

NBN Co 2012 Special Access Undertaking
Telstra's response to the ACCC Consultation Paper

18 January 2013

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Abbreviations, acronyms and key definitions

ABRR	Annual Building Block Revenue Requirement
ACCC	Australian Competition and Consumer Commission
ACCC Consultation Paper	ACCC's consultation paper entitled " <i>NBN Co Limited 2012 Special Access Undertaking Consultation Paper</i> " dated November 2012
ACCC Regulatory Decisions	Binding Rules of Conduct and Access Determinations
ACL	Australian Consumer Law
ACMA	The Australian Communications and Media Authority
AD	Access Determinations
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
ARPU	Average Revenue Per User
AVC	Access Virtual Circuit
BROC	Binding Rules of Conduct
CAGR	Constant Annual Growth Rate
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
CDP	Contract Development Process
CSG	Customer Service Guarantee
CVC	Connectivity Virtual Circuit
December 2011 SAU	NBN Co's Special Access Undertaking, as lodged by NBN Co on 5 December 2011 (withdrawn on 7 September 2012)
GBE	Government Business Enterprises
IAMA	The Institute of Arbitrators and Mediators Australia
ICRA	Initial Cost Recovery Account
IPR	Intellectual Property Rights
LTIE	Long term interests of end-users
LTRC	Long Term Revenue Constraint
NBN	National Broadband Network
NBN Co	collectively, NBN Co Limited and NBN Tasmania Limited
NBN Co SAU	NBN Co's Special Access Undertaking, as lodged on 18 December 2012
NER	National Electricity Rules
NNI	Network-Network Interface
NPTC	Non-price terms and conditions
NRO	Non-Reference Offer
PDF	Product Development Forum
POI	Point of Interconnection
RO	Reference Offer

RSP	Retail Service Provider
SAU	Special Access Undertaking
Previous Submission	Telstra's submission to the ACCC's Supplementary Consultation Paper, in relation to the December 2011 SAU, April 2012
Supporting Submission	NBN Co's supporting submission entitled " <i>Supporting Submission: NBN Co Special Access Undertaking</i> " dated 28 September 2012
Telco Act	<i>Telecommunications Act 1997</i> (Cth)
TIO	Telecommunications Industry Ombudsman
UNI	User Network Interface
WACC	Weighted Average Cost of Capital
WBA	Wholesale Broadband Agreement

Capitalised terms in this submission have the meanings set out in this submission. Capitalised terms that are not defined within this submission, have the meaning given to those terms in the NBN Co SAU.

In this submission, Telstra uses the terminology "RSP" to describe both (a) a direct customer of NBN Co that is a wholesale or retail service provider, and (b) a direct customer of NBN Co that is a retail service provider only. Accordingly, the term "RSP" should be interpreted in a manner consistent with its context within this submission.

1. Executive Summary

1.1. Introduction

- Telstra welcomes the opportunity to comment on the special access undertaking (**SAU**) lodged by NBN Co Limited and NBN Tasmania Limited (collectively, **NBN Co**) with the Australian Competition and Consumer Commission (**ACCC**) on 18 December 2012 (**NBN Co SAU**).
- While the NBN Co SAU is a material improvement on the SAU lodged by NBN Co in December 2011 (**December 2011 SAU**), Telstra believes it requires improvement in a number of key areas before it can be accepted by the ACCC.
- In this submission Telstra offers a number of constructive proposals to address its key areas of concern. If these key areas of concern can be satisfactorily addressed, Telstra is confident the NBN Co SAU could deliver the certainty that NBN Co is advocating while promoting the long-term interests of end-users (**LTIE**).
- Telstra looks forward to constructively working with all industry stakeholders (including NBN Co and the ACCC) to achieve these objectives.

1.2. Design of the NBN Co SAU

- In principle, Telstra supports the modular design of the NBN Co SAU, but believes some adjustments should be made to enable it to work effectively over the long term as a genuine “incentive-based” model.
- A properly constructed “incentive-based” SAU will contain commitments and constraints that allow NBN Co to recover its efficiently incurred costs while still promoting efficient downstream market outcomes for end-users.

27 year term and fixed principles

- Consistent with the December 2011 SAU, the NBN Co SAU has an extensive term of 27 years. Even with an effective modular design, this is a lengthy commitment period, particularly given the dynamic nature of the telecommunications sector (both at a technological and industry structure level). The role of the ACCC, to ensure the NBN Co SAU remains relevant and continues to promote the LTIE, takes on increased significance given this extended term.
- The implications of this lengthy commitment period are most acute with Modules 0 and 2 (these being the modules that are “on foot” for the full term). These modules are also subject to an additional layer of protection through their categorisation as “fixed principles terms and conditions”, taking them outside the scope of future review by the ACCC.
- In principle, Telstra supports the use of fixed principles. However, in the context of the NBN Co SAU, Telstra has some concerns about locking in all of the provisions of Modules 0 and 2 for the full 27-year term and with designating all of these provisions as “fixed principles terms and conditions”. The provisions that Telstra is particularly concerned about are identified in this submission.

Initial Regulatory Period

- Unlike Modules 0 and 2, Module 1 remains on foot for a period of some 10 years (the **Initial Regulatory Period**) with the potential for NBN Co to extend. Even if the NBN Co SAU contained comprehensive review points and effective ongoing regulatory oversight, Telstra believes this is a significant period of time (one that can be contrasted against shorter regulatory periods that otherwise apply in the telecommunications sector).
- Telstra also believes that certain aspects of Module 1 remain the subject of industry development and are not ready to be “locked in” at this time, most notably certain non-price provisions and service levels.
- Given this, Telstra proposes that the Initial Regulatory Period be shortened to 6 years. Importantly, however, any reduction in the term of Module 1 should not accelerate the introduction of price increases or price increase rights otherwise contained in the NBN Co SAU.
- In relation to the use of a midpoint review for Module 1, Telstra considers this to be a positive feature of the NBN Co SAU. However, Telstra proposes that the midpoint review occur after 3 years and that certain adjustments be made to the review process itself to ensure ongoing relevance and effectiveness. For example:
 - the Multilateral Processes (for example, the Multilateral SFAA Forum, the Dispute Management processes and the Product Development Forum processes) should be reviewed based on their independent operation as well as being reviewed on their “combined” operation. This would ensure that the efficacy of each Multilateral Process can be assessed on its own merits while also ensuring that, as a whole, the combined operation of the Multilateral Processes is working as intended;
 - the commitments in relation to industry consultation and engagement should be enhanced, including by ensuring that effective consultation and engagement is mandatory and by setting appropriate timeframes in which to complete this. This will provide industry participants with confidence that they will have a genuine opportunity to participate in the midpoint review;
 - the time periods for the ACCC to complete its review should also be amended to ensure that this review is able to be completed in a timely manner and does not lead to the prospect of NBN Co’s proposal being “deemed” accepted; and
 - the power that is given to the ACCC to propose alternative terms to NBN Co’s proposal should exist in relation to all non-price aspects of Module 1 and price related components, subject to ensuring that price increases are not accelerated and subject to consistency with the fixed principles in Modules 0 and 2. This will appropriately incentivise NBN Co to put forward a proposal that is balanced and ensure the ACCC is empowered to take remedial action in the event that it does not.

Implementation through the SFAA and regulatory recourse

- In principle, Telstra supports NBN Co’s proposal to update its standard form of access agreement (**SFAA**) and make this available on a two yearly basis. The resetting of the

SFAA is a positive step towards ensuring RSPs can avail themselves of ACCC Binding Rules of Conduct (**BROC**) or Access Determinations (**AD**) (together, **ACCC Regulatory Decisions**). While this solution deprives the ACCC of certain immediate intervention rights (for example, use of BROCs as a tool to address matters of urgency), with a number of important improvements to this mechanism, Telstra believes that effective regulatory oversight can still be achieved.

- To this end, Telstra proposes that the following key improvements be made to the regulatory recourse mechanism:
 - RSPs should not be forced on to the new SFAA published by NBN Co every two years (**New SFAA**), rather they should have the right to elect to transition or to extend supply under the current terms. Telstra believes this will preserve the integrity of the commercial arrangement and provide an incentive for NBN Co to implement regulatory pass-through on acceptable terms;
 - NBN Co should be required to consult and meaningfully engage with industry in relation to all proposed changes. Telstra does not believe that consultation on the implementation of ACCC Regulatory Decisions should be at NBN Co's discretion (as is currently proposed);
 - the ACCC should be able to intervene in relation to both non-price **and** price terms and conditions, except price commitments relating to the initial pricing for Reference Offers (**RO**) and Non-Reference Offers (**NRO**) as clearly defined in the NBN Co SAU (that is, where the price has been set at a level greater than zero). As Telstra explains in this submission, the current approach of setting prices for new products subject only to an anchor pricing concept and a broadly defined set of high level principles is not an effective constraint and is not a mechanism which Telstra considers to be in the LTIE. Telstra also has concerns in relation to the way in which Connectivity Virtual Circuit (**CVC**) pricing may evolve over time and therefore considers that in the absence of more definitive commitments from NBN Co in relation to CVC pricing, this should also be subject to regulatory recourse;
 - the ability to seek regulatory recourse should survive the term of Module 1 and should be available throughout the term of the NBN Co SAU (that is, an “approved” regulatory recourse mechanism should be incorporated in each replacement module);
 - the pass-through of ACCC Regulatory Decisions into the New SFAA should apply independently of other changes that NBN Co may develop unilaterally. This will provide RSPs with the certainty that they will be able to avail themselves of ACCC Regulatory Decisions without having to face the prospect that, in order to do so, they must also accept other changes that NBN Co wishes to unilaterally impose; and
 - where a subsequent ACCC Regulatory Decision is required to rectify concerns about the way that NBN Co has implemented previous ACCC Regulatory Decisions, the NBN Co SAU should ensure that the application of such decisions can be backdated. This would both encourage the appropriate implementation of ACCC Regulatory Decisions and would provide certainty to RSPs that they will not have to wait a further 2 years to rectify implementation concerns.

- Importantly, there remain a number of components of the NBN Co SAU that have unclear enforcement protocols. Telstra believes that the NBN Co SAU needs to be clearer about whether substantive commitments are to be enforced through commercial arrangements or through the NBN Co SAU itself (for example, it is unclear how RSP rights and obligations associated with the PDF are expected to be enforced and managed given they do not appear to be effected through NBN Co's SFAA).

Replacement modules

- Telstra supports the use of a replacement module mechanism that relies upon the statutory variation mechanism under the CCA. However, Telstra is concerned that the supporting process proposed by NBN Co may not provide the means to ensure effective implementation of ACCC Regulatory Decisions.
- Telstra proposes the following changes to the replacement module mechanism to create the appropriate incentives for NBN Co and to provide effective regulatory oversight:
 - each replacement module should have a term of no more than 3 years (a time period consistent with current regulatory periods in the telecommunications sector);
 - NBN Co should be required to consult and meaningfully engage with industry in relation to each replacement module, and ACCC approval should be mandatory before they commence;
 - the ACCC should be able to make effective ACCC Regulatory Decisions in order to fill any “gaps” that arise as a consequence of NBN Co's failure to submit an acceptable replacement module; and
 - for that purpose, the ACCC should retain the right to make an ACCC Regulatory Decision at any time, without risk that these are not applicable during the first financial year of a replacement module.

Compliance monitoring

- Telstra believes that the implementation of an appropriate compliance reporting regime would be a welcome and positive feature of the NBN Co SAU.
- An effective compliance monitoring and reporting regime will ensure that the undertakings given in the NBN Co SAU continue to be “front of mind” and are given an appropriate level of attention within NBN Co's organisation.
- Telstra notes that NBN Co has set out commitments (in Schedule 1G) in relation to the provision of certain information, but Telstra believes these are not adequate to ensure the ACCC (and industry more generally) is able to monitor NBN Co's overall compliance. For example, there is no requirement for NBN Co to report to the ACCC regarding compliance with important commitments such as the product development and withdrawal commitments.

1.3. Product Terms and Conditions

- Telstra's priority is to ensure that its customers (both wholesale and retail) receive a high quality customer experience (both in terms of migration to the NBN and ongoing

supply) and that NBN Co's product suite is aligned with customer and end-user requirements.

- While important improvements have been made since the December 2011 SAU, there are a number of areas where further improvement is still required.

Product development and withdrawal

- Telstra believes that if the PDF was to include a more robust industry engagement mechanism, it would be capable of resolving a number of Telstra's key concerns. For example, an appropriately refined PDF could ensure that there is adequate transparency about, and genuine consultation on, the introduction of new Ancillary Services by NBN Co (including in terms of whether it is appropriate to charge for such services).
- The approach to industry engagement that Telstra proposes is designed to provide certainty for RSPs through a genuine opportunity to participate in NBN Co decisions about whether to invest in the development of a Product Idea, and to enable continued RSP engagement throughout the various stages of development once this decision has been made.
- Telstra also proposes that NBN Co be required to develop and fully document all essential product attributes of a proposed product before it is introduced. This will ensure that all essential elements of the product "package" have been fully developed and consulted on before the product is made available as a commercial proposition.
- In relation to the PDF processes, Telstra believes that more flexibility is required in relation to both the confidentiality and intellectual property provisions. Telstra is concerned that the detailed terms and conditions in the NBN Co SAU (which, in Telstra's view, require significant amendment) do not provide the flexibility needed to encourage participation and, ultimately, promote product innovation.
- Important changes are also needed to clarify the operation of the product development and withdrawal commitments and to avoid the potential for NBN Co to "side step" these commitments. For example, exclusions apply for products that are identified in NBN Co's "Initial Product Roadmap" and for product variations which NBN Co determines to be "minor". Broad exclusions also apply in circumstances where a more constructive approach could be used, such as for services that NBN Co is required by statute to supply or withdraw.

Service levels

- Telstra believes that the service levels currently contained in the NBN Co SAU fall short of industry and end-user expectations. Telstra proposes that consideration be given to a more flexible regime which recognises that service levels, by their very nature, will need to evolve in parallel with product changes, technological developments and customer expectations.
- Rather than documenting a detailed regime that represents an NBN Co "point-in-time" position, Telstra proposes the establishment of a set of fundamental, high-level commitments that would guide the development and evolution of service levels over time (including in respect of new products). This approach would provide a consultative framework within which NBN Co (or the ACCC) will be able to develop the required

service level details while providing RSPs with an appropriate baseline against which to test (and, if necessary, challenge) those details.

- It is also critical that the service level regime includes appropriate sanctions, in the form of rebates, and positive obligations, in the form of remediation commitments, in the event that NBN Co's performance or that of the NBN does not meet specified service level requirements. Such disincentives are required to ensure that NBN Co's behaviour is aligned with appropriate levels of service quality and to promote the LTIE.

Network Termination Device

- The Network Termination Device (**NTD**) is a fundamental part of the NBN Access Service. Without it, a service cannot be supplied. It follows that the NBN Co SAU should be clear about NBN Co's responsibilities regarding the NTD. For example, the NBN Co SAU should be clear that NBN Co (as the network owner and operator) is responsible for:
 - NTD installation and maintenance;
 - securing appropriate tenure at end-user-premises; and
 - associated ancillary hardware and cabling (including the lead-in drop, premises connection device, power supply unit, battery back-up and associated consumables).
- If the NBN Co SAU is not clarified in this regard, Telstra is concerned that there will continue to be confused lines of responsibility, with RSPs and end-users inappropriately taking responsibility for these matters or having to incur additional costs for what is a fundamental component of supply.
- It must also be clear that the supply of an NTD is included as part of each RO and NRO which involves the supply of a User Network Interface (**UNI**). This will avoid confusion regarding NBN Co's responsibility to supply where an NTD is not already available at the applicable premises (including due to there being no available UNI ports on existing NTDs or due to the Maximum Data Transfer Rate of existing NTDs being reached).

Layer 2

- Operating at Layer 2 in the OSI model is central to the overall policy objectives behind the development of the NBN. Telstra believes the introduction of any additional Layer 3 capabilities should be addressed by way of variation to the NBN Co SAU, so that this can be considered on its merits, rather than something that is decided at NBN Co's discretion (as is currently proposed).

Ancillary Services

- The service description for Ancillary Services applies to services that are "necessary for Access Seekers to acquire" the NBN Access Service. However, because the NBN Access Service is described in functional and technology neutral terms (something which Telstra generally supports), it remains difficult to know where NBN Co intends to draw the line between the NBN Access Service and Ancillary Services (or, in fact, whether the service feature or component is covered by the commitments in the NBN Co SAU at all).

- Telstra believes it is critical that service components or features (whether intrinsic to supply or of a more general supporting nature) do not remain “at large”. RSPs must have confidence that they know precisely what they will receive as part of the NBN Access Service, and for those service features or components that fall outside of this scope, whether the NBN Co SAU will apply to these as Ancillary Services.

1.4. Price terms and conditions

- Telstra supports an incentive-based framework that allows for the recovery of efficient costs over the long term. The NBN Co SAU contains commitments in relation to individual pricing and the cost recovery framework. However Telstra is concerned that NBN Co’s proposed combination of short-to-medium and medium-to-long term commitments and constraints on pricing will not be effective. Telstra believes that NBN Co will not face strong incentives to either recover its costs in an efficient manner over time that promotes the LTIE, or to recover no more than its efficient costs.

Adverse outcomes under the proposed price control

- Telstra has concerns that the CPI-1.5% cap on individual wholesale prices for components of the service proposed by NBN Co has the potential to increase the overall wholesale price faced by RSPs on a per end-user or SIO basis by significantly more than CPI-1.5%. This will translate into higher retail price increases for end-users, and has the potential to generate inefficient retail market outcomes as it limits the ability of RSPs to rebalance retail prices for access and usage appropriately to meet end-user preferences.
- Telstra proposes two solutions to address this issue. A global CPI-X price cap could be applied to the average wholesale price faced by cohorts of end-users, where the average is a weighted average of all service features and components used by those end-users. Alternatively, the CPI-X global price cap could be applied to total revenues over the total premises connected.

Definitive CVC pricing commitment is required

- The NBN Co SAU does not contain any definitive commitment in relation to pricing for the CVC. Telstra believes a weak constraint on CVC pricing could potentially result in NBN Co recovering its costs over time in a manner that creates significant retail market distortions and does not promote the LTIE. This could have a significant impact on RSP business models, the efficiency of end-user charges and the development of new services offered in the market (for example, content distribution networks) as aggregate data usage increases over time.
- Telstra believes that a definitive commitment about CVC pricing in conjunction with the proposed global price cap would reduce price uncertainty to RSPs and provide NBN Co with greater flexibility and stronger incentives to rebalance CVC prices in a way that promotes the LTIE. In the absence of this, CVC pricing must be subject to regulatory recourse.

Pricing for new products

- Telstra does not believe the high level pricing principles or the anchor pricing proposed in the NBN Co SAU, through the use of ROs in Module 1, will provide an effective means of constraining the pricing of new products during the Initial Regulatory Period.

- To address this, the NBN Co SAU should contain a regime which subjects initial pricing of new products to appropriate industry consultation and ACCC oversight (where “new products” includes products set out in the “Initial Product Roadmap” but which have not yet been delivered).

Enhancements to the LTRC are needed

- Telstra believes that the Long Term Revenue Constraint (**LTRC**) sets a revenue constraint that is in fact greater than NBN Co’s reasonably forecast costs in its Corporate Plan, including a 7% return on investment. Telstra also remains concerned that the LTRC may not operate to be a binding constraint on the pricing of NBN Co at any time during the term of the NBN Co SAU.
- Combined with the limited scope for regulatory oversight for the majority of NBN Co costs, it appears that the LTRC is unlikely to promote appropriate cost recovery incentives that will drive efficient market outcomes for end-users.
- Given this, in addition to increased regulatory oversight and transparency of NBN Co costs, Telstra proposes that the LTRC be reconciled to NBN Co’s Corporate Plan, or alternatively, the Corporate Plan and annual reports should be used as a basis for an appropriate revenue cap.
- Furthermore, NBN Co appears to have an incentive to over-forecast losses and under-forecast profits, since those forecast losses or profits will be incorporated into the cost base (even though those forecasts may turn out to be incorrect). Telstra considers that any “carry-forward” of losses or profits from one period to the next would need to be based on actual losses and profits, not those forecast by NBN Co.

Enhancements to cost efficiency incentives are needed

- Telstra does not believe the NBN Co SAU provides adequate cost efficiency incentives. The efficiency incentives built into the NBN Co SAU appear to be much weaker than would be expected under a conventional utility regulation model, particularly during the term of Module 1. As a result, there is a risk that NBN Co will be able to recover large amounts of inefficiently incurred expenditure through the pricing of its products and services, an outcome that would not be in the LTIE.
- Telstra therefore proposes that the NBN Co SAU provides for greater ACCC oversight of expenditure and scope for intervention on pricing if costs become demonstrably inefficient over time.

