating to publication of rollout information remain reasonable during Module 1?