1.5. Non-price terms and conditions

- The approach that NBN Co has adopted in relation to non-price terms and conditions demonstrates the inextricable link between the NBN Co SAU and the SFAA. NBN Co’s commitments have no independent or stand-alone value unless the SFAA is executed (forming an “access agreement”). It also demonstrates the tension between the certainty that comes with detailed drafting on the one hand and the need for flexibility over time on the other.
- Industry consensus is yet to be reached on the detailed drafting of certain non-price terms and conditions. It is therefore premature to include detailed non-price terms and conditions in the NBN Co SAU at this time.

- As an alternative, Telstra proposes that NBN Co adopts a series of high-level, non-price commitments in the NBN Co SAU. This approach will provide a framework within which industry can continue to develop the detailed drafting (a process which Telstra remains committed to) and will allow the final drafting to be implemented by NBN Co once a consensus has been reached (or, if not, potentially provided by the ACCC).
- The high-level commitments Telstra proposes in this submission have been drawn from a variety of industry standard positions, international best practice and various non-price terms and conditions that have been published by the ACCC.
- Telstra has sought to work within the scope of the relatively limited set of non-price terms set out in the NBN Co SAU. Telstra notes, however, that commitments enabling RSPs to comply with their downstream regulatory obligations (currently absent from the NBN Co SAU) should also be included in the non-price sections of the NBN Co SAU.
- Telstra reserves the right to provide detailed comments on the specific drafting set out in Schedule 1H to the NBN Co SAU in the event that an approach based on high-level commitments is not adopted and/or the NBN Co SAU continues to contain detailed non-price terms and conditions.

2. Design of the NBN Co SAU

2.1. Introduction

This section discusses the key elements of the design of the NBN Co SAU and how they interact.

In approaching the design of the NBN Co SAU, NBN Co submits that it has had regard to the context for the NBN Co SAU, and in particular the objectives of providing an appropriate degree of regulatory certainty to RSPs, their end-users and NBN Co, and establishing a long-term framework reasonably necessary to achieve uniform national wholesale pricing.¹

The revised design of the NBN Co SAU is a significant improvement on the design of the December 2011 SAU. However, Telstra considers that there are a number of elements the revised design of the NBN Co SAU that could, and should, be adjusted in order to ensure that the terms and conditions will provide regulatory certainty for NBN Co and industry, remain in the LTIE and remain reasonable over its period of operation.

Telstra welcomes the opportunity to be involved in further discussions with the ACCC, NBN Co and the industry, on the design of the NBN Co SAU.

2.1.1. Key features of the NBN Co SAU design

The design of the NBN Co SAU has been substantially revised from the design that was set out in the December 2011 SAU. The NBN Co SAU now provides for what is referred to as an “incentive-based modular”² design. The key features of the new modular design are explained in section 4 of NBN Co’s *Supporting Submission: NBN Co Special Access Undertaking* dated 28 September 2012 (**Supporting Submission**) and sections 2 and 3 of the ACCC’s consultation paper, “*NBN Co Limited 2012 Special Access Undertaking Consultation Paper*” dated November 2012 (**ACCC Consultation Paper**).

The design of the NBN Co SAU is complex. It relies on a series of time-based modules (in place for differing periods of time), and a series of commitments that are implemented and enforceable through a combination of the NBN Co SAU and detailed terms and conditions implemented through NBN Co’s Standard Form of Access Agreement (**SFAA**).

The design features of particular note, and those which Telstra has provided detailed comments in this submission, include:

- the 27 year term;
- the use of “fixed principles terms and conditions” to quarantine the content of Module 0 and Module 2 from future regulatory review;
- the design features specific to Module 1, notably:
 - a 10 year Initial Regulatory Period;
 - a 5 yearly review, in essence, a mid-term review for the Initial Regulatory Period (**Midpoint Review**); and

¹ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p 41.

² NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012 and NBN Co, *Incentive Based Modular SAU: Design Principles*, 20 June 2012.

- an information reporting regime;
- use of the SFAA as the primary mechanism for the implementation of the NBN Co SAU commitments and regulatory recourse (during the Initial Regulatory Period);
- a replacement module regime that provides for expiring modules (Module 1 and subsequent replacement modules) to be replaced by NBN Co over the term of the NBN Co SAU;
- a combination of “individual” and “broad” pricing commitments, contained in Module 1 (applicable for the Initial Regulatory Period) and Module 2 (applicable from the expiration of the Initial Regulatory Period until the expiration of the NBN Co SAU); and
- different commitments made in relation to the NBN Access Service, Ancillary Services and the Facilities Access Service.

The design features relating specifically to NBN Co’s pricing and product related commitments are addressed in detail in sections 3 (Product Terms and Conditions) and 4 (Price Terms) of this submission.

Accordingly, this section 2 (Design of the NBN Co SAU) sets out Telstra’s observations and a number of proposed modifications in relation to the remainder of the design features listed above, while sections 3 (Product Terms and Conditions) and 4 (Price Terms) set out Telstra’s observations and a number of proposed modifications in relation to product and pricing matters.

Telstra considers that these modifications are essential to:

- ensure the NBN Co SAU provides a genuinely “incentive-based” regulatory structure, creating positive incentives for NBN Co to engage in behaviour which promotes the LTIE by:
 - undertaking expenditure in a prudent and efficient manner;
 - pricing its products and services in a manner that allows for the recovery of efficiently incurred costs over time and which promotes the LTIE;
 - undertaking efficient and targeted product development;
 - delivering products and services of the highest quality; and
 - working within a support structure of non-price terms that reflect an appropriate balance between each party’s rights and obligations;
- provide effective regulatory oversight of the above matters (and appropriate industry engagement in relation to the same);
- recognise the dynamic nature of the telecommunications industry and the nascent nature of NBN Co’s operations; and
- ensure the NBN Co SAU remains relevant over its term.

2.1.2. Interaction with Part XIC of the CCA

The NBN Co SAU has been designed against a legislative backdrop that provides clear

guidance on the interaction between various supply related documents (of both a commercial and regulatory nature), including the SFAA, Access Agreements, Special Access Undertakings, BROCs and ADs (each a **Supply Related Document**). The relationship between these various documents, including the statutory hierarchy that dictates their interaction, is accurately described in section 2.1 of the ACCC Consultation Paper.

Given the cascading hierarchy of the Supply Related Documents, it is possible for documents that are higher in the hierarchy to not only prevail to the extent of any inconsistency over documents lower in the hierarchy (as is self evident on the face of the legislation), but to also reset the way in which the hierarchy works. For example, given the primacy of the Access Agreement, it is possible for the Access Agreement to include terms and conditions that restructure the hierarchy itself. This also applies to documents lower in the hierarchy. For example, it is possible for an SAU to create a regime which restructures the hierarchy of those documents lower than the SAU in the statutory hierarchy (that is, BROCs and ADs).

In many respects, this is an appropriate and intended consequence of the legislative regime. If parties wish to negotiate an agreement that adjusts the hierarchy (or the detail in which it works), this is the right outcome in a regime that gives primacy to commercially negotiated outcomes.

Despite the above, and in contrast to other access providers that operate under the terms of Part XIC, NBN Co's Access Agreement (referred to as Wholesale Broadband Agreement or WBA) is not a genuinely negotiated arrangement.

In fact, the NBN Co WBA has been developed against a backdrop where:

- there is no alternative terms of supply (including regulated terms of supply) available to RSPs;
- NBN Co has adopted a very conservative view of its non-discrimination obligations (essentially driving a single set of terms and conditions for all RSPs); and
- the terms of the WBA reflect NBN Co's preferred position but do not necessarily reflect a meeting of minds between NBN Co and its customers.

As a consequence, the WBA is not an arrangement that reflects the outcome of a normal commercial arms-length negotiation that would occur in a competitive environment.

It is for these reasons that Telstra was surprised to read the ACCC's observations and recommendations in relation to the execution of NBN Co's SFAA.³ The ACCC states that the decision to enter into an Access Agreement that is the same as the SFAA "is a commercial decision". The ACCC goes on to state that it "...expects that access seekers would carefully consider the consequences of the terms and conditions that are to be contained in the Access Agreement prior to executing it..." and that a failure to do so "may adversely impact on their ability to obtain access on regulated terms."⁴

These statements suggest that RSPs have had (or continue to have) a choice to take supply under alternative terms and conditions. They also infer that there is the ability to reach a genuinely negotiated resolution to any outstanding matters contained in the SFAA. Indeed, the ACCC Consultation Paper identifies a number of alternative options through which an RSP

³ ACCC, *NBN Co Limited Special Access Undertaking Consultation Paper*, November 2012, section 3.1.1, p 20.

⁴ *Ibid.* s 3.1.1, p 20 and 21.

may take supply.⁵

Unfortunately, at this time, none of these alternatives have been made available to RSPs. To date, the SFAA is the only means by which an Access Seeker can take supply of services over the NBN and the NBN Co SAU will not change this. Accordingly, the SFAA can be (and in Telstra's view has been) presented to industry on a "take-it-or-leave-it" basis.

It is for this reason that the NBN Co SAU, and the ACCC's current role in considering whether to accept or reject the NBN Co SAU, takes on an increased significance. The NBN Co SAU (and the current consultation process relating to the NBN Co SAU) has now become the primary means through which RSPs are able to table, and potentially resolve, key outstanding concerns residual from recent multilateral and bilateral industry engagement. Additionally, a regime created by the NBN Co SAU may be the only way in which RSPs can be assured of ongoing regulatory oversight and NBN Co accountability.

Detailed comments in relation to NBN Co's approach to regulatory oversight are set out further in section 2.4 below.

2.1.3. The "incentive-based" approach

NBN Co states that a key design feature of the NBN Co SAU is the "emphasis on incentives".⁶ It states that the NBN Co SAU is consistent with Australian utility regulation in taking, wherever possible, an "incentive-based" rather than a "compliance-based" approach.⁷

Telstra considers that, in general, reliance on incentive-based approaches to utility regulation should be preferred over compliance-based approaches. Incentive-based approaches are applied in a range of regulated sectors in Australia and, if appropriately designed can be effective in constraining a monopoly provider from exercising its market power, while at the same time providing rewards for innovation that a supplier of services would get if it were in an effectively competitive market environment. Regulated businesses can in these circumstances be provided with the opportunity to earn a normal rate of return on efficiently invested capital, and can earn above normal returns to the extent they outperform the competitive benchmarks set by the regulator (and therefore face incentives to outperform these benchmarks).

Unlike most other regulated suppliers, NBN Co is initially a loss-making business. Despite this, it still needs to be subject to the appropriate constraints and commitments to ensure that as a monopoly supplier of a service it has positive incentives to efficiently incur costs in a manner that avoids distorting the downstream retail market outcomes and adversely impacting the LTIE.

Telstra is concerned that the current design of the NBN Co SAU appears to depart from conventional incentive-based approaches to utility regulation, particularly for the first decade of the NBN Co SAU term. For the duration of Module 1, the incentive regime applying to NBN Co will be similar to what was proposed under the December 2011 SAU, which is likely to provide little incentive for NBN Co to behave in an efficient manner. It is only from July 2023 onwards that the NBN Co SAU will commit NBN Co to implement what it describes as "*a conventional utility regulation approach based around the periodic provision of expenditure forecasts to the*

⁵ Ibid. s 3.1.1, p 19.

⁶ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012.

⁷ Ibid. p 42.

ACCC⁸.

Telstra has specific concerns regarding the strength of efficiency incentives faced by NBN Co both in the initial 10-year period and for the remainder of the NBN Co SAU term. These concerns are set out in detail in section 4 (Price Terms).

More fundamentally, Telstra is concerned with the “split incentive design” of the NBN Co SAU which delays the implementation of what appears to be more conventional incentive-based approaches for 10 years and provides for particularly weak incentives for prudence and efficiency during the network rollout period. NBN Co appears to be seeking a form of “regulatory holiday” for this initial period – that is, a period in which more traditional forms of regulatory oversight will not apply. Telstra considers that this is neither necessary nor appropriate.

In its Supporting Submission, NBN Co argues that the split incentive design reflects the fact that NBN Co will have “considerable external governance and oversight arrangements” during the Initial Regulatory Period and that NBN Co will face significant ongoing risk as to its long-term revenue sufficiency throughout the network rollout period, such that it will be commercially rational for NBN Co to only incur expenditure in a prudent and efficient manner.⁹ As discussed in section 4 (Price Terms), Telstra does not consider that NBN Co’s “external governance” framework will be sufficient to ensure efficient behaviour by NBN Co during the Initial Regulatory Period. Furthermore, it is not clear why it would be commercially rational for NBN Co to only incur expenditure in a prudent and efficient manner in circumstances where it will be allowed to recover a return on all expenditure that is rolled into its revenue constraint model. As noted by the ACCC in its February 2012 consultation paper in relation to the December 2011 SAU, there is likely to be limited incentive for NBN Co to seek cost savings, or to invest efficiently, if it is not being financially rewarded for doing so.¹⁰

The fact that the NBN will be rolled out over the Initial Regulatory Period does not provide justification for the split incentive design proposed by NBN Co. Rather, given that vast amounts of capital expenditure are likely to be incurred over this initial period, it is all the more important that there be effective incentive mechanisms in place to ensure that all expenditure is prudently and efficiently incurred. The importance of this is further amplified when considered in the context of the RAB roll forward mechanism and the use of the ICRA, which together allow for all costs incurred during the rollout period to be rolled into the regulatory asset base and recovered later with interest.

2.2. 27 year term modular design with fixed principles

2.2.1. Observations on the 27 year term

Consistent with the December 2011 SAU, the NBN Co SAU includes a lengthy term of some 27 years. By any measure, this is an extraordinary commitment period and its potential impact is increased given the inherently dynamic nature of the telecommunications sector (both at a technological and industry structure level). The role of the ACCC in ensuring that the NBN Co SAU remains relevant, reasonable and continues to promote the LTIE takes on increased significance given this extended term.

Telstra included a detailed discussion of the term of the SAU in its submission to the ACCC’s

⁸ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p 46.

⁹ *Ibid.* p 46.

¹⁰ ACCC, *NBN Co Special Access Undertaking: Supplementary Consultation Paper*, February 2012 p 55.

supplementary consultation paper in April 2012 (**Previous Submission**). As previously noted, the proposed long term of the NBN Co SAU may be contrasted with the regulatory periods of what could be considered NBN Co's infrastructure "peers", such as electricity transmission, and electricity and gas distribution networks. These energy networks typically have regulatory periods of no more than five years, and the rules governing reviews at the end of each period are subject to change from time to time.¹¹ The proposed term of the NBN Co SAU can also be contrasted with other regulatory periods that apply in the telecommunications context, including that which applies to regulation of Telstra's declared fixed line services (currently a three year regulatory period).

While the investment in the NBN is undoubtedly significant, it is similar in magnitude to recent investments made in electricity markets.¹² The lives of NBN Co's key assets are also expected to be broadly similar to those of electricity transmission businesses. For example, electricity transmission assets such as transmission lines and cables can have standard asset lives of 50 years and substations, 40 years.¹³

While Telstra recognises that it is reasonable for NBN Co to seek to have the NBN Co SAU in operation over a long term, it notes that a long-term SAU of this nature will not necessarily be able to deal with a range of matters in precise detail because of the flexibility required to deal with all future uncertainties. In other industries, this flexibility is dealt with by the use of shorter regulatory terms. By contrast, in the case of the NBN Co SAU where the regulatory term will be 27 years, the inbuilt flexibility in the NBN Co SAU itself will need to be considerable. This is ever more important in the telecommunications sector where there is a high degree of uncertainty as to the services that could be developed and ultimately supplied over the next 27 years.

The NBN Co SAU deals with the requirement for flexibility arising from the proposed term and scope of the NBN Co SAU through the use of a modular design approach (with regulatory recourse and midpoint reviews available in the first 10 years and replacement modules applying in the proceeding 17 or so years).

Telstra considers that the modular approach is a significant improvement on the approach adopted in the December 2011 SAU (in which all content was locked in for close to 30 years, with limited regulatory recourse and review points). In theory, having modules that operate for various periods of time allows greater flexibility and creates a structure that can enable relevance over the long term.

However, it is vital that the modular design provides an appropriate mix of certainty for NBN

¹¹ In other utility industries, the rules governing regulatory reviews are usually capable of amendment from time to time, either by the regulator or an independent rule-making body – for example the National Electricity Rules have recently been substantially amended by the Australian Energy Markets Commission, pursuant to a request made by the Australian Energy Regulator (refer to: AEMC, *Rule Determination: National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*; *National Gas Amendment (Price and Revenue Regulation of Gas Services) Rule 2012*, 29 November 2012).

¹² The AER has assessed \$56b of spend by electricity companies under the NER over the past five years - Andrew Reeves, 'Promoting efficient investment – protecting consumers from paying more than necessary', *AER Chairman's Address to the AEMC Public Forum*, 23 November 2011, p 3. In comparison, NBN Co's capex and opex is forecast to equate to \$55b up to and including the 2020 financial year – NBN Co, *Corporate Plan: 2011-2013*, 17 December 2010, Exhibit 10.3.

¹³ See for example the AER's draft decision in respect of TransGrid, the transmission network operator in NSW, which sets out the AER's conclusion of a 50 year standard asset life for transmission lines and cables, and 40 years for substations: AER, *TransGrid Transmission Determination 20090-10 to 2013-14: Draft Decision*, 31 October 2008, p 161.

Co and RSPs, flexibility to address future uncertainty, and scope for regulatory oversight and incentives for NBN Co to conduct its operations in a prudent and efficient manner. If an appropriate mix is not achieved, the modular design will only serve to increase the level of discretion available to NBN Co, thereby reducing the degree of certainty afforded to RSPs. Telstra believes that the design of the NBN Co SAU requires a number of adjustments in order to achieve the right mix. These are set out in further detail in this section 2 (Design of the NBN Co SAU).

Telstra therefore agrees that while it is important that both NBN Co and RSPs have certainty that the “rules of the game” or the applicable regulatory model will not unnecessarily change, this does not translate into a requirement that the term of the NBN Co SAU must be for a period of 27 years.

2.2.2. Implications on Modules 0 and 2

The implications associated with the 27 year term are most acute for Modules 0 and 2. These modules are “on foot” for the full term and are subject to an additional layer of protection through their categorisation as “fixed principles terms and conditions” (taking them outside of scope for future review by the ACCC, including in the context of it considering variations or replacements to the NBN Co SAU).

In principle, Telstra agrees with the use of fixed principles to provide longer term certainty around certain aspects of the regulatory regime. However, in the context of the NBN Co SAU, Telstra believes that a number of provisions within Modules 0 and 2 are neither appropriate for the long term nor do they warrant the additional protection afforded to “fixed principles terms and conditions”.

In its Supporting Submission, NBN Co states that the protection afforded by the fixed principles will:

- *“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”;* and
- *“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.”¹⁴*

Contrary to NBN Co’s position above, and for the reasons set out below, Telstra believes that the categorisation of the entirety of Modules 0 and 2 as fixed principles terms or conditions is neither necessary to provide the certainty NBN Co refers to in its Supporting Submission nor will it necessarily simplify future ACCC assessments.

Under the CCA, fixed principles terms and conditions in an SAU are given a very high level of protection, in that they cannot be removed or amended except in very limited circumstances.¹⁵ In the context of the NBN Co SAU, the effect of the fixed principles terms and conditions will be most noticeable when NBN Co submits its replacement modules (after the expiration of the Initial Regulatory Period). In this scenario, the ACCC must not reject a replacement module “for a reason that concerns” the term or condition in the SAU that is specified to be a fixed principles term or condition.¹⁶ In Telstra’s view, the ACCC correctly summarises the constraints

¹⁴ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p 36.

¹⁵ CCA, s 152CBAA.

¹⁶ CCA, s 152CBAA(6) .

associated with the use of fixed principles in its Consultation Paper.¹⁷

In the ACCC's Supplementary Information Paper,¹⁸ the ACCC also identifies parts of the legislation that create a further element of uncertainty about the scope and impact of fixed principles terms or conditions (including use of the words "for a reason that concerns" and what these are intended to cover). While the Explanatory Memorandum¹⁹ provides some guidance in this regard, the full breadth of the legislation and its impact on future variation assessments remains inherently uncertain.

As noted above, Telstra does not, *per se*, object to the use of fixed principles as a design feature. Indeed, in Telstra's Previous Submission, Telstra noted that "...the use of fixed principles could be one way of providing certainty as to the detail of the regulatory framework to apply to services on the NBN Co Network...".²⁰ However, in its Previous Submission Telstra advocated the use of fixed principles terms and conditions in the context of an overall design proposal in which the term of the SAU would be materially shorter. Telstra also envisaged that the fixed principles terms and conditions would be clearly identified and would provide certainty for an appropriate period in relation to specific matters. NBN Co has not used the fixed principles in this way, but rather has used this device to lock in substantial parts of the NBN Co SAU for a period of nearly 27 years (a period which Telstra has previously objected to as being too lengthy).

For example (and without limitation), Telstra has concerns in relation to:

- the inclusion of very broad and subjective principles for pricing of new products.²¹ As industry dynamics change over time, the interpretation and application of these principles may become open to different interpretations, potentially creating wide discretion for NBN Co in relation to pricing of new products. As discussed in section 4 (Price Terms) below, Telstra considers that pricing for new products should be subject to proper ACCC oversight rather than being at NBN Co's discretion;
- locking in of the requirements for forecasts as fixed principles.²² As with the new product pricing principles, changing industry dynamics may mean that some of these requirements take on different meanings or become redundant over time. Therefore locking in these requirements as fixed principles should not be a substitute for proper ACCC oversight of expenditure; and
- allowing NBN Co to update the Network Design Rules over the term of the NBN Co SAU.²³ Given the likely developments in technology and evolution of end-user preferences, updating of Network Design Rules should not be left to NBN Co's discretion for a period of 27 years.

Telstra has concerns in relation to several other fixed principles, which are discussed in more detail in section 4 (Price Terms) of this submission.

¹⁷ ACCC, *NBN Co Limited Special Access Undertaking Consultation Paper*, November 2012, section 3.1.1, p 28.

¹⁸ Supplementary information paper about the Special Access Undertaking given to the ACCC by NBN Co Limited and NBN Tasmania Limited on 18 December 2012.

¹⁹ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (Cth).

²⁰ Telstra Corporation Limited, *Telstra's response to the ACCC's supplementary consultation paper*, 5 April 2012 section 2.2.5, p 16.

²¹ NBN Co SAU, cl 2C.5(a).

²² NBN Co SAU, cl 2D.6.

²³ NBN Co SAU, cl 2D.8.

Given the strong protection given to fixed principle provisions by the statutory regime and the restrictions imposed on future ACCC review of these provisions, the ACCC must be satisfied now that the fixed principles provisions proposed as part of the NBN Co SAU will remain reasonable for the next 27 years. Telstra does not consider that NBN Co has presented sufficient material to support such a conclusion.

2.3. Module 1 and the Initial Regulatory Period

Module 1, in its current form, contains the majority of NBN Co's more detailed commitments under the NBN Co SAU. Its content includes:

- product and service details (and how the NBN Co SAU commitments will be implemented through certain Product Components and Product Features);
- regulatory oversight through the “pull through” of ACCC Regulatory Decisions into the NBN Co SFAA on a 2 yearly cycle;
- details of NBN Co's ROs and NBN Co's commitments in relation to these products;
- details of NBN Co's NROs and NBN Co's commitments in relation to these products and implementation of other charges;
- details of how NBN Co will calculate the RAB and the application of the proposed LTRC;
- certain reporting obligations in relation to various forecasts, costs information, revenue information and capex and compliance reporting;
- detailed non-price terms and conditions;
- product development and withdrawal commitments (including details in relation to the PDF); and
- service level commitments, including limited service level rebates.

Telstra comments in detail on each of the Schedules in Module 1 in later sections of this submission. For the purposes of this section 2 (Design of the NBN Co SAU), however, Telstra's assessment of Module 1 relates primarily to the following design features:

- the proposition that Module 1 takes an “incentive-based”, rather than “compliance-based” approach (discussed above);
- the duration of the Initial Regulatory Period;
- the Initial Regulatory Period Midpoint Review; and
- the compliance reporting regime.

2.3.1. Duration of the Initial Regulatory Period

As drafted, the NBN Co SAU contemplates an Initial Regulatory Period of 10 years, with the potential for a further one year extension in certain circumstances. Even if the NBN Co SAU

contained a comprehensive midpoint review and effective ongoing regulatory oversight,²⁴ this is a significant period of time. Over the next decade there are likely to be very significant changes in the nature of services demanded by end-users and the technology used to deliver those services (as there have been over the past decade). This will almost certainly impact on the scope of products offered by NBN Co and the cost of providing these products.

As with the discussion above in relation to the 27 year term, the 10 year Initial Regulatory Period can also be contrasted with the regulatory periods of NBN Co's infrastructure peers and other regulatory periods that apply in the telecommunications context.²⁵

Telstra believes that the Initial Regulatory Period is too long and an appropriate term for Module 1 is 6 years with a midpoint review at the 3 year mark. Shortening the term of Module 1 would have two advantages from a design perspective:

- first, this will shorten the period in which the materially weaker incentive regime inherent in Module 1 is to apply (a point discussed in more detail above); and
- second, this would allow for earlier review of the more detailed terms of Module 1, which Telstra considers to be necessary given much of the content of Module 1 is still under development and must necessarily be dynamic, even over the short term.

2.3.2. Initial Regulatory Period Midpoint Review

As noted above (and also in Telstra's Previous Submission), there must be built-in flexibility to deal with future uncertainties over the short-to-medium term. Even over the next 5 years or so, there is uncertainty as to the scope and nature of services that will be provided over the NBN (and the likely "take-up" rates of end-users).

Accordingly, the NBN Co SAU needs to be designed in a manner that places NBN Co, RSPs and end-users in a position of relative certainty that they will not be exposed to unreasonable terms and conditions, either imposed in the future or becoming so due to the evolving nature of the industry and NBN Co's products and services.

The NBN Co SAU appears to deal with this, in the context of Module 1, through its Midpoint Review under Schedule 1K.²⁶ This is to apply to:

- a number of the multilateral processes set out under the NBN Co SAU (i.e. customer engagement process, PDF, dispute management processes and the Multilateral SFAA forum); and
- certain non-price terms and conditions, service levels, the regulatory recourse mechanism and reporting commitments.

The scope and effectiveness of this Midpoint Review is of significant importance where acceptance of a long term undertaking is being sought. Telstra is concerned that there are a number of shortfalls in the Midpoint Review which mean that the review process is unlikely to operate in a manner that will maintain reasonableness of the terms and conditions over time. Specifically:

²⁴ Importantly, Telstra does not consider that either the Midpoint Review (in Schedule 1K) or the regulatory oversight provisions (in Schedule 1B) in the NBN Co SAU are sufficient. Detailed comments and suggestions to strengthen these proposals are set out in detail within this submission.

²⁵ ACCC, *Inquiry to make final access determinations for the declared fixed line services: Final Report*, July 2011.

²⁶ NBN Co SAU, Module 1, Sch 1K.

- Telstra considers that a 5 year delay for the Midpoint Review is not appropriate. Those aspects covered by the Midpoint Review have developed in a very dynamic way over the past 12 to 18 months or so. With every updated version of the WBA, these have become more robust and sustainable. However, these processes, terms and conditions are **not** ready to be “locked in”, even for 5 years, at this time. A 3 year timeframe would be more appropriate and align with current regulatory periods for fixed services in the telecommunications industry;
- the current Midpoint Review processes (including timing in relation to the various review steps) may well push out beyond the six month period set aside for the Midpoint Review and may not give the ACCC the necessary time to develop and put in place replacement proposals for the remainder of the Initial Regulatory Period. The processes and associated timings need to be realigned so that they are completed within an appropriate review window and the ACCC has a realistic opportunity to develop an alternative proposal;
- the Multilateral Processes (for example, the Multilateral SFAA Forum, the Dispute Management processes and the PDF) should be reviewed based on their independent operation as well as being reviewed on their “combined” operation. This would ensure that the efficacy of each Multilateral Process can be assessed on its own merits while also ensuring that, as a whole, the combined operation of the Multilateral Processes is working as intended;
- industry consultation and decision publication should be a mandatory component of the Midpoint Review. At the moment, there is discretion on the ACCC to consult prior to making an “accept” or “reject” decision and whether to publish its decisions. Effective industry engagement is critical to the success and efficacy of the Midpoint Review;
- with the exception of those terms relating to the initial pricing for ROs and NROs as clearly defined in the SAU (that is, those prices which are currently the subject of consultation and which will be set above zero in the SAU), price related terms set out in Module 1 should not be excluded from review, provided this review does not accelerate any increase in charges (or rights to increase charges). In particular, pricing of new products and zero-priced offers (i.e. pricing for those products for which there is currently no individual price commitment in the NBN Co SAU) should be subject to review, as well as CVC pricing (to the extent that the NBN Co SAU continues to lack definitive commitments in relation to such pricing); and
- there cannot be a “deemed” acceptance of the Engagement or Non-Price Proposal. The ACCC must be able to complete its review and, if appropriate, develop replacement proposals.

2.3.3. Compliance reporting regime

One of the most effective and practical ways to ensure compliance with the NBN Co SAU is through compliance reporting. Telstra therefore welcomes the inclusion of an enhanced compliance reporting regime within Module 1 of the NBN Co SAU.

However, it is vital that NBN Co’s compliance with the NBN Co SAU is able to be objectively measured and assessed by the ACCC, and that the ACCC is able to take appropriate action where it considers that there is a need to do so. An obligation to be transparent about compliance will provide a far more efficient and effective outcome for all stakeholders (including the ACCC) than if the ACCC or RSPs are required to identify breaches before action

is taken.

An effective compliance monitoring regime can also be an efficient means through which to ensure that the undertakings given in the NBN Co SAU continue to be "front of mind" for NBN Co and are given an appropriate level of attention within the organisation.

The commitments given by NBN Co in Schedule 1G of the NBN Co SAU are intended to provide the ACCC with information that is relevant to NBN Co's compliance with price-related undertakings. Telstra welcomes these commitments but queries whether they are adequate to ensure that the ACCC is able to effectively monitor NBN Co's overall compliance with the NBN Co SAU.

For example, there is no requirement for NBN Co to report to the ACCC regarding compliance with important commitments such as the product development and withdrawal commitments in Schedule 1I of the NBN Co SAU. Moreover, if a "high level commitments-based" approach to service levels and non-price terms is to be adopted (as is proposed by Telstra in this submission), this will need to be accompanied by a requirement to continuously monitor, and report on, compliance with such commitments.

2.4. Implementation through the SFAA and regulatory recourse

An important design feature of the NBN Co SAU is that it will not constitute a stand-alone document or reference offer. In order to access services and in order for the NBN Co SAU to be effective, RSPs will need to execute NBN Co's SFAA.

NBN Co states that it intends for the NBN Co SAU and SFAA to operate as "*complementary and consistent documents*."²⁷ To this end, NBN Co commits to ensuring that any terms of an SFAA will not be inconsistent with the NBN Co SAU, as it may be varied from time to time.²⁸

Telstra supports the commitment by NBN Co to maintain consistency between the NBN Co SAU and SFAA. It is not clear, however, how alignment with the NBN Co SAU will occur for those that are on an existing Access Agreement (or choose to extend an Access Agreement), given the commitment to align to the NBN Co SAU applies only to the SFAA. Telstra considers that clarification on this point is required.

In the NBN Co SAU, NBN Co also commits to updating the SFAA every two years within the Initial Regulatory Period, including to give effect to:

- any valid AD or BROC made by the ACCC;²⁹
- any "facilities access decision" made by the ACCC;³⁰ and
- any changes that NBN Co considers appropriate (including changes that may arise out of the Multilateral SFAA Forum contemplated in the NBN Co SAU).³¹

The two yearly SFAA update process above is the primary mechanism for giving effect to ACCC Regulatory Decisions during the Initial Regulatory Period. NBN Co's proposal is illustrated in Figure 1 below.

²⁷ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012 p 48.

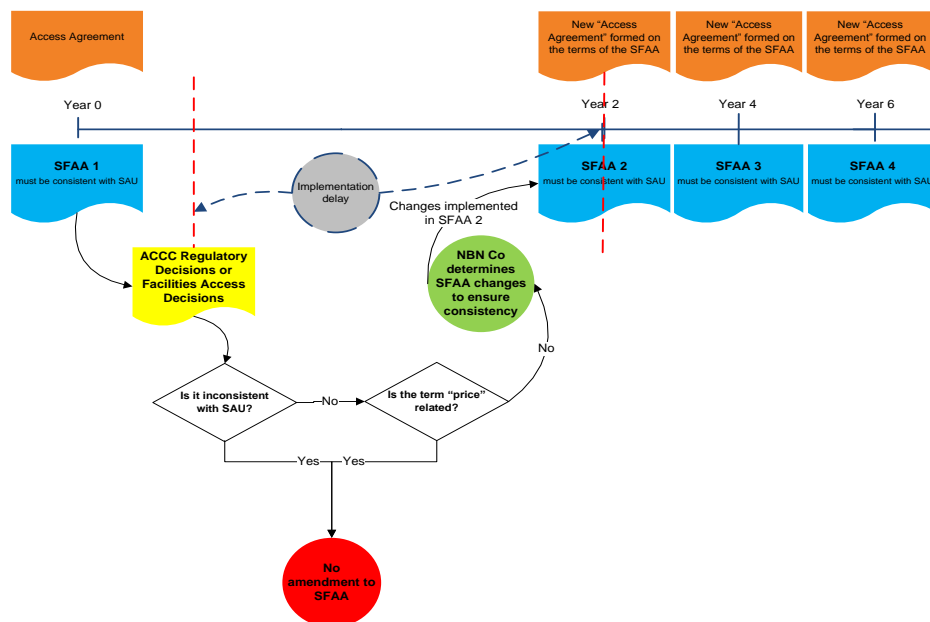
²⁸ NBN Co SAU, Main Body, cl 6.

²⁹ NBN Co SAU, Module 1, Sch 1B, cl 1B.1.3.

³⁰ NBN Co SAU, Module 1, Sch 1B, cl 1B.2.3.

³¹ NBN Co SAU, Module 1, Sch 1B, cl 1B.3.1(e).

Figure 1: Overview of NBN Co Regulatory Recourse Proposal



While the diagram above focuses on the implementation of ACCC Regulatory Decisions, it is important to note that the mechanism also provides an avenue for NBN Co to independently and unilaterally update terms of supply which are unrelated to any particular ACCC Regulatory Decision. This is discussed further below.

As mentioned in Telstra’s Previous Submission,³² the ability for effective regulatory oversight is critical to the success of the NBN Co SAU. While Telstra believes that the rolling 2 yearly SFAA is a material improvement on the previous “regulatory recourse” mechanism set out in the December 2011 SAU, there remain a number of features that need to be modified and improved in order for it to be effective. The modifications and improvements that Telstra proposes are set out below.

RSPs should not be forced to transition to the newly published SFAA

NBN Co commits to publish a New SFAA every two years, with the intention that RSPs transition from their existing Access Agreement to a new Access Agreement consistent with the terms of the New SFAA. Telstra believes that RSPs should not be forced on to the New SFAA. Instead, they should have the right to elect not to transition or extend supply under the current terms.

This will preserve the integrity of the commercial arrangement and provide RSPs flexibility to move to the New SFAA once the terms and conditions are acceptable (i.e. the ADs or BROCs have been correctly implemented).

³² Telstra Corporation Limited, *Telstra’s response to the ACCC’s supplementary consultation paper*, 5 April 2012.

Commitments to meaningful consultation are needed

While the regime contemplates a potential Multilateral SFAA Forum, it does not require NBN Co to consult in relation to the implementation of ACCC Regulatory Decisions (in fact, the NBN Co SAU specifically contemplates that NBN Co “may, but is not obliged to” engage with industry in relation to the implementation of ACCC Regulatory Decisions).³³ NBN Co suggests, in its Supporting Submission, that access seekers should seek comfort in the ability to seek further recourse from the ACCC on the manner in which ACCC Regulatory Decisions have been implemented (presumably through further ADs or BROCs) but this appears to require access seekers to wait a further two years (i.e. until the SFAA resets again) before this further determination is able to be utilised, effectively making the potential for recourse illusory.

To resolve this, NBN Co must be required to consult and meaningfully engage with RSPs and the ACCC in relation to all the changes that it proposes to introduce with each resetting of the SFAA. Consultation should commence on all aspects no later than 6 months prior to the expiration of a then current Access Agreement. This includes consultation in relation to changes that are unrelated to the implementation of ACCC Regulatory Decisions (although, as noted below, RSPs should not be forced to accept such changes in order to get the benefit of ACCC Regulatory Decisions).

In addition, to incentivise NBN Co to appropriately implement ACCC Regulatory Decisions, the NBN Co SAU should allow for backdating of a BROc or AD to the extent these relate to the manner in which earlier ACCC Regulatory Decisions have been implemented. If this does not occur, RSPs would need to wait for a further two years to have an AD or BROc correct implementation deficiencies. Furthermore, the ability to backdate acts as a further incentive to correctly implement an ACCC Regulatory Decision in the first place.

Regulatory recourse should not be “bundled” with changes that are unrelated to ACCC Regulatory Decisions

The publication of the New SFAA is the means by which RSPs will be able to avail themselves of the benefit of ACCC Regulatory Decisions, however, this mechanism also appears to provide an avenue for NBN Co to independently and unilaterally update terms of supply which are entirely unrelated to ACCC Regulatory Decisions. If the New SFAA was to be offered to RSPs on an “all or nothing” / “take it or leave it” basis (which appears to be the case under the NBN Co SAU), these changes can be bundled in with changes that are intended to give effect to ACCC Regulatory Decisions. This means that RSPs would need to take the SFAA with these “unilateral” changes in order to get the benefit of ACCC Regulatory Decisions.

Telstra believes that the New SFAA should distinguish between these “regulatory changes” and “unilateral changes” and RSPs should not be under an obligation to take the terms of any “unilateral changes” in order to get the benefit of the “regulatory changes” in the New SFAA.³⁴

³³ NBN Co SAU, Sch 1B, cl 1B.3.1(j).

³⁴ In Telstra’s Previous Submission, it noted concerns with NBN Co’s right to unilaterally amend terms of supply. Telstra’s concerns in this regard remain, but it expects the regulatory recourse regime and the re-setting of the SFAA to provide oversight of this at a high level.

Clarity regarding transitional arrangements is needed

At this stage there do not appear to be any provisions in the NBN Co SAU that deal with the manner of transition to the New SFAA, either following the implementation of an ACCC Regulatory Decision under the regulatory recourse provisions, or following the Midpoint Review. For example, it can be expected that there will be certain terms that have been triggered under expiring Access Agreements and which remain “in flight” at the time that RSPs are required to transition to the New SFAA. These might include ordering or provisioning processes which have not been completed or disputes that have not yet been resolved.

It is critical that NBN Co provides clarity regarding the means by which it intends to deal with these transitional issues, so as to avoid future confusion as to which terms apply at any particular point in time. This could potentially be addressed in a number of ways, including through the grandfathering of certain expiring terms or giving RSPs the option to elect to take the updated terms in relation to processes that are “in flight”.

Price should not be excluded

Telstra disagrees with NBN Co’s proposal to exclude all “price” terms from the regulatory oversight mechanism. Telstra accepts that the level of the initial prices for ROs and NROs are currently the subject of industry consultation and their inclusion in the NBN Co SAU will have been subject to ACCC oversight. However ACCC oversight should extend to other pricing commitments and, especially, CVC pricing (in the absence of any definitive commitments used in conjunction with an additional price cap) and the establishment of initial prices for new products and zero-price offers (i.e. those products for which there is currently no individual price commitment in the NBN Co SAU).

At present, NBN Co is afforded considerable discretion as regards CVC pricing and the pricing of new products and zero-price offers. It would be contrary to the interests of RSPs and the LTIE if NBN Co’s use of its discretionary powers was not subject to regulatory oversight in circumstances where there has currently been no consultation and regulatory oversight of the individual price commitments which could be developed following the exercise of its discretion.

In relation to CVC pricing, Telstra has concerns in relation to the lack of any definitive commitment from NBN Co, which are discussed in section 4 (Price Terms) below. In the absence any more definitive commitments from NBN Co in relation to CVC pricing combined with an additional price cap (discussed further in section 4), Telstra considers that this should also be subject to regulatory recourse.

Treatment of certain non-price terms needs to be clarified

The scope of the regulatory recourse mechanism needs to also be expanded to include a number of non-price terms which are otherwise excluded. Telstra believes that service levels should also be subject to an annual reset mechanism (at the least). As currently drafted, service levels fall within the Midpoint Review only (set out in Schedule 1K of Module 1). This issue is discussed in more detail in section 3 (Product Terms and Conditions).

The 10 year sunset date should be reconsidered

The 10 year sunset date for the regulatory recourse mechanism should be removed. There is no apparent reason why the operation of the regulatory recourse provisions should be limited

to the term of Module 1. Rather, given the importance of these provisions, Telstra considers that appropriate regulatory recourse provisions must be operative for the full term of the NBN Co SAU. Telstra therefore proposes that an “approved” regulatory recourse mechanism should be incorporated in each replacement module.

In addition, the NBN Co SAU should not impinge on the ACCC’s ability to make binding ACCC Regulatory Decisions which may take effect immediately, in relation to matters not dealt with in either the NBN Co SAU or a current Access Agreement. Telstra notes that the statutory hierarchy clearly intends that ACCC Regulatory Decisions which are not inconsistent with the NBN Co SAU or a current Access Agreement will have effect on their own terms.³⁵

While Telstra supports the inclusion of these ACCC Regulatory Decisions within the scope of the regulatory recourse mechanism (i.e. so that they are incorporated in the SFAA through the two-yearly update mechanism) it should also be made clear that the operation and enforcement of such determinations independently of this mechanism is not limited by the NBN Co SAU and that such determinations may take effect on their own terms.

Finally, it remains unclear whether the reset of the SFAA will give effect to ACCC Regulatory Decisions that have been made during the previous 2 year period but that have expired by the time of the 2 yearly reset. If the ACCC Regulatory Decision has to be “on foot” at the point of co-terminus expiry (as is Telstra’s assumption), and the SFAA only applies the ACCC Regulatory Decision for its regulatory duration, then the ACCC will have to reconsider (and adjust) its processes to ensure these determinations are given due effect. For example, a BROC issued between SFAA expiry dates may well have no effect at all on the terms of the supply because it has expired³⁶ (i.e. the NBN Co SAU would effectively make the BROC a redundant instrument going forward).

2.5. Replacement module regime

NBN Co has committed to submitting replacement modules prior to the expiry of Module 1 (as well as prior to the expiry of subsequent replacement modules). As illustrated by Figure 4.2 in NBN Co’s Supporting Submission, the submitting of a Replacement Module may result in either:

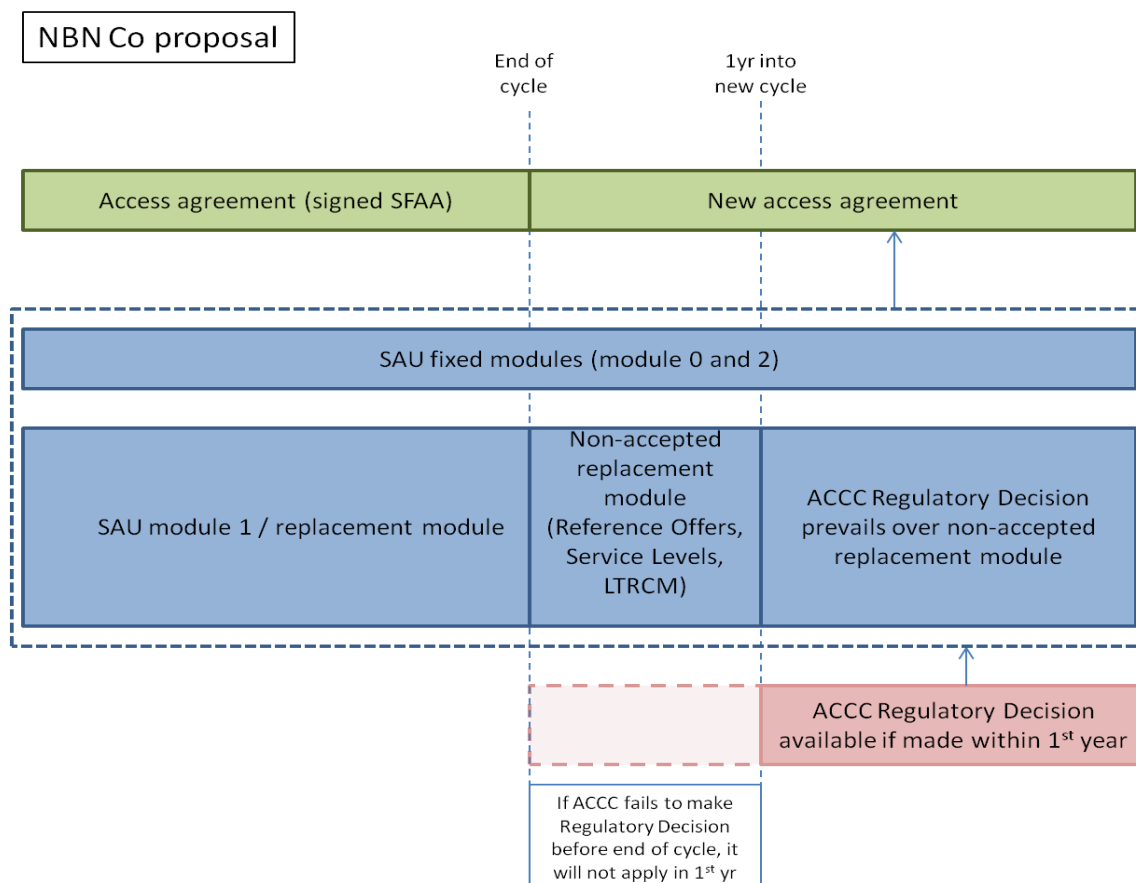
- NBN Co’s proposed terms taking effect if they are accepted by the ACCC;
- ACCC designed terms taking effect if the ACCC rejects NBN Co’s proposed terms *and* makes an AD or BROC before the end of the preceding Regulatory Cycle;
- NBN Co’s proposed terms being deemed to take effect if they are not accepted by the ACCC and the ACCC does not make an AD or BROC; or
- NBN Co’s proposed terms being deemed to take effect for one year and ACCC designed terms taking effect for the remainder of the Regulatory Cycle, if the ACCC makes an AD or BROC no more than one year into the Regulatory Cycle.

³⁵ An access agreement or accepted undertaking will only prevail over inconsistent access determinations or binding rules of conduct, and these Regulatory Decisions will otherwise have effect on their own terms. Refer to: CCA, ss 152BCC, 152BDB, 152CBIA, 152CBIB.

³⁶ BROCs must have an expiry date within 12 months of taking effect (CCA, s 152BDC).

This is illustrated in Figure 2 below.

Figure 2 – NBN Co replacement module regime



Telstra supports the use of a Replacement Module mechanism that relies upon the statutory mechanism under section 152CBG of the CCA to vary the NBN Co SAU. However, Telstra is concerned that the approach proposed by NBN Co is susceptible to gaming and has the potential to materially limit the scope for ACCC oversight of replacement terms. The modifications and improvements that Telstra proposes are set out below.

Components of the Replacement Module should not be deemed accepted

It appears that deeming provisions apply from the expiry of the Cycle Expiry Date, even if the ACCC rejects (or fails to accept) a Replacement Module Application. That is, an ACCC rejection or failure to accept a Replacement Module Application triggers the deeming provisions, which are applicable even if the ACCC has not accepted a Replacement Module Application.

Under NBN Co’s proposed approach there is significant potential for access seekers to be subject to terms of access which have been considered unreasonable and unacceptable by the ACCC. Accordingly, any terms of a Replacement Module should not take effect unless and until they are accepted by the ACCC.

Incentives to provide timely and reasonable Replacement Modules

The potential for NBN Co to lodge a Replacement Module so close to the expiration of a

regulatory cycle opens up a material gaming opportunity. This is the case in clause 4.10(c) of Module 0, when a “Replacement Module Application” can be submitted as close as 20 Business Days prior to the expiry of the Regulatory Cycle, leaving very little time in which the ACCC is able to consider and issue an ACCC Regulatory Decision.

Given that some terms of a Replacement Module may be deemed to take effect if they are rejected and not “replaced” by an AD or BROCC within a certain time, this process potentially dis-incentivises NBN Co to submit timely and reasonable Replacement Module applications.

ACCC given time to fully consider Replacement Modules

Following on from the point above, the ACCC should be given appropriate time to consider, reject/accept and, if appropriate, develop alternative terms of supply. As drafted, general process timing could undermine the time required to fully consider and consult upon the Replacement Module.

ACCC Regulatory Decisions should apply in the first financial year

ACCC Regulatory Decisions that are issued after the expiration of the Regulatory Cycle should be able to apply for the first financial year of the new Regulatory Cycle (rather than being excluded from operation in the manner contemplated in the NBN Co SAU).

Increase the mandatory scope of the Replacement Modules

To the extent that Telstra’s submission to remove the sunset period on regulatory recourse is not accepted, it is important that any Replacement Module Application should include a proposal to address ongoing regulatory recourse (currently at NBN Co’s discretion) and should enable a more dynamic review of service levels so that these can be subject to development throughout the term of the Replacement Module.

NBN Co SAU should not undermine the legislative framework

Finally, the NBN Co acknowledgement that “*if a Replacement Module Application is rejected by the ACCC, the ACCC may make an Access Determination or Binding Rule of Conduct that will have effect to the extent it is not inconsistent with the terms of [this] Special Access Undertaking*”³⁷ suggests that this would not otherwise be the case at law. The ACCC should be free to make ADs and BROCCs at any time and the legislation should manage the application of these determinations.

In Telstra’s view, unless the issues set out above are addressed, the integrity of the ACCC review process is materially constrained. Telstra therefore proposes a Replacement Module process that:

- removes the deeming provisions and puts accept/reject control back with the ACCC;
- ensures Replacement Module Applications, if updated, reset the processes and timing obligations so that the ACCC has appropriate time to consider changes in approach;
- has sufficient timing built into the process to enable the ACCC to fully consider the merits of the Replacement Module, and settle alternative terms if a rejection occurs;
- enables backdating to occur for ACCC Regulatory Decisions that concern the

³⁷ NBN Co SAU, cl 4.10(f).

implementation of earlier ADs and BROCs;

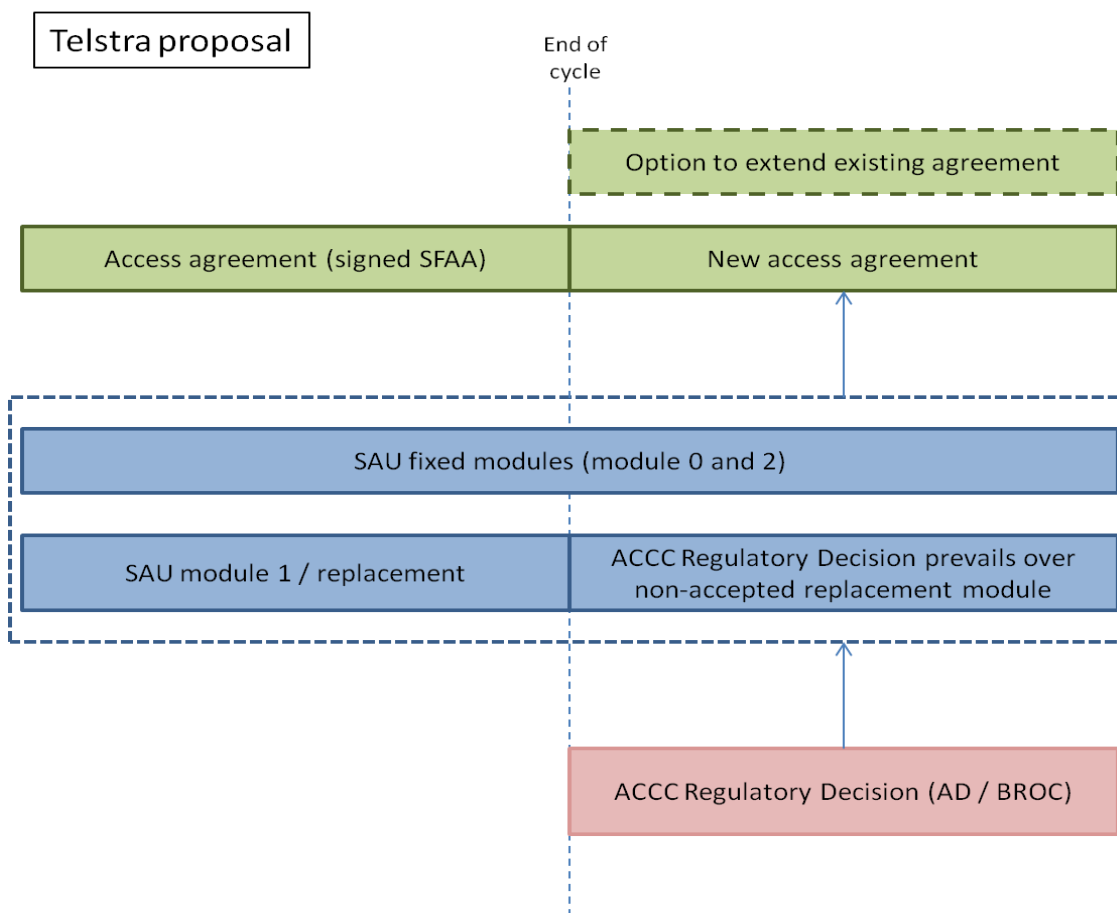
- ensures regulatory recourse options and more regular service level reviews are part of the Replacement Module; and
- preserves the integrity of the legislative hierarchy, and does not undermine the right and ability for the ACCC to issue “not inconsistent” ADs and BROCs.

This approach would ensure that:

- access seekers would not be subject to any terms that have not been accepted as “reasonable” by the ACCC;
- the ACCC would be able to fill any “gaps” left where NBN Co has not submitted acceptable terms, by making an AD or BROC; and
- NBN Co would have strong incentives to engage early with the ACCC on a Replacement Module proposal and ensure that the terms it is proposing are reasonable.

This alternative proposal is illustrated in Figure 3 below.

Figure 3 – Telstra’s proposed replacement module regime



As discussed above, Telstra believes the Initial Regulatory Period should be shortened to 6 years, with a 3 year midpoint review. On this basis, Replacement Modules would become

available on and from year 7 in the NBN Co SAU term.

In addition to the above, Telstra does not support a regime that puts in place 5 year Replacement Modules. Consistent with its rationale for the Initial Regulatory Period, Telstra believes that any replacement modules should be no longer than 3 years in duration. This duration accords with the typical duration of regulatory instruments in the telecommunications industry. Utility industries, such as gas and electricity, may often be subject to five year regulatory periods but the speed of innovation and development of services in those industries is not comparable to that in the telecommunications sector.

2.6. Pricing and Product design features

As mentioned earlier in this section, the SAU design is also characterised through:

- a combination of “individual” and “broad” pricing commitments, contained in Module 1 (applicable for the Initial Regulatory Period) and Module 2 (applicable from the expiration of the Initial Regulatory Period until the expiration of the NBN Co SAU); and
- commitments in relation to the NBN Access Service, Ancillary Service and the Facilities Access Services.

These design features are addressed in detail in sections 3 (Product Terms and Conditions) and 4 (Price Terms) of this submission.

3. Product Terms and Conditions

3.1. Introduction

As stated in Telstra's Previous Submission, Telstra's priority is to ensure that its customers (both wholesale and retail) receive a high quality customer experience (both in terms of migration to the NBN and ongoing supply) and that NBN Co's product suite is aligned with customer and end-user requirements.

To this end, the product terms and conditions of the NBN Co SAU are of particular importance. If the service descriptions are defective or inaccurate, or do not include fundamental components of supply, the resulting downstream impacts can be significant. The ACCC itself has recognised the importance of an effective service description, having previously specified those elements of a bitstream access service likely to provide a basis for effective competition in downstream markets and efficient use of, and investment in, infrastructure.³⁸

Moreover, Telstra believes that the commitments which NBN Co makes in respect of service levels and product development and withdrawal are just as important as the product descriptions themselves. A strong set of performance-related commitments will give RSPs confidence that NBN Co has positive incentives to develop, deliver and manage the supply of services in a way that promotes the LTIE over the term of the NBN Co SAU.

In this section Telstra examines:

- the services to which the NBN Co SAU relates;
- the service level commitments provided for in the NBN Co SAU; and
- the commitments which relate to product development and withdrawal.

Importantly, Telstra is generally supportive of the product construct that is established by the NBN Co SAU. However, Telstra believes that the NBN Co SAU requires further work to be effective and relevant over its term.

3.2. Services in the NBN Co SAU

3.2.1. NBN Access Service

The NBN Co SAU is given by NBN Co in relation to the "NBN Access Service". The "NBN Access Service" is defined in functional and technology neutral terms as:

...a Layer 2 service supplied on the NBN Co Network between and including:

- (a) a UNI on an NTD; and*
- (b) the NNI associated with the relevant NTD,*

³⁸ ACCC, Submission to the Department of Broadband, Communications and the Digital Economy, "National Broadband Network: Regulatory Reform for 21st Century Broadband", June 2009, p 180.

for the purpose of enabling an Access Seeker (or another Service Provider that is a customer of an Access Seeker) to supply Carriage Services or Content Services.³⁹

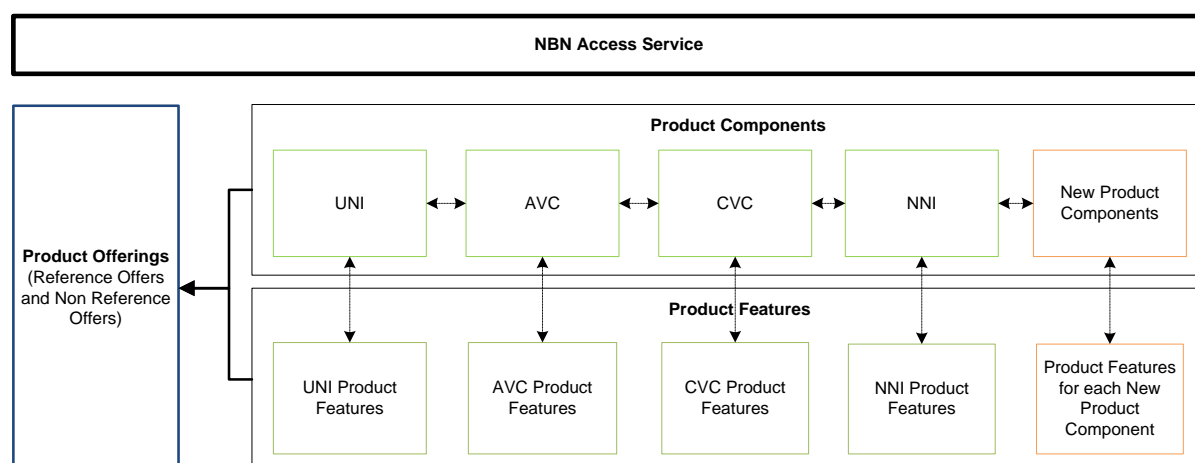
NBN Co will meet its obligation to supply the NBN Access Service by offering to supply certain “Product Components,”⁴⁰ being:

- User Network Interface (**UNI**),
- Access Virtual Circuit (**AVC**),
- Connectivity Virtual Circuit (**CVC**); and
- Network-Network Interface (**NNI**).

Each Product Component will have a range of selectable “Product Features” that will determine the technical features of the Product Component (e.g. service speed).

As illustrated in Figure 4 below, the combination of Product Components with varying Product Features provides scope for NBN Co to develop a range of different product offerings.

Figure 4: Product construct proposed by the NBN Co SAU



The product offerings covered by the NBN Co SAU are divided into ROs and NROs. ROs and NROs may comprise a “bundle” of Product Components with specified Product Features or may comprise an offer that relates to a single Product Component with particular Product Features. In the framework of the NBN Co SAU, NBN Co must supply ROs and NROs on request, but cannot otherwise be compelled to supply other services or products unless and until they are introduced through an SFAA as a NRO.⁴¹ ROs cannot be withdrawn by NBN

³⁹ NBN Co SAU, Attachment A, cl 2.

⁴⁰ NBN Co SAU, cl 1A.1.2 and cl 1A.1.3.

⁴¹ It is acknowledged that, outside of the framework of the NBN Co SAU, eligible services supplied, or capable of being supplied, by NBN Co can also be declared by the ACCC pursuant to section 152AL(8A) of the CCA. If this were to occur, NBN Co would also then be obliged to supply that service under section 152AXB(2) of the CCA.

Co during the Initial Regulatory Period⁴² whereas NROs may be withdrawn at any time, subject to compliance with the product withdrawal commitments (discussed below).⁴³

In principle, Telstra supports the product construct that is established by the NBN Co SAU. Telstra also generally supports an approach that allows the scope of the NBN Co SAU to “expand” to encompass new products as they are developed over time. However, as highlighted below and elsewhere in this section 3 (Product Terms and Conditions), there are some areas that require further attention.

An “expanding” scope reinforces the need for robust product development and service level commitments

If the product scope of the NBN Co SAU is designed to “expand” in the manner described above, it follows that all new products should be subject to the same level of consultation and regulatory scrutiny as the products which are currently included in the NBN Co SAU.

In sections 3.3 and 3.4 below Telstra discusses the importance of ensuring that the processes and requirements applicable to the development of products and their associated service levels are appropriate and effective from the outset, to ensure that the NBN Co SAU remains effective and relevant into the future.

Network Termination Device

In relation to the descriptions of each Product Component and each of the ROs and NROs, Telstra believes there is a potentially significant gap relating to the Network Termination Device (NTD).

A functioning NTD is critical to supply. Without it, a service cannot be supplied. Yet despite this, the NTD is not currently specified as a “Product Component”. In fact, the obligation for NBN Co to supply the UNI is made expressly conditional on the availability of a UNI on the NTD⁴⁴, and the supply of the AVC is conditional on the “Maximum Data Transfer Rate” of the associated NTD not being exceeded.⁴⁵

As a consequence, the NBN Co SAU is silent about NBN Co’s responsibilities regarding the NTD. For example:

- there is no express obligation to actually supply an NTD in the first place (as this seems to be something that is assumed);
- it is not clear whether NBN Co is entitled to elect not to install a second NTD (including where all UNI ports have been used or the Maximum Data Transfer Rate has been reached); and
- it is not clear that NBN Co will be responsible for things such as:
 - NTD installation and maintenance;

⁴² NBN Co SAU, cl 1C.1.2(a), although Telstra notes that some exceptions apply in relation to the NBN Co Interim Satellite Network and services which NBN Co is prohibited from supplying by law.

⁴³ NBN Co SAU, cl 1D.1.2(a), although Telstra notes that an exception applies for services which NBN Co is prohibited from supplying by law.

⁴⁴ NBN Co SAU, cl. 1A.3.4.

⁴⁵ NBN Co SAU, cl 1A.3.3.

- securing appropriate tenure at the relevant premises; and
- associated ancillary hardware and cabling (including the lead-in drop, premises connection device, power supply unit, battery back-up and associated ongoing consumables).

In the absence of clear commitments about these things, NBN Co may be able to shift responsibility to RSPs and end-users, even in circumstances where it is more appropriate and/or efficient for NBN Co (as the network owner and provider⁴⁶) to perform them. RSPs and end-users will also be faced with the prospect that they may be required to incur additional costs for this fundamental aspect of the supply.

To this end, Telstra considers that it must be clear that the supply of the NTD is included as part of the ROs and NROs that involve the supply of a UNI. This will avoid confusion regarding NBN Co's responsibility to supply the NTD as part of the applicable RO or NRO where an NTD is not already available at the applicable premises (including due to there being no available UNI ports on existing NTDs or due to the Maximum Data Transfer Rate of existing NTDs being reached). These must also be supported by commitments which make it clear that NBN Co (as the network owner and provider) is also responsible for associated NTD responsibilities, such as those identified above in relation to installation and maintenance, securing appropriate tenure and supply of associated hardware and associated ongoing consumables.

Layer 2

NBN Co itself has recognised that the provision by it of a Layer 2 service is the best means by which to support a market structure which promotes healthy retail competition. Among other matters, Layer 2 is best able to deliver the highest amount of choice for end-users by facilitating both RSP and downstream choice. NBN Co itself has stated that:

"[A] Layer 2 product is most closely aligned with NBN Co's stated objectives and is most likely to facilitate the achievement of optimum competitive outcomes over the short-to-medium term. Layer 2 products are also most likely to support end-user choice and simplicity, while avoiding the downside risks associated with Layer 3 products, such as a lack of competitive differentiation and limited scope for innovation."⁴⁷

The expectation that NBN Co will supply only at Layer 2 of the OSI Model (or lower) is specifically mandated by the Statement of Expectations issued by NBN Co's shareholder Ministers, which makes it clear that NBN Co *"will offer open and equivalent access to wholesale services, at the lowest levels in the network stack necessary to promote efficient and effective retail level competition, **via Layer 2 bitstream services**"* [emphasis added].⁴⁸

Telstra acknowledges that NBN Co has sought to give effect to its shareholders' expectations in the NBN Co SAU, but notes that NBN Co has also identified specific areas where "Layer 3 awareness" is needed. Telstra has no objections to the specific areas that have been identified but is concerned that clause 1A.2.6 of the NBN Co SAU currently leaves room for NBN Co to identify further areas for supply at Layer 3 (without any regulatory

⁴⁶ Telstra notes that the NTD is defined as being "owned, operated or controlled" by NBN Co and is specifically designated as part of the NBN Co Network by its inclusion in the definition of NBN Co Equipment.

⁴⁷ NBN Co, "NBN Co consultation paper: proposed wholesale fibre bitstream products", December 2009.

⁴⁸ NBN Statement of Expectations dated 17 December 2010, p 2.

oversight or industry consultation) because it is not expressed to be an exhaustive statement about the extent to which NBN Co may supply at Layer 3. As currently drafted NBN Co could decide to introduce additional Layer 3 awareness capabilities without any further regulatory oversight or industry consultation.

Given the NBN Access Service is defined as a Layer 2 service,⁴⁹ Telstra believes it is important to ensure that the NBN Co SAU is exhaustive about the extent to which NBN Co may supply at Layer 3. If in the future NBN Co believes a further exception to the Layer 2 requirement is needed, it should effect this through a variation to the NBN Co SAU, at which point the relevant exception could be considered on its merits.

3.2.2. Ancillary Services

The NBN Co SAU is also given in relation to “Ancillary Services”, which is defined as:

“ . . . the services supplied by NBN Co that facilitate the supply of, and are necessary for Access Seekers to acquire, the NBN Access Service, including:

- (a) a service supplied by NBN Co that supports an Access Seeker to perform activation and assurance related transactions; and*
- (b) a test and verification service supplied by NBN Co that enables an Access Seeker to prepare for, and perform, certain network and operational interoperability testing in relation to the NBN Access Service and development and implementation by that Access Seeker of Carriage Services, Content Services and operational platforms that utilise components and functionality of the NBN Access Service,*

but excludes the Facilities Access Service.”⁵⁰

NBN Co will meet its obligation to supply Ancillary Services by offering to supply the “Platform Interfacing Service” and the “Sandpit”.⁵¹

Telstra welcomes the inclusion of these Ancillary Services within the scope of the NBN Co SAU and generally supports the construct that the NBN Co SAU establishes in relation to the supply of Ancillary Services. Telstra is also supportive of the service descriptions that have been used to define the Platform Interfacing Service and the Sandpit.

However, because the NBN Access Service is described in functional and technology neutral terms (something which Telstra generally supports), it remains difficult to know where NBN Co intends to draw the line between the NBN Access Service and Ancillary Services (or, in fact, whether the service feature or component is covered by the commitments in the NBN Co SAU at all).

Service qualification is a good example. If NBN Co were to impose limitations on the number of daily transactions that an RSP is able to carry out through the NBN Co service qualification systems, this will have the effect of “choking” the flow of end-user orders that can be processed by RSPs on a daily basis and will also give rise to the possibility that NBN Co may seek to introduce charges where the prescribed daily limit is exceeded. These issues are material, yet

⁴⁹ NBN Co SAU, Attach A, cl 2(a).

⁵⁰ NBN Co SAU, Attachment A, cl 3.

⁵¹ NBN Co SAU, cl 1A.4.1 and cl 1A.4.2.

it is not clear how they would be able to be addressed through the NBN Co SAU because service qualification is not something that is strictly “necessary to acquire” the NBN Access Service.

For these reasons, Telstra believes it is critical that service components or features (whether intrinsic to supply or of a more general supporting nature) do not remain “at large”. RSPs must have confidence that they know precisely what they will receive as part of the NBN Access Service, and for those service features or components that fall outside of this scope, whether the NBN Co SAU will apply to these as Ancillary Services. As currently drafted, this remains unclear.

3.2.3. Facilities Access Service

NBN Co makes certain commitments in relation to the “Facilities Access Service” in the NBN Co SAU in connection with the satisfaction of its interconnection obligations under section 152AXB(4) of the CCA in relation to the NBN Access Service and the Ancillary Service.

The Facilities Access Service is defined as:

“ . . . a service that provides:

- (a) cross connection;*
- (b) co-location for a Carrier or Carriage Service Provider to install, operate and maintain its telecommunications equipment at or near an Established POI for the purpose of supporting interconnection with the NBN Co Network in connection with the NBN Access Service and the Ancillary Services;*
- (c) NBN Co ODF termination point; and*
- (d) other Facilities supplied by NBN Co that are necessary to facilitate entry to buildings, such as cable trays or building duct access⁵².*

NBN Co will implement the Facilities Access Service by offering to supply the following types of facilities access:

- **Cross-Connect:** which provides point-to-point connectivity between certain pairs of locations within the relevant Aggregation Node Site;
- **NBN Co Co-Location:** which enables a Customer to install, operate and maintain Customer Active Equipment in Rack Space;
- **NBN Co ODF Termination Point:** which enables a Customer’s lead-in or backhaul transmission cables to be connected by NBN Co to the NBN Co ODF at the relevant Aggregation Node Site;
- **other facilities:** other Facilities supplied by NBN Co that are necessary to facilitate entry to buildings such as cable trays or building duct access; and
- **new services:** such other types of facilities access that NBN Co introduces in accordance with Schedule 11.

⁵² NBN Co SAU, Attachment B, cl 2.

Telstra welcomes the inclusion of the commitments that have been given by NBN Co in relation to the Facilities Access Service in the NBN Co SAU and accepts that these commitments are given in recognition of NBN Co's interconnection obligations under section 152AXB(4) of the CCA in relation to the NBN Access Service and Ancillary Services.

3.3. Service Levels

3.3.1. General observations

As foreshadowed in Telstra's Previous Submission, Telstra considers that the NBN Co SAU must contain a robust and future proofed service level regime that recognises the need for performance related incentives to drive high quality service delivery.

Telstra acknowledges that the service levels included in the NBN Co SAU are an improvement on those included in the December 2011 SAU. However, Telstra does not believe the approach taken to service levels in the NBN Co SAU will promote the LTIE.

The terms of the Service Level Schedule have evolved materially in recent times. The relevant provisions have gone through an evolutionary process that is entirely appropriate, adjusting to improvements in NBN Co's processes and systems (and an increased level of confidence in NBN Co's ability to provide assurance on basic performance criteria). Despite this, the Service Level Schedule, in its current form, still falls short of Telstra (and end-user) expectations, in particular:

- the service level regime fixes service levels for an inappropriate length of time;
- the service levels are not adequate to enable RSP compliance with downstream regulatory obligations;
- the service levels proposed are not aligned with current end-user expectations (including where such expectations arise from current levels of service delivery) and, further, NBN Co's measurement and monitoring commitments are not absolute but rather are subject to a "reasonable endeavours" limitation which will call into question the integrity of reporting information provided;
- the sanctions and performance obligations currently proposed by NBN Co and which arise in the event of any failure to meet a service level are either non-existent or impose relatively weak commitments and constraints on NBN Co and, as a result, are not considered to be sufficient to create appropriate incentives for NBN Co to provide an appropriate level of service assurance;
- a number of service levels important to promoting the LTIE are not in the NBN Co SAU or fall short of current end user expectations; and
- the process for ongoing review of, and changes to, service levels is insufficient in light of the dynamic market requirements and evolving NBN Co product and service set.

With this in mind, and having considered the service specific detail of the NBN Co SAU, Telstra believes that NBN Co's approach to service levels should be reconsidered. In the remainder of this section, Telstra explains its key concerns with the current approach and puts forward a proposed solution.

3.3.2. Specific comments on the service level regime

Service levels should not be “locked in” for any material length of time

Telstra considers that service levels must not be “locked in” for any material length of time. Telstra believes that to do so at this juncture would be detrimental to the LTIE as any “lock in” would not provide the necessary flexibility to adapt and improve service and performance levels over time in what is a dynamic and continuously evolving market.

Telstra expects that ROs and NROs will continuously evolve over the term of the NBN Co SAU, including over the Initial Regulatory Period. Telstra also believes that performance related commitments from NBN Co will need to materially improve (and will do so) on an ongoing basis, and expects that NBN Co will deliver the same or better customer experience to that which customers currently experience today. This is a baseline requirement at the time of migration to the NBN, however the NBN Co SAU will also need to be dynamic in this regard, capable of evolving in line with the continual development of NBN services and products, the improving level of NBN Co performance and the resultant evolution of customer demands and expectations.

Furthermore, effective economic and performance incentives in the form of rebates and positive obligations to remediate areas of service deficiency are required in the event that service level failure arises. Such economic and performance incentives must be sufficient in both quantum and effect to drive appropriate NBN Co behaviour with respect to service quality and will also require continued review to promote the LTIE.

For this reason, Telstra considers that detailed service levels should not be set out in the NBN Co SAU, but rather:

- the service level details, including economic and performance incentives, should be contained in the SFAA and subject to regulatory oversight;
- the development and enhancement of the service levels should take place according to settled processes and principles set out in the NBN Co SAU (with the output included in the SFAA); and
- the definitions, obligations, processes and principles in respect of service levels in the NBN Co SAU should be subject to annual review by the ACCC (the midpoint review proposed under the NBN Co SAU is considered to provide insufficient protection in this regard and will not promote the LTIE).

The approach proposed by Telstra will provide assurance to all relevant parties, including end-users, that service levels can and will (a) evolve in line with changes to NBN Co’s capability, (b) change to reflect new products developed and introduced, and (c) meet (and exceed) end-user expectations.

To this end, Telstra proposes a number of high-level commitments that it believes should be incorporated in the NBN Co SAU and which would replace the detailed service level terms and conditions currently being proposed. These are set out in the examples and Table 1 below.

Examples of where commitments are not sufficiently robust to enable downstream regulatory compliance

The service levels to which NBN Co is subject must be sufficient to enable RSPs to meet downstream regulatory obligations. These obligations may change over time so, consistent with the statements above, service levels should be dynamic enough to adjust accordingly.

As currently drafted, the NBN Co SAU does not allow for this. This is most acute in relation to commitments associated with the CSG and Priority Assistance. Specifically (and by way of limited example only):

- the “CSG Compensation” regime in the NBN Co SAU requires RSPs to undertake a number of actions to “avoid or mitigate” CSG liability, including a mandated obligation to offer an alternative service and obligations to pursue waivers from end-users.⁵³ Mandating avoidance in this way is neither consistent with the legislation nor practical, given the NBN Co compensation processes;
- the NBN Co SAU includes an assumption built on a 10% ceiling (as a proportion of total ordered connections) for NBN Co in relation to “Accelerated Connections” (where Accelerated Connections consist exclusively of CSG services). CSG services that fall outside the 10% cap, as determined by NBN Co, will be treated as simple end-user connections and, as a result, could have to wait for up to 2 weeks beyond the regulated CSG timeframe. End-users should be able to expect that NBN Co will perform services in a manner that enables RSP compliance with all CSG-related service levels without being limited by an assumption determined by NBN Co. To do otherwise would promote a regime that falls materially short of that in place today (and, in Telstra’s view, would result in a regime that fails to promote the LTIE);
- the CSG compensation process does not align with the realities of a mass roll out where CSG related obligations are likely to arise with increased frequency (as distinguished from the processes that may be required for established networks). Taking into account the nascent stage of NBN Co’s network rollout and the expected increase in CSG compensation claims, Telstra anticipates that NBN Co’s processes (which are yet to be tested) will come under significant strain as the rollout of NBN Co’s network ramps up. Telstra also notes that NBN Co is a wholesale-only supplier, so is not directly responsible to end-users for CSG compliance. On this basis, Telstra believes that it would be more efficient, and would better incentivise NBN Co (as a wholesale-only supplier) to strive for CSG compliance, to establish a process which requires NBN Co to compensate RSPs up front, rather than impose a regime which requires RSPs to submit claims for compensation; and
- the associated processes that NBN Co provides to support the provision of Priority Assistance services to end-users do not, on all occasions, enable RSPs to fulfil their obligations within the regulated timeframes. For example, with respect to a repair and for the purposes of fault resolution, NBN Co does not commence counting time against the relevant service level until it acknowledges the trouble ticket from the RSP, but the RSP’s obligations to a relevant end-user commence when the end-user has reported the fault. Because the NBN Co service level absorbs 100% of the regulated timeframe for a Priority Assistance repair (which would only be appropriate if the time

⁵³ NBN Co SAU, Schedule 1J, Part C, sections 14.1(c) and 15.

measurement commenced at the same point, i.e. when the end-user reported a fault) any lag by NBN Co in acknowledging the trouble ticket reduces the regulated time available to the RSP.

Telstra's concerns about regulatory compliance are also detailed in the NPTC review set out in section 5 (Non-price terms and conditions) below. Telstra believes that high-level commitments in relation to regulatory compliance should also form part of NBN Co's NPTC commitments.

Examples of service levels that are not addressed by the NBN Co SAU

It is important that those service levels that are critical to ensuring a high quality end-user experience are defined in the NBN Co SAU. There are a number of service levels (important to ensuring and promoting the LTIE as well as meeting regulatory obligations) that are not in the NBN Co SAU, for example, service levels related to complaint resolution and network shortfall provisioning where NBN Co has stated its intention to deploy network or is the relevant infrastructure provider of last resort.

RSPs must have confidence that NBN Co will address the complaints that are received from end-users' and that NBN Co is incentivised to deploy its network as scheduled in accordance with regulatory standards. In the absence of any service levels to incentivise NBN Co to do so, RSPs are faced with the risk that they may be required to incur additional costs associated with NBN Co's delay. Of course, delays will ultimately impact end-users, who would be forced to wait longer for network services over the NBN to be provided.

It is also important that service levels (or mechanisms that assist with the development of service levels) associated with undeveloped and undelivered roadmap products are defined in the NBN Co SAU. This will provide NBN Co with strong incentives to ensure the service level regime remains relevant and effective over time.

Example of service levels falling short of end-user expectations

Some service levels proposed by NBN Co will fall considerably short of end user expectations based on current experience. By way of example, and with respect to the shared network utilisation performance metric, Telstra has consistently been of the view that the threshold for this service level, consistent with end user expectation, should be set at 3 or more events over a 6 week period where network utilisation exceeds 70% during a 30 minute window.

However, and while NBN Co agrees that this service level is critical to ensuring congestion is adequately managed, NBN Co has proposed a service level based on 3 or more events over a 7 day period. If this measure was to be accepted and NBN Co managed to the metrics proposed, this would result in significant levels of congestion and a negative end-user experience (with the corresponding complaints and customer service issues needing to be managed by RSPs) before NBN Co is required to act to address network congestion issues (and noting that, as proposed by NBN Co, the remediation obligation of NBN Co is one which requires it merely to "aim" to return utilisation to below the threshold within 15 business days⁵⁴).

3.3.3. Telstra's proposed service level solution

Based on the submissions set out above, Table 1 below sets out Telstra's proposed alternative to the service level regime set out in the NBN Co SAU. It is premised on the current NBN Co SAU Schedule 1J "Service Level Commitments" being removed in its entirety and being

⁵⁴ NBN Co SAU, Sch 1J, Part A, section 11.3(b).

replaced with the higher level commitments set out in the table below. Telstra believes that this alternative approach would generate a robust service level regime which will flex as NBN Co products and services evolve and as NBN Co capability increases (thus avoiding distortions in retail market outcomes and limiting detrimental impacts on the LTIE).

If this approach is not accepted or adopted as part of any refinements to the NBN Co SAU, then Telstra considers that the service levels outlined in its CDP submission to NBN Co would form a more appropriate basis for a more definitive service level regime. Telstra is able to provide this on request.

Table 1: Proposed high-level Service Level commitments

Service Area	Service Level Commitments
<p>Development of Service Levels</p>	<p>Appropriate service levels (including the relevant metrics to measure performance against service levels) must accompany each product and/or service (including each product or service contained within the “initial product roadmap” and any new, developed or enhanced product or service).</p> <p>Such service levels must be developed in consultation with RSPs (with regulatory oversight from the ACCC).</p> <p>The development of such service levels will be subject to the following overriding principles:</p> <ul style="list-style-type: none"> a) service levels must be sufficiently robust, with sufficient headroom, to ensure RSPs are able to rely on NBN Co’s performance to allow such RSPs to meet their downstream regulatory obligations; b) service levels must be capable of enabling RSPs to deliver a service experience for their end-users and downstream customers which is at least the same as the end-to-end service experience for comparable products and services which is experienced prior to their connection to the NBN; c) service levels must include measurable performance targets set against predefined, objective metrics (e.g. timeframes, percentage-based thresholds) and NBN Co must provide accurate reporting information; d) rebates must be available for any failure to meet a service level. The quantum of such rebates must be sufficient to ensure NBN Co corrects previous performance deficiencies and to reflect the reduction in value to an RSP of the relevant product/service delivered; e) service levels must, where relevant and based on the categories of products being provided, be aligned with the legitimate expectations of sophisticated customers; f) service levels must support the adoption and continued usage of the relevant NBN Co product or service by end-users by mandating a level of service which is commensurate with the price applicable to the product or service; and g) service levels must be consistent with any relevant international

	benchmarks for comparable products and services (where those benchmarks are normalised for local conditions).
Obligation to review	<p>NBN Co must conduct a formal review (through an industry wide forum established for this purpose and with necessary regulatory oversight provided by the ACCC) of existing service levels on an annual basis during the term of the NBN Co SAU. There can be no change in service levels which is or would be detrimental to RSPs compared with the service levels in place during the previous 12 months.</p> <p>Minimum criteria for consideration at each such review include the following:</p> <ul style="list-style-type: none"> a) NBN Co's performance against existing service levels; b) the relevance of the service levels to downstream customer (including end-user) expectations; c) relevant international benchmarks for comparable products and services (where those benchmarks are normalised for local conditions); d) the effectiveness of a service level in supporting RSPs end-to-end delivery of services to downstream customers (including end-users) (including the effectiveness of a service level in ensuring RSPs are able to comply with downstream regulatory obligations taking into account any changes in regulatory commitments); e) the effectiveness of the service levels in supporting adoption of NBN products and services by downstream customers (including end-users); f) downstream customer (including end-user) perception of the service levels; g) the effectiveness and appropriateness of applicable rebates and remediation commitments; and h) reporting accuracy.
Implementation of results	NBN Co must implement changes to existing or new service levels and changes to associated supporting processes required as a result of the review detailed above, via the change management provisions contained within the SFAA and Access Agreements.

3.4. Product development and withdrawal

3.4.1. General observations

As the history of the telecommunications sector in Australia has shown, the product suite of tomorrow will look very different to the product suite of today. It is therefore important to acknowledge that the commitments about the introduction, variation and withdrawal of products are just as important as the commitments that are made about the products themselves.

The introduction, variation and/or withdrawal of products, or product features, will have potentially significant downstream impacts on RSPs and their downstream customers. It is therefore imperative that the product development and withdrawal commitments in the NBN Co SAU are appropriate and effective from the outset. These commitments should not only foster innovation and efficient decision making, but they should also provide for appropriate levels of industry consultation and regulatory oversight (both in terms of price and non-price aspects of supply).

To this end, Telstra proposes some key enhancements to the product development and withdrawal commitments in the NBN Co SAU. This section considers both the merits of the current regime and proposals to improve the product development and withdrawal processes.

Telstra has not proposed detailed drafting at this time, given there are such significant issues with the underlying principles. In the event that NBN Co does not amend the NBN Co SAU to address these concerns, in the manner contemplated by Telstra in this submission, Telstra reserves the right to provide detailed comments regarding the specific matters that arise from the drafting of Schedule 1I, including the PDF Processes.

3.4.2. Product development

NBN Co has adopted a product construct which provides a functional service description, and allows the NBN Co SAU to “expand” as new products, which fall under this service description, are developed. It is important that, as part of this construct, new products are subject to the same level of consultation and regulatory scrutiny as the products which are expressly included in the NBN Co SAU (i.e. the ROs and NROs). To do otherwise means there are two very different levels of consultation and regulatory oversight provided for the current set of products and for those yet to be developed.

Telstra is concerned that the product development commitments in Schedule 1I of the NBN Co SAU, and the PDF Processes contained in Annexure 1 to that Schedule, provide NBN Co with a significant degree of discretion about whether, when and how it will consult with RSPs in relation to the development (including variation) of its product suite. Telstra is also concerned that the confidentiality and intellectual property terms that form part of the PDF Processes do not provide the flexibility needed to encourage participation by RSPs and, ultimately, promote product innovation.

As a consequence, Telstra considers that the current product development regime provides limited incentives for NBN Co to meaningfully engage with industry on the one hand, and for industry to participate in product development on the other. In the remainder of this section Telstra explains its key concerns with the current approach to product development and, where relevant, puts forward its proposals to resolve these concerns.

3.4.2.1. Addressing the exclusions, carve-outs and discretions available to NBN Co

A number of exclusions, carve-outs and discretions have been built into the product development commitments in the NBN Co SAU. In some cases, Telstra believes that these can be readily addressed through drafting clarifications, while in others Telstra queries whether an exemption is justified, particularly when a more constructive approach can be taken.

The issues of particular concern to Telstra are discussed below.

Initial Product Roadmap

The NBN Co SAU excludes from the product development commitments in Schedule 11 all products which have been identified by NBN Co in its Initial Product Roadmap.⁵⁵ In its Supporting Submission NBN Co states that it believes that this exclusion is warranted on the basis that it believes that it has already undertaken consultation in relation to these products.

Telstra notes, however, that products which have not been included in the NBN Co SAU have not received the same degree of scrutiny and regulatory oversight as the ROs and NROs. RSPs require certainty that such products will be subject to the express product development commitments in the NBN Co SAU to ensure that they are subject to the requisite level of scrutiny and regulatory oversight which should be afforded to all products (current, or to be developed). It is not appropriate to include an exemption from the consultation commitments on the basis of NBN Co's belief that sufficient consultation has been undertaken. There is no evidence that the consultation NBN Co has undertaken to date would be sufficient to comply with the consultation processes that may ultimately be approved by the ACCC in the NBN Co SAU.

Statutory requirement to supply

The introduction of Product, Product Component or Product Feature that NBN Co is obliged to offer pursuant to a licence condition imposed under section 41(1) of the *NBN Companies Act 2011* (Cth) (**NBN Companies Act**) is expressly excluded from the operation of the product development commitments.⁵⁶

Telstra appreciates that NBN Co will need to ensure it is able to comply with its statutory obligations, however, Telstra does not believe this warrants a complete exemption from the NBN Co SAU. If an exemption is to be included, it should only apply to the extent that NBN Co is unable to comply due to its statutory obligations. Telstra expects this will only bite in limited circumstances because in most cases Telstra expects that it will be possible for NBN Co to comply with its commitments in the NBN Co SAU as well as its statutory obligations. In addition, it is also very likely that the responsible Minister will have regard to the NBN Co SAU when developing the terms of any direction to NBN Co to supply a particular service.

Accordingly, Telstra proposes that the exclusion be limited only to circumstances where NBN Co is subject to competing and inconsistent obligations. This will ensure that NBN Co is able to continue to meet its statutory obligations while providing certainty for RSPs that NBN Co is committed to complying with the product development commitments in the NBN Co SAU in the event that NBN Co is not prevented by statute from doing so.

Minor Product Changes

The NBN Co SAU excludes from the operation of the product development commitments product variations or enhancements which update or improve functionality or performance and which NBN Co reasonably determines will not have a material adverse impact on Customers.⁵⁷

⁵⁵ NBN Co SAU, Sch 11, cl 11.1.3(b)(i).

⁵⁶ NBN Co SAU, Sch 11, cl 11.1.3(b)(ii).

⁵⁷ NBN Co SAU, Sch 11, cl 11.1.3(b)(iii).

Telstra is concerned that a complete exclusion for these so-called “minor” product changes delivers significant discretion to NBN Co and increases the likelihood that the boundaries of what is “minor” will be tested by NBN Co. For example:

- NBN Co could determine a variation or enhancement to be “minor” where a relevant change may in fact materially impact a number of RSPs, but not others. This seems highly probable in circumstances when RSPs may be impacted in varying ways – the impact that a change may have on one RSP may be insignificant but for another RSP the same change may have a material impact. The NBN Co SAU seems to treat the test as an aggregate test (i.e. the impact on RSPs as a whole), such that NBN Co could seek to define a change as minor on the basis that only a proportion of RSPs are materially impacted. This would not be in the interests of RSPs, individually, or as a whole.
- The test that applies in determining whether a change is minor is whether it will have a material adverse impact. While Telstra notes that NBN Co is required to act reasonably when making this determination, Telstra believes that this nevertheless provides a great deal of scope for NBN Co to by-pass the product development and withdrawal commitments. For example, NBN Co could take the view that because a change results in an “enhancement” or “improvement” to the applicable service there will not be any adverse impacts to RSPs. There is no requirement to consult with RSPs as to whether this is in fact the case and, indeed, there is no requirement to have regard to the views expressed by RSPs about this.

Rather than exclude “minor” product changes altogether, a more constructive approach would be to include specific commitments about the way in which NBN Co proposes to deal with “minor” product changes (for example, the criteria that NBN Co will use to determine whether a product change is ‘minor’ and the process that it proposes to implement for these changes). This will provide RSPs and the ACCC with the opportunity to consider NBN Co’s proposal on its merits, rather than face the uncertainty of what NBN Co might choose to do in the event it determines a product change to be “minor”.

Service Levels

Under the NBN Co SAU, NBN Co will not be required to subject the development of service levels to the product development commitments where NBN Co is “unable to offer service levels (including any applicable remedies) prior to [its] introduction”.⁵⁸ This appears to provide a means for NBN Co to “end run” the product development processes when it comes to service levels.

As explained in section 3.4.2.2 below, Telstra proposes that the service levels applicable to new products be fully developed, documented and consulted on before they are introduced by NBN Co on a commercial basis. It follows from this view that Telstra proposes this exclusion be removed.

Ancillary Services and Facilities Access Service

There seems to be a level of confusion in the drafting of Schedule 11 regarding the extent to which the commitments apply to Ancillary Services and Facilities Access Service. For example, the product development commitments in clause 11.1.2 do not mention Ancillary

⁵⁸ NBN Co SAU, Sch 11, cl 11.3.6(b)(b).

Services or the Facilities Access Service whereas the product withdrawal commitments in clause 11.5 do. Similarly, clauses 11.1.3(b)(i), (ii) and (iii) do not mention these services but clause 11.1.3(b)(iv) does.

Also, as noted further below, Ancillary Services and the Facilities Access Service have been excluded from the definition of “Product Idea”, with the result that the PDF Processes in Annexure 1 of Schedule 1I will not apply to these services.

There is no apparent reason why these services should be excluded from some provisions and not others. The NBN Co SAU would benefit from the clarification of this issue.

Product variations generally

The NBN Co SAU predominantly makes reference to “product development” and “product withdrawal” and only on a select few occasions makes reference to product variations.⁵⁹ Telstra assumes that it is intended for product variations (including release timing of variations) to be addressed by the existing references to product development but proposes that this issue be clarified.

3.4.2.2. PDF Processes - Industry engagement

The PDF Processes themselves also provide a significant degree of discretion for NBN Co about whether, when and how it will consult with RSPs in relation to the development (including variation) of its product suite.

For example:

- at the assessment stage of a Product Idea (i.e. before the decision about whether to proceed with developing the Product Idea is made) there is no requirement for NBN Co to consult with RSPs. Clause 11.3.3 also gives NBN Co complete discretion to determine the criteria that it considers to be appropriate for considering and selecting Product Ideas (something which Telstra considers is at odds with clause 11.1.2, which lays down specific principles that apply to product development);
- at the development stage of a Product Idea (i.e. after the decision has been made to proceed with developing a Product Idea) the decision about whether to invite formal submissions and conduct workshops is a matter over which NBN Co has discretion;⁶⁰
- where NBN Co does decide to engage RSPs, the matters that are subject to consultation, and the lead times that are to be afforded to RSPs to respond, also appear to be largely at NBN Co’s discretion;
- Ancillary Services and Facilities Access Services have been excluded from the definition of “Product Idea”, with the result that the PDF Processes will not apply to these services; and
- it is not clear whether the PDF Processes are intended to apply to Product Ideas which have been organically developed by NBN Co because the PDF Processes appear to

⁵⁹ The only clauses where product variations are mentioned are NBN Co SAU, Sch 1I, cl 11.1.3 and the exclusion that applies for minor product changes in NBN Co SAU, Sch 1I, cl 11.4.

⁶⁰ NBN Co SAU, Sch 1I, Annexure 1. cl8.1(a) for example provides that NBN Co ‘may’ arrange workshops. Similarly, NBN Co SAU, Sch 1I, Annexure 1. cl 9.1(a) provides that NBN Co ‘may’ request formal submissions.

have been developed on the assumption that they will only apply in circumstances where NBN Co has received a Product Idea.⁶¹

More generally, Telstra believes that more work is needed to ensure that the industry engagement terms of the PDF Processes provide positive incentives for NBN Co to ensure that the processes it undertakes to consult with industry in relation to product development are meaningful and effective.

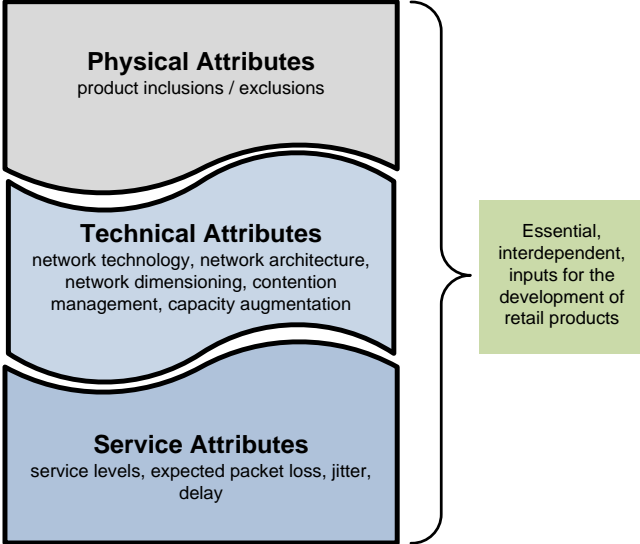
In this regard, Telstra's specific proposals are set out in Table 2 below. In developing these proposals Telstra has sought to draw on concepts that are already utilised in the PDF Processes (where relevant).

Table 2: Proposed industry engagement model for product development

Subject matter	Telstra's proposal
Scope of PDF Processes	<p>The PDF Processes should apply to all NBN products and services. In particular, the development of (or variation to) Ancillary Services and Facilities Access Services should not be excluded.</p> <p>The PDF Processes should also apply to Product Ideas that NBN Co has organically developed (in addition to those that have been submitted to NBN Co).</p>
Product Ideas Register	<p>Telstra welcomes NBN Co's commitment to publish and maintain a register of Product Ideas and considers this to be a positive feature of the PDF Processes.</p> <p>At a minimum, the following information should be required to be included in the register:</p> <ul style="list-style-type: none"> • information that NBN Co possesses in relation to the Product Idea (subject to confidentiality requirements); • the date that the Product Idea was received by NBN Co, or was developed by NBN Co; • the date that Product Idea was included in the register; • the status of NBN Co's decision regarding the development of the Product Idea (e.g. accepted / rejected / pending); and • the status of the development of that Product Idea (e.g. finalised / pending / ceased). <p>The register should be updated as soon as possible after a Product Idea is received, or has been organically developed, by NBN Co.</p>
Assessment Phase	<p>A requirement to undertake mandatory consultation in relation to NBN Co's assessment of a Product Idea, and ultimately the decision whether to invest in its development, should be enshrined in the PDF Processes.</p>

⁶¹ NBN Co SAU, Sch 11, Annexure 1. cl 4.3(a) for example applies only in respect of Product Ideas received by NBN Co and NBN Co SAU, Sch 11, Annexure 1. cl 4.3(b) applies only in respect of Product Ideas 'submitted'. Similarly, the commitments in NBN Co SAU, Sch 11, Annexure 1. cl 7 relate to the assessment of Product Ideas, which seems to suggest that this only applies to Product Ideas that have been submitted to NBN Co.

	<p>The decision about whether to proceed with development is a matter that concerns all of industry and should not occur in isolation. RSPs must have confidence that they will be given the opportunity to put forward their views, and have them considered, as part of NBN Co's assessment.</p> <p>In addition, the consultation processes that NBN Co uses should be subject to overriding principles which are equivalent to those proposed by Telstra in relation to the development phase of a Product Idea (set out further below).</p>
<p>Decision to Develop</p>	<p>As soon as possible after NBN Co makes a decision to approve or reject development of a Product Idea, this should be communicated by means of updating the Product Idea register.</p> <p>Notification should also occur where NBN Co decides to cease developing a Product Idea (having initially decided to do so).</p> <p>Importantly, where NBN Co decides to reject a Product Idea, or to cease developing a Product Idea, NBN Co should provide reasons for this.</p>
<p>Product Construct Paper</p>	<p>Telstra welcomes NBN Co's commitment to the preparation of a more detailed "Product Construct Paper" in circumstances where the decision to proceed with developing a Product Idea has been made. Telstra is also generally supportive of the type of content that NBN Co proposes to include in the Product Construct Paper.</p> <p>Importantly, however, the Product Construct Paper should also include information about the proposed price-related terms of supply.</p>
<p>Development Phase</p>	<p>Mandatory consultation should occur throughout the development phase of each Product Idea.</p> <p>Telstra welcomes NBN Co's commitment to the development of an "Idea Development Plan" but believes that it is important to enshrine a set of overriding principles that will guide its development.</p> <p>The overriding principles that Telstra proposes are as follows:</p> <ul style="list-style-type: none"> • Product Construct Papers should be regularly updated each time material changes are made. This will ensure that RSPs are kept abreast of developments at appropriate stages throughout the development process. • As a minimum requirement, RSPs must be given the opportunity to make formal submissions in response to the matters included in the Product Construct Paper (and each update to the Product Construct Paper). This will provide RSPs with an opportunity to put forward their views (and have them considered) as the Product Idea develops. • The Idea Development Plan must include a proposal regarding the use of workshops and other forums as part of the consultation process and must provide reasons why NBN Co considers this proposal to be reasonable and appropriate in the circumstances (including where NBN Co determines that it will

	<p>not undertake any workshops or other forums). This will incentivise NBN Co to develop a proposal that has been properly considered and is appropriately balanced.</p> <ul style="list-style-type: none"> • The Idea Development Plan must include a proposal regarding the use of both bi-lateral and multi-lateral consultation as part of the consultation process and must provide reasons why NBN Co considers this proposal to be reasonable and appropriate in the circumstances. Again, this will incentivise NBN Co to develop a proposal that has been properly considered and is appropriately balanced. • NBN Co must ensure that lead-times afforded to participants for lodgement of submissions and participation in workshops and other forums are reasonable. This will give RSPs confidence that they will be given sufficient time to consider the issues at hand and participate meaningfully in the consultation process. • NBN Co should be required to continuously review (and, if appropriate, revise) the Idea Development Plan to ensure that it continues to be relevant and appropriate, and to ensure that appropriate adjustments are made in the event that circumstances changes. • Finally, NBN Co should be subject to a positive obligation to consider, and have regard to, the views and submissions put forward by participants. This is essential to providing industry with confidence that the consultation processes will afford them a genuine opportunity to participate and have their views considered.
<p>“PASS” Test</p>	<p>In its Previous Submission Telstra identified three fundamental attributes that must be known about each product in order for RSPs to have the requisite degree of certainty about that product. These three attributes are illustrated in Figure 5 below.</p> <p style="text-align: center;">Figure 5: Fundamental product attributes</p> <div style="text-align: center;">  </div>

	<p>As Figure 5 illustrates, these product attributes are interdependent and it is not possible for RSPs to develop retail products if only part of this product "package" is known.</p> <p>Accordingly, Telstra proposes that a test (which Telstra refers to as the "PASS" test) be applied to each Product Idea before it is introduced as a commercial proposition.</p> <p>The "PASS" test would require NBN Co to establish, as a pre-condition to the introduction of a new product:</p> <ul style="list-style-type: none"> • that the product attributes, technical attributes and services attributes of the Product Idea are complete and have been fully documented; and • that it has undertaken consultation in relation to these matters as required by the PDF Processes.
<p>Integrated Roadmap</p>	<p>Telstra notes that, in practice, the theoretical development of a product is of little value unless that product is supported by NBN Co's IT systems and operational capabilities. Without this support, the "theoretical" product will not be capable of being physically implemented.</p> <p>It is therefore critical for RSPs to understand how each of these key elements (i.e. product development, IT support and operational support) will "come together", so that they are in a position to plan and deploy resources appropriately and efficiently.</p> <p>To this end, Telstra proposes that NBN Co commit to publishing and maintaining an "integrated roadmap". The roadmap would identify each Product Idea that is under development and would contain the quarterly development programs (covering the ensuing 12 month period) through which IT and operational support for that Product Idea are to be developed.</p> <p>The road map should then be updated each quarter as new quarterly development programs are released.</p>

3.4.2.3. PDF Processes - Intellectual property and confidentiality

General observations

The PDF Processes in Schedule 11: Annexure 1 contain specific IP and confidentiality provisions in relation to product development activities. Telstra supports the disaggregation of these provisions from the "business as usual" provisions⁶² on the basis that the PDF processes need to be flexible and adaptable to encourage industry participation and innovation.

NBN Co has stated that *"the confidentiality and IPR arrangements [in the PDF Processes]... strike an appropriate balance between the interests of Customers to protect their confidential information and IPR rights and the need for NBN Co to consult transparently and in*

⁶² NBN Co SAU, Sch 1H: Annexure 2, cl 5.

accordance with its non-discrimination obligations to ensure the development of new products".⁶³ Telstra agrees that it is imperative that this balance be appropriately struck.

However, Telstra remains concerned that aspects of the PDF:

- do not adequately recognise and protect RSP confidential information and/or IPRs;
- do not adequately recognise and address third party IPR;
- impose onerous obligations (and potentially "penalties") on RSPs for a failure to identify submitted confidential information or IPR at or shortly after the time of submission;
- include provisions that are not relevant in a product development context; and
- are overly rigid and do not support the flexibility that is required to encourage product innovation through the PDF by RSPs of different sizes and risk profiles.

As a natural consequence, Telstra believes that it is likely that RSPs will be reluctant to submit materials to the PDF or even to actively participate, thereby compromising the intended effect of the PDF and the achievement of the product development principles.⁶⁴

Telstra has set out its key concerns with the PDF confidentiality and IP provisions below. In doing so, Telstra has been mindful of NBN Co's concern (shared by Telstra) to maintain the integrity of the PDF processes and ensure that the process is not "gamed".⁶⁵

Confidentiality

Telstra supports the removal of the stand-alone multi-party confidentiality agreements previously proposed. Nevertheless, Telstra highlights the following aspects of the confidentiality regime that require amendment:

- RSPs are required to identify their confidential information in writing at, or shortly after, the time of submission (through a range of different engagement processes, not just PDF).⁶⁶ Consequently a failure to identify information as confidential would render that information able to be freely used and disclosed. While Telstra acknowledges that NBN Co needs to have the confidence to use information provided, Telstra believes a more pragmatic solution would be for confidentiality to apply to information that could reasonably be inferred to be confidential from the circumstances surrounding its disclosure.
- NBN Co has seemingly lifted numerous aspects of the "business as usual" confidentiality regime into the PDF confidentiality regime (for example, use and disclosure rights for credit purposes, statutory consents etc), despite many of those provisions having no relevance to product development.⁶⁷ It appears to Telstra that many of the confidentiality provisions have been taken from the "business as usual"

⁶³ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p.92.

⁶⁴ NBN Co SAU, Sch 11, cl 11.1.2, NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012 p.89 – 90.

⁶⁵ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p.93.

⁶⁶ NBN Co SAU, Sch 11: Annexure 1, cl 5.1(a),(b).

⁶⁷ For example, the following seem irrelevant: disclosure to complete a review of Customer's credit risk (NBN Co SAU, Sch 11: Annexure 1, cl 5.3(c)(v)(A)), to a debt collection agent (NBN Co SAU, Sch 11: Annexure 1, cl 5.3(c)(v)(C)), or consents under the CCA (NBN Co SAU, Sch 11: Annexure 1, cl 5.9 – 5.11).

provisions without consideration of applicability in the product development context. This creates confusion about the purposes and potential use of the information.

- RSPs are required to “indemnify” NBN Co against certain costs incurred by NBN Co in reliance on confidential information that the RSP subsequently requires returned, destroyed or deleted.⁶⁸ This indemnification effectively means that RSPs cannot retract their own confidential information without fear of being liable for NBN Co’s unknown development or implementation costs in connection with that information (it is further noted that the indemnity is drafted in extremely broad terms, without any of the usual qualifications or limitations). This is a matter which should be addressed as part of the negotiated access to RSP confidential information (see clause 5.12), and removed as a default arrangement.
- There must be no exception to the principle, if NBN Co requires access to RSP confidential information in order for it to consider and develop a product idea or implement, offer or supply a product (or component, feature or alternative product), then access to such RSP confidential information must be negotiated on a case by case basis (and only concluded by written agreement).⁶⁹

Intellectual Property

Telstra supports the removal of the previous arrangement of granting mandatory licences and assignments of IPR for product development activities.⁷⁰ Nevertheless, Telstra highlights the following aspects of the IPR regime that require further amendment:

- It must be made clear that, notwithstanding that Customer IPR or Third Party IPR may have been incorporated into a product developed by NBN Co, at all times the RSP or a relevant third party retains ownership of all Customer IPR or Third Party IPR (as applicable).
- As with confidential information, RSPs are required to identify (in “exact” terms) IPR at the time of, or shortly after, submission.⁷¹ Given the nature of “ideas” that are likely to be submitted under the PDF, while Telstra is willing to use its reasonable endeavours to comply, it will be almost impossible to do so at the time of submission and NBN Co may never use an idea that has been submitted. Further, the consequences flowing from failure to comply are onerous, namely:
 - the RSP must meet NBN Co’s costs or losses (effectively an indemnity) where the RSP fails to identify Third Party IPRs in submitted materials of which it should reasonably be aware;⁷² and
 - the RSP waives its rights to bring an infringement claim where the RSP fails to identify Customer IPRs in submitted materials and NBN Co makes use of those IPRs (irrespective of the nature of the Customer IPRs or the use to which those IPRs are put).⁷³

⁶⁸ NBN Co SAU, Sch 11: Annexure 1, cl 5.7(b).

⁶⁹ NBN Co SAU, Sch 11: Annexure 1, cl 5.12.

⁷⁰ NBN Co, *Submission NBN Co Special Access Undertaking*, 28 September 2012, p.93

⁷¹ NBN Co SAU, Sch 11: Annexure 1, cl 6.2.

⁷² NBN Co SAU, Sch 11: Annexure 1, cl 6.5(c).

⁷³ NBN Co SAU, Sch 11: Annexure 1, cl 6.6.

A more reasonable and balanced approach would be that any remedies *only* apply if NBN Co has first provided notice to the RSP that it intends to use or develop materials or a product idea submitted by the RSP (together with details of its development proposal), and has afforded the RSP an opportunity to:

- confirm whether there are any relevant Customer IPRs or Third Party IPRs subsisting in those materials or product idea;
 - procure the right for NBN Co to use such IPRs (or alternative IPRs); or
 - otherwise withdraw the materials in whole or part.
- Telstra further believes that it would be reasonable for:
 - the indemnity for undisclosed Third Party IPR to be subject to usual contractual qualifications, protections or limitations (see for example Schedule 1H: Annexure 3 (Risk management)); and
 - the automatic waiver for undisclosed Customer IPR to be replaced with a process whereby the parties agree a licence for such Customer IPR, to be settled by an independent evaluator if necessary.

These key components are missing from the regime and, when coupled with Telstra's concerns about enforceability of the PDF given it is an NBN Co SAU only document at this point in time (not provided in the SFAA),⁷⁴ the regime falls short in terms of RSP protections required to encourage innovation under the PDF.

- The scope of the “internal use” Customer IPR licence is too broad⁷⁵ (this is a similar issue for business as usual activities). Specifically, any pre-agreed Customer IPR licence should be for NBN Co's internal dissemination and communication only, and expressly only for the purposes of NBN Co to determining whether it wishes to seek to conclude a licence to that IPR. Use, development or exploitation (whether internal or external) of Customer IPR must be subject to a negotiated licence pursuant to clause 6.4 of the PDF Processes.
- Other than in relation to the “internal” use licence described above, there must be no exception to the principle that if NBN Co requires access to Customer IPR for any purpose, then the rights to use such Customer IPR will be negotiated on a case by case basis (and only concluded by written agreement).⁷⁶ Without obtaining appropriate rights (in writing) from the RSP (which the RSP may withhold in its discretion), NBN Co *must not* use those Customer IPRs and must desist related activities (the current drafting leaves this to NBN Co's discretion).⁷⁷

⁷⁴ See submissions in relation to enforceability of the PDF in section 3 (Product Terms and Conditions) of this submission.

⁷⁵ NBN Co SAU, Sch 11: Annexure 1, cl 6.3.

⁷⁶ NBN Co SAU, Sch 11: Annexure 1, cl 6.4(b).

⁷⁷ For example, as drafted, NBN Co ‘may elect’ not to conduct an initial assessment of a Product Idea (NBN Co SAU, Sch 11: Annexure 1, cl 6.4(a)(i)) and ‘may not’ use relevant Customer IPRs until such time as an appropriate licence has been granted.

- Consistent with the principle of having to agree any licence of Customer IPR on a case by case basis, the provisions of any “to be agreed” licence should not be pre-supposed in the manner contemplated in the PDF Processes.
- The treatment of Third Party IPRs is particularly problematic. For example, it is stipulated that unless and until a licence is granted, “NBN Co may not use the relevant Third Party IPRs except as permitted by this clause 6,”⁷⁸ even though clause 6 provides no such permission in relation to Third Party IPRs. Further, RSPs are required to indemnify NBN Co for losses suffered or incurred by NBN Co arising out of or in connection with any “permitted use” of submitted materials in which Third Party IPRs subsist (whether or not identified).⁷⁹ However, the permitted use licence only extends to Customer IPRs, not Third Party IPRs, and therefore the whole basis of this indemnity appears flawed.

Proposed commitments

Accordingly Telstra submits that the product development IP and confidentiality commitments should be re-cut by NBN Co to address the specific concerns raised above and reflect the high level principles that Telstra proposes in Table 3 below. These particular principles primarily address customer generated Product Ideas. As noted earlier in this submission, Telstra believes the PDF should be increased in scope to clearly address product development and withdrawal more generally. Telstra believes that this combination of changes will provide a fair and reasonable, though appropriately flexible, product development framework.

Given the significance of the PDF, and the changes that will be required to give effect to this solution, Telstra would welcome the opportunity to work closely with NBN Co, the ACCC and other RSPs to amend the current PDF Processes.

Table 3 – PDF high-level principles (IPR/Confidentiality)⁸⁰

Concept	High-level principles
Establishment of a Product Development and Price Setting Forum	<p>NBN Co will design and establish a customer and end-user focused forum that will enable its customers (both current and prospective) to participate in the development of NBN Co products and services by:</p> <ul style="list-style-type: none"> • encouraging the submission of product and service ideas to NBN Co, for potential development into NBN Co products and services; • providing industry and the ACCC with a robust consultation and engagement process; and • ensuring that the development of products, and the settling of prices, is subject to appropriate regulatory oversight.
Intellectual	In developing Product Ideas, and commercialising the Products

⁷⁸ NBN Co SAU, Sch 11: Annexure 1, cl 6.5(a).

⁷⁹ NBN Co SAU, Sch 11: Annexure 1, cl 6.5(d).

⁸⁰ For ease of interpretation, in crafting the high level principles, Telstra has used applicable definitions from the NBN Co SAU. However, the substance of the definitions in the NBN Co SAU may not always be appropriate, and accordingly Telstra reserves its rights to seek amendments to these definitions depending on their use in the SAU NPTC Commitments.

Concept	High-level principles
Property	<p>developed from these Product Ideas, NBN Co will need confidence that it has the IPR required to commercialise the Products.</p> <p>Accordingly, NBN Co will work with each participating RSP, in good faith, with a view to agreeing terms that will protect the IPR of RSPs and enable RSPs to get commercial return on its contributions.</p> <p>In negotiating these terms, it is acknowledged that:</p> <ul style="list-style-type: none"> • inadequate protections for RSP IPRs, and a failure to adequately compensate RSPs for value in those IPRs, will impact on an RSP's ability and willingness to submit Product Ideas to NBN Co; and • overly restrictive IPR requirements, and unrealistic price demands, will impact on NBN Co's ability to effectively develop Product Ideas.
Confidentiality	<p>In developing Product Ideas, information about those Product Ideas will necessarily need to be shared with a wider audience (including other industry participants) at some point in time.</p> <p>Accordingly, NBN Co will work with each participating RSP, in good faith, with a view to agreeing terms that will protect the confidentiality of commercially sensitive RSP information while enabling NBN Co to effectively develop Product Ideas.</p> <p>In negotiating these terms, it is acknowledged that:</p> <ul style="list-style-type: none"> • inadequate protections of RSP confidential information will impact an RSP's willingness and ability to submit Product Ideas to NBN Co; and • overly restrictive confidentiality requirements from RSPs (including restrictions on disclosure) will impact on NBN Co's ability to effectively develop Product Ideas.
Two tiered product development	<p>NBN Co will adopt a "two-tiered" regime to create a process for dealing with new product ideas and development which encourages participation, innovation and competition between RSPs.</p>
No compulsion to submit an idea	<p>In order to participate in the PDF, NBN Co will not require RSPs to submit an idea to NBN Co (and RSPs will not be precluded from participating in the PDF if they do not submit ideas).</p>
Sourcing IPR	<p>NBN Co may source IPR inputs for its product development from RSPs, from other parties (i.e. other vendors), or develop its own IP.</p> <p>Bilateral commercial arrangements in this context are therefore appropriate.</p>
Product Ideas	<p>Where an RSP submits a "Product Idea" into the PDF:</p> <ul style="list-style-type: none"> • prior to submitting the idea, RSPs may seek to separately negotiate an arrangement with NBN Co which adequately addresses any specific IPR of that RSP;

Concept	High-level principles
	<ul style="list-style-type: none"> • there will be no default acquisition (including licence, transfer or assignment) of any Customer IPR; and • no RSP representations, warranties or indemnities are given in relation to its Customer IPR (again, unless these are specifically negotiated and agreed).
Ideas Stage	<p>There should be a high level “idea” submission stage e.g. a submission which gives NBN Co a high level understanding of an “idea”, sufficient for NBN Co to discuss the “idea” within the PDF to gauge interest and potential development opportunities.</p> <p>At this time, the RSP would forgo any rights to claim IPR in the copyright in the written expression of the “idea” submitted to NBN Co and would grant NBN Co a limited licence for the purpose of considering the idea in the PDF only (i.e. not for adaption, exploitation, commercialisation or productisation).</p>
Product Stage	<p>If, following the “Ideas Stage”, NBN Co is interested in using any Customer IPR to develop and “productise” an idea submitted by an RSP, then the parties will separately negotiate commercial terms to do so, including terms relating to access, consideration and any warranties/indemnities etc (to the extent commercially appropriate).</p> <p>If NBN Co receives any licence of Customer IPR, NBN Co must not use that licence as security, including as a security under the <i>Personal Properties Securities Act 2011</i>. Accordingly, any licence, or other right, granted for the benefit of NBN Co should be non-transferable (or an undertaking signed that it cannot be used for the purposes of security).</p>
NBN Co’s IPR	<p>The NBN Co SAU and WBA must not include any potentially misleading statements as to IPR ownership by NBN Co, e.g. ownership of IPR is not established merely by stating it – an express grant or assignment is required.</p>
Third Party IPRs	<p>Any obligations to procure third party IPR must be set against the reality that IPR licences will depend on external factors (e.g., existing contractual terms, third party licensing practices) along with the commercial value inherent in those IPR. An RSP would likely pay more to acquire a broader licence from its third party suppliers e.g. a licence broad enough to benefit not only the RSP customer but also the RSP’s supplier (NBN Co) plus the supplier’s (NBN Co’s) other customers</p>

3.4.3. Product withdrawal

The commitments that are given in relation to the supply of a Product or Product Feature are only as strong as the commitments that NBN Co makes in relation to the withdrawal of that Product or Product Feature. As noted above, Telstra is generally supportive of a product construct that distinguishes between ROs and NROs, such that ROs cannot be withdrawn

during the Initial Regulatory Period whereas NROs may be withdrawn at any time, subject to compliance with the product withdrawal commitments.

In this section Telstra has focused its comments on the specific product withdrawal commitments that it believes should be amended.

Withdrawal of Product Features

The product withdrawal commitments in the NBN Co SAU provide that 12 months written notice be given to RSPs before withdrawing a Product Feature⁸¹, and only in the case where the withdrawal of the Product Feature will have a material adverse effect on the functionality or performance of a Product or Product Component will NBN Co be required to give 24 months written notice.⁸²

Telstra is concerned about distinctions being drawn on the basis that the withdrawal of a particular Product Feature will or won't have a particular effect on the performance or functionality of the associated Product or Product Feature. For example, the effect that withdrawal has for one group of RSPs may be material whilst the effect that it has for others may not. Similarly, there may be varying impacts for downstream customers and end-users which are unrelated to the performance or functionality of the associated Product or Product Feature.

Telstra considers that it is more appropriate for NBN Co to provide 24 months notice of withdrawal of any Product Feature, regardless of its perceived impact on the performance or functionality of its associated Product or Product Component. This will ensure that differences of view about the effect of a withdrawal are avoided and will provide RSPs with the requisite degree of certainty that they will have a consistent lead time in which they will be able to plan for changes to Product Features as they arise.

Transitional arrangements

The NBN Co SAU provides that NBN Co will give written notice to RSPs of the transitional arrangements that NBN Co may put in place to migrate RSPs to an alternative product.⁸³ As a result, decisions about what these transitional arrangements would look like, or whether they would be implemented at all, would be entirely at NBN Co's discretion.

The process of transitioning from one product to another is not insignificant. RSPs will need sufficient time and information to ensure that appropriate planning and preparation can take place, and to ensure that resources can be appropriately deployed. Additionally, Telstra believes that the potential for misalignment between the respective expectations of differing supply chain participants in relation to transition (such as the significance of the transition exercise, how transition should occur, and the time that is needed) is material.

With this in mind, Telstra believes that further work is needed to provide a sufficient degree of certainty for RSPs in relation to this issue. Telstra proposes that the requirement to develop a "transition plan" should be mandatory in all cases and that mandatory consultation also be undertaken in relation to this "transition plan". This will provide a degree of certainty for RSPs that NBN Co is committed to engaging with RSPs in relation to this highly complex issue.

⁸¹ NBN Co SAU, Sch 11, cl 11.5.2(a)(ii).

⁸² NBN Co SAU, Sch 11, cl 11.5.2(a)(iii).

⁸³ NBN Co SAU, Sch 11, cl 11.5.2

Statutory requirement to cease supply

The withdrawal of a Product, Product Component, Product Feature, Ancillary Service or type of Facilities Access Service that NBN Co is required to withdraw or is prohibited from providing under section 41(3) of the NBN Companies Act is excluded from the operation of the product withdrawal commitments.⁸⁴

Telstra has addressed the equivalent carve-out for the introduction of new products that NBN Co is required by statute to supply in section 3.4.2 above. For the same reasons as stated in that section, Telstra does not believe this warrants a complete exemption from the NBN Co SAU and proposes that it only apply to the extent that NBN Co is unable to comply due to its statutory obligations.

Factors to be considered when withdrawing and varying products

At present, clause 11.5.2(b) of the NBN Co SAU specifies various factors that NBN Co must have regard to when considering whether to withdraw a product. Telstra believes these factors should also apply when considering a product variation, and that the following additional factors should be included:

- the wider social impact of the variation / withdrawal (e.g. impacts to disability services, payphone services etc.);
- the cost impact of the variation / withdrawal on RSPs and end-users; and
- how NBN Co intends to address or ameliorate these impacts (including sharing of cost impacts between NBN Co and RSPs), and whether these impacts are outweighed by the benefits of the withdrawal or variation.

Non-circumvention

Clause 11.5.1 of the NBN Co SAU provides that NBN Co will not implement a product withdrawal for the purpose of circumventing, or avoiding the operation of, the Individual Price Increase Limits under clause 1C.4 and clause 1D.4. The scope of this clause should be extended such that it applies to *all* commitments in the NBN Co SAU, and not just the Individual Price Increase Limits under clause 1C.4 and clause 1D.4.

⁸⁴ NBN Co SAU, Sch 11, cl 11.1.3(b)(iv) and cl 11.5.3.

4. Price Terms

The NBN Co SAU contains a package of commitments and constraints in relation to the individual pricing of products and services and the overall allowed level of cost recovery. This involves:

- setting initial prices for ROs and all NROs known at the time of the NBN Co SAU;
- allowing maximum annual individual price increases by CPI-1.5% for NROs and ROs (after a period of fixed nominal prices for 5 years);
- broad pricing principles guiding the initial pricing of new products and services; and
- the establishment of an overall Long Term Revenue Constraint (**LTRC**).

NBN Co maintains that over the term of the NBN Co SAU (a period of some 27 years) this package of commitments and constraints will provide incentives for NBN Co to price in a way that promotes the LTIE. In particular, NBN Co submits that:

- it will face incentives to be cost efficient in supplying products and services over time;
- the individual price commitments on ROs and NROs will serve to effectively constrain the setting of prices for new products and services in the short-to-medium term of the SAU, as it is these existing price commitments that will “anchor” the setting of these prices; and
- the LTRC will provide a medium-to-longer term constraint as it prevents NBN Co from ever recovering more than its costs including a return on capital.⁸⁵

Telstra does not agree. Telstra recognises that NBN Co, unlike other regulated utilities, is subject to large upfront initial losses that will prevent it from earning a return on its invested capital in the early years of its operation. Telstra also recognises that NBN Co should have the opportunity to recover its efficient costs over the longer term. However, Telstra considers that the package of commitments and constraints provides for only weak and in some cases misdirected incentives. If the ACCC were to accept the NBN Co SAU, price outcomes would not be in the LTIE. Telstra’s main concerns are as follows.

The proposed CPI-X price control is likely to lead to very high end-user prices

The CPI-1.5% cap on individual wholesale prices for components of the service proposed by NBN Co has the potential to increase the overall wholesale price (i.e. for AVC, CVC, ancillary services and other services) faced by the RSPs on a per end-user or SIO basis by significantly more than CPI-1.5%. This will translate into higher retail price increases for end-users, and has the potential to generate inefficient retail market outcomes as it limits the ability of RSPs to rebalance retail prices for access and usage appropriately to meet end-user preferences.

No definitive commitments on CVC pricing

Related to concerns about the cap and potential for price rebalancing, beyond a statement of intent, there is no commitment in the NBN Co SAU that CVC prices will fall over time as usage increases. This is the case even though NBN Co views CVC charges as being a more

⁸⁵ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, section 6.

important component on its cost recovery over time as usage increases⁸⁶. Telstra notes that usage has already increased substantially over the course of consideration of NBN Co's SAU, yet NBN Co has not decreased the proposed CVC prices.⁸⁷ Telstra believes a weak constraint on CVC pricing could potentially result in NBN Co recovering its costs over time in a manner that creates significant retail market distortions and does not promote the LTIE.

There is no meaningful constraint on new product prices

Beyond compliance with weak pricing principles, there is no meaningful commitment given by NBN Co in relation to pricing of new products. Telstra is concerned that affording NBN Co such wide discretion in this area may lead to price outcomes that do not promote the LTIE. Telstra considers that the effectiveness of initial RO and NRO prices set out in the NBN Co SAU to act as an “anchor” on the pricing of new products will diminish rapidly, especially where the RO products are not subject to any updating over the notional 10 year timeframe proposed for Module 1.

NBN Co would face weak incentives for cost efficiency leading to higher prices for consumers

Actual expenditure is deemed to be “efficient” under the SAU, so even if the ACCC were to find otherwise based on information provided by NBN Co under the information disclosure regime, NBN Co would not face any consequences. Further, as a Government Business Enterprise (GBE) Telstra does not believe NBN Co will necessarily face the same efficiency incentives faced by private companies.

Telstra has been unable to reconcile the LTRC with NBN Co's costs in its Corporate Plan

Telstra considers that an appropriate level of consultation on the LTRC requires a working version of the LTRC with a reasonable forecast of the outcomes arising from it. Telstra has undertaken its own forecast based on the LTRC defined in the NBN Co SAU and NBN Co's Corporate Plan. That analysis predicts that the LTRC is unlikely to impose a meaningful long-term constraint on the overall pricing of NBN services at any time during the term of the NBN Co SAU. Further, Telstra has not been able to reconcile costs measured by the LTRC with NBN Co's costs forecast in its Corporate Plan. Telstra is concerned that the LTRC places a cost-based constraint that is substantially higher than the costs forecast in the Corporate Plan.

In the subsequent regulatory period, NBN Co has an incentive to over-forecast losses to raise the revenue ceiling

The shortfalls between revenue and cost that are carried into future years in the LTRC are determined by reference to NBN Co's forecasts, rather than by reference to actual expenditure. This means NBN Co has an incentive to over-forecast costs, so that losses are exaggerated. Telstra cannot identify any means by which the ACCC can change NBN Co's forecasts or alter the operation of the NBN Co SAU to prevent this.

NBN Co provides itself a very broad and asymmetric right to pass through tax changes.

The tax pass through provisions proposed by NBN Co are too vague and potentially provide it

⁸⁶ NBN Co, *Corporate Plan 2012-15*, 6 August 2012, p 62.

⁸⁷ NBN Co, *Corporate Plan 2012-15*, 6 August 2012, p 49-50.

with broad discretion to determine the manner in which it will pass through the effects of tax changes. This can be contrasted with tax pass through provisions applying to other regulated utilities, which are more clearly defined and subject to regulatory oversight.

The following sections examines each of these issues in more detail and sets out Telstra's proposed solutions.

4.1. Implementation of the CPI-X price control

This section identifies the issues with the proposed CPI-1.5% price control proposed by NBN Co, and outlines how these concerns would best be resolved.

In principle, Telstra supports the use of a properly implemented global CPI-X price cap.⁸⁸ For example, one that would be applied to the average wholesale price faced by all access seekers for cohorts of end-users, where the average is a weighted average of all NBN services (i.e. the combination of AVC speed tiers and CVC units, ancillary services and other charges) used on a per end-user or SIO basis.⁸⁹ Telstra also accepts that sub-caps may need to be implemented to enforce specific wholesale pricing policies. Such a price control can be an effective means of constraining wholesale prices, while also providing incentives for the supplier to set wholesale prices that will drive efficient outcomes in retail markets.⁹⁰

However, the price cap proposed by NBN Co is different to this as it applies wholesale price controls to each individual price point. NBN Co's price control is unlikely to result in the benefits of a global CPI-X price cap. In particular, under NBN Co's proposed price control:

- the overall potential wholesale price increase faced by the RSP on a per end-user or SIO basis (i.e. purchasing a bundle of AVC and CVC services) is likely to be significantly greater than CPI-1.5%, which will subsequently translate into higher retail price increases for end-users; and
- the relative prices of services and inability to allow for appropriate rebalancing of wholesale prices, has the potential to generate inefficient retail market outcomes that would be to the detriment of end-users.

These concerns are discussed in more detail in sections 4.1.1 and 4.1.2 below.

In section 4.1.3, Telstra puts forward a potential solution to its concerns. This solution involves adding a global CPI-X price cap applied to the average wholesale price faced by cohorts of end-users, where the average is a weighted average of all NBN services usage by end-users. With the correct setting of the X-factor, this global price cap can be linked to revenues forecast in NBN Co's Corporate Plan to ensure NBN Co is not prevented from achieving the 7% IRR forecast in that plan.

⁸⁸ For vertically integrated firms global price caps refer to caps that apply to all products including retail and wholesale products supplied by the vertically integrated firms. In this case, NBN Co is not vertically integrated so we refer to global price cap as applying to all NBN Co's products, which obviously excludes retail products.

⁸⁹ For example, if it was assumed that an access seeker had one customer that used a basket of services involving 0.1 units of CVC priced at \$20 and 1 unit of AVC priced at \$24 (and for simplicity no ancillary or other services), then the global price cap that would be applied to the weighted average of those prices would be \$26 (i.e. $0.1 \times \$20 + 1 \times \24).

⁹⁰ Vogelsang, I. and Finsinger, J. (1979) "A Regulatory Adjustment Process for Optimal Pricing by Multiproduct Monopoly Firms", *Bell Journal of Economics*, Vol. 10(1), p 157-171; Laffont, J-J. and Tirole, J. (2000), *Competition in Telecommunications*, The MIT Press: Cambridge, Massachusetts, from p 170.

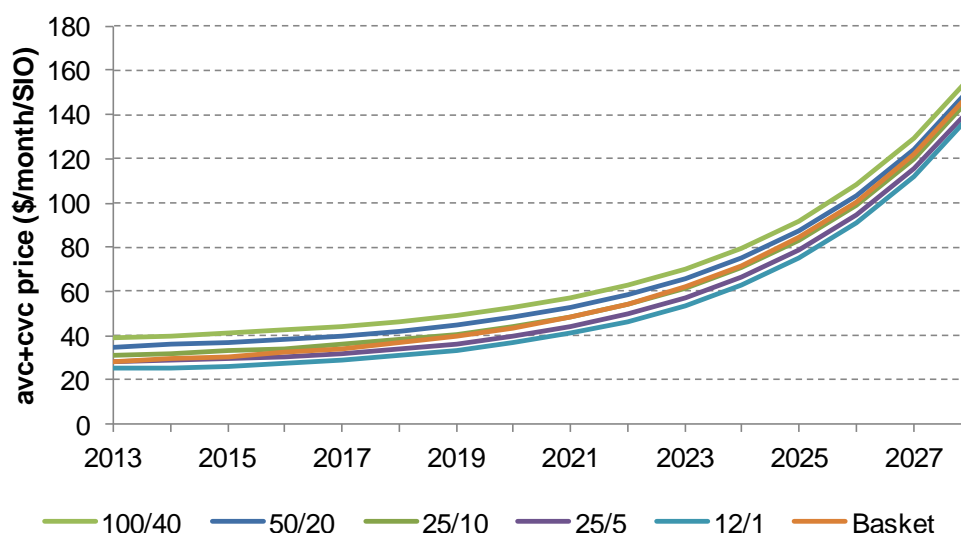
4.1.1. End-user price increase likely to be greater than CPI-1.5%

The price cap proposed by NBN Co applies to individual AVC and CVC price points rather than to the basket of all services that are acquired by RSPs for each end-user. While each price point cannot increase by more than CPI-1.5%, because usage of the CVC price point is likely to increase substantially over time, the overall amount paid by the RSP on a per end-user or SIO basis can increase by significantly more than CPI-1.5%.

To illustrate this, Figure 6 below shows the path of the prices for a basket of price points that would be paid for different speed tiers where there is a CPI-1.5% increase allowed on the AVC and CVC charges and it is assumed that CPI is 2.5% and average usage increases by 30% per year. Figure 6 also shows the weighted average of the baskets of price points, representing NBN Co's average revenue per SIO or end-user.

As illustrated in Figure 6, the average price paid by RSPs on behalf of end-users for NBN services could increase by nearly 20% every year under NBN Co's proposed price cap.

Figure 6 – Forecast price path for an average weighted basket of AVC and CVC price points assuming 30% growth in usage



Notes: CPI is assumed to be 2.5% pa over the term of the NBN CO SAU; the rebate on the first 50kbps of CVC is applied in every year. Source: Attachment 2 where the profile of speed tiers by end-users is extracted from NBN Co Corporate Plan 2012-15.

Table 4 below provides scenarios for the Compound Annual Growth Rate (CAGR) of prices over the term of the NBN Co SAU under different assumptions about average customer usage (1%, 30% and 60% annual increases).

See the following page for Table 4.

Table 4: CAGR of prices (AVC+CVC) per end-user over the term of the NBN Co SAU with the CPI-1.5% increase on individual prices

Speed	Annual Usage Growth		
	1%	30%	60%
100/40	3%	17%	45%
50/20	3%	18%	45%
25/10	3%	18%	46%
25/5	3%	19%	46%
12/1	3%	19%	47%
Basket	3%	19%	46%

Source: Attachment 2 (CPI is assumed to be 2.5%)

As Table 4 shows, if it is assumed that usage increases by 1% per annum and CPI is assumed to be 2.5%, then the CAGR for the basket of AVC and CVC services purchased by RSPs on behalf of end-users is around 3% under NBN Co's proposed price cap. However, it is unrealistic to assume a 1% annual usage growth rate. Using the more realistic assumption that usage increases by 30% per annum, the CAGR for the basket of AVC and CVC services purchased by end-users is 19%. If CPI is assumed to be 2.5%, this is equivalent to a price cap applied to the basket of all services of CPI+16.5%.

To compare this to the Corporate Plan, NBN Co's forecast average revenue increases at an average CAGR of 5.4%,⁹¹ which is significantly lower than the 19% CAGR of prices that would be allowed under the proposed NBN Co price control when the assumed usage growth is 30%. This is highly concerning, particularly given that in its most recent Corporate Plan NBN Co acknowledged that data usage has actually increased at a considerably higher rate than it had previously assumed.⁹² Hence, it is likely that, given the expected growth in data usage as a result of faster download speeds and the development of new content and applications, the CPI-1.5% price control proposed by NBN Co would result in considerably higher per SIO wholesale price increases and, hence, even higher retail prices for end-users than illustrated above.

Telstra does not expect that these potential wholesale price increases allowed by the cap would be sustainable when translated into corresponding retail prices. That is, it creates the real possibility that wholesale prices are set such that RSPs cannot supply services at retail prices that end-users would be willing to pay. This could also distort potential RSP investments in innovative downstream products. For example, over time such pricing could make investments in content delivery networks to supply next generation multi-media services that are made possible through the deployment of a fibre access network uneconomic. Such an outcome would not be in the LTIE.

While NBN Co has committed to an annual review process for the CVC price control,⁹³ this only represents a commitment by NBN Co to give consideration to a number of general pricing principles, including the level of aggregate demand for CVC capacity. It by no means

⁹¹ NBN Co, *Corporate Plan 2012-15*, 6 August 2012, suggests that overall average revenue per user, including all revenue sources and SIOs, will be approximately \$27 per month in 2015, \$68 per month in 2025, increasing to approximately \$103 per month in 2040.

⁹² *Ibid.* Section 7.1.2, p 49-50.

⁹³ NBN Co SAU, cl 1C.4.2(d).

represents a commitment to a lower price path than what it has actually included or allowed for under the price cap in the NBN Co SAU and, hence, is largely irrelevant for assessing the potential outcomes that could arise under the NBN Co SAU.

4.1.2. Limited ability to efficiently re-balance prices within the price cap

One of the benefits of a “global” price cap is that it would provide greater flexibility as to the mix of prices that make up the basket.⁹⁴ As wholesale pricing will impact on retail pricing structures for services, a global price cap ensures that wholesale prices can be appropriately rebalanced within the proposed price cap in response to end-users becoming more or less price responsive to certain retail pricing structures over time. Telstra believes that NBN Co’s proposal is unlikely to allow for such rebalancing of price points over time (unless of course NBN Co prices substantially under the price cap).

If NBN Co were to price at the proposed cap on individual product components, due to the increasing level of usage over time an increasing share of revenue on a per SIO or end-user basis would be collected by NBN Co from the CVC charges over time relative to the AVC. Assuming the wholesale charges were passed through to retail prices, then this would translate into having relatively lower access charges compared to usage charges over time. As Telstra believes that the demand by end-users for usage will be much more responsive or elastic relative to the demand for access, such a wholesale pricing structure used by NBN Co to recover its costs has the potential to reduce and inhibit the ability of RSPs to appropriately price retail services in an efficient manner that would meet end-user preferences.

The inefficiency arises because the wholesale price cap implicitly will constrain the retail pricing structure in such a way that it presumes demand for usage is relatively inelastic (i.e. less responsive) than demand for access. If end-users are taxed disproportionately more for usage than access,⁹⁵ they will derive less utility from using the NBN and they will inefficiently under-utilise the network. If end-users get less value from NBN, then it follows that RSPs are less likely to profit from and invest in new retail services and plans.

This highlights that in the absence of any positive incentives or appropriate constraints, there is the potential for wholesale pricing structures under the NBN Co SAU to evolve over time in such a way that while this may allow NBN Co to recover its costs in the longer term and achieve a 7% return overall, it will do so in a manner that distorts retail market outcomes and RSPs business models and fails to promote the efficient use of the NBN and efficient investment in complementary infrastructure over time. Such an outcome would not promote the LTIE.

4.1.3. Potential solution

Telstra considers that the price control proposed by NBN Co can be reinforced by a relatively simple global CPI-X price cap that would bring many of the economic efficiency benefits of price caps that would not result from NBN Co’s proposal. Further, this change would not affect NBN Co’s ability to meet its Corporate Plan forecasts and 7% internal rate of return.

The global CPI-X price cap suggested by Telstra would be based on the average wholesale price faced by cohorts of end-users, where the average is a weighted average of all NBN services (i.e. the combination of AVC speed tiers and CVC units, ancillary services and other

⁹⁴ See Vogelsang, I (2002) “Incentive Regulation and Competition in Public Utility Markets: A 20-Year Perspective.” *Journal of Regulatory Economics* Vol. 22(1), pp. 5-27

⁹⁵ That is, disproportionate to efficient Ramsey price relativities.

charges) used on a per end-user or SIO basis. This average price would be permitted to change from one period to the next by a maximum of CPI-X. The X factor could be set to a level that is based on NBN Co's growth in average revenue per user as forecast in its current Corporate Plan. Recognising that the Corporate Plan is an estimate of average revenues not maximum revenues, the X factor could allow for some potential revenue upside.

Alternatively, if the CPI-X global price cap were applied to total revenues over the total premises connected, then the global price increase could be capped at 5% (or CPI+2.5% assuming CPI equals 2.5%). That would allow NBN Co to achieve more than the 4% average revenue growth forecast in its Corporate Plan from 2017 to 2040. If the CPI-X global price cap were applied to cohorts of end-users (for example, customers on different speed tiers), then the X factor would need to be less, to account for the expectation that customers will shift up the value chain to the higher speed tiers over the term of the NBN Co SAU.

If such a global price cap were applied, NBN Co's CPI-1.5% price controls on individual price points (AVC in particular) could be relaxed a little to allow for more efficient rebalancing of prices.

Telstra believes that a definitive commitment on CVC pricing in conjunction with the proposed global price cap would reduce price uncertainty to RSPs and provide NBN Co with greater flexibility and stronger incentives to rebalance CVC prices in a way that promotes the LTIE.

In the absence of any specific commitment in the NBN Co SAU, the general statement of intent from NBN Co is not sufficient to ensure that CVC pricing will evolve over time in a way that promotes the LTIE. The ACCC should maintain oversight of CVC pricing, such that CVC pricing is subject to regulatory recourse. This recourse should include consideration and review of the broader re-balancing of AVC and CVC prices.

4.2. Initial pricing for new products

This section considers the limitations of the constraints on NBN Co in pricing new products and products currently set at \$0 (pursuant to anchor product commitments, and pursuant to Schedules 1I and 2E), and outlines how these limitations should be addressed.

4.2.1. No regulatory oversight

Prior to introducing a new product developed through the PDF, NBN Co must consult with RSPs through the PDF on the price at which the new products will be introduced.⁹⁶ NBN Co can then determine the price in accordance with a set of broad pricing principles.⁹⁷

Ultimately NBN Co has considerable discretion in how it sets initial prices for new products. The pricing principles to which NBN Co must have regard are extremely broad and provide only a weak incentive mechanism. They offer little in the way of incentives to constrain high initial prices. For instance, one pricing principle is that a price will be determined by NBN Co having regard to "the nature and extent of market demand". The list of pricing principles is expressed as being non-exhaustive⁹⁸ and several of the matters which NBN Co says it will have regard to can be argued to point in different directions, meaning that just about any

⁹⁶ New products are developed under the NBN Co SAU according to processes set out in Annexure 1 to Schedule 11 of Module 1 and Schedule 2E of Module 2. See, specifically, NBN Co SAU, cl 11.3.5 and cl 2E.4.4.

⁹⁷ NBN Co SAU, cl 1D.6 and cl 2C.5.

⁹⁸ NBN Co SAU, cl 1D.6. This clause states that initial prices will be determined by NBN Co having regard to certain high level principles, "among other relevant matters".

pricing construct could be set by NBN Co under these principles. Further, there is no recourse built into the NBN Co SAU for the ACCC or RSPs to challenge NBN Co's interpretation of those principles. It is difficult to imagine a scenario where even the most monopolistic price justified by NBN Co under this principle could be successfully challenged by RSPs, the ACCC or, indeed, the Federal Court.

Allowing NBN Co broad discretion to set initial prices for new services places a great deal of trust in NBN Co that it will put the LTIE criteria ahead of its own private interests. Should NBN Co's interests and the LTIE not align (and NBN Co preferences the former), the adverse impact on RSPs, end-users and economic welfare more generally could be large. The price for new services could be inflated relative to existing services, resulting in low take-up and RSPs facing limited incentives to promote them. Further, the discretion is not limited to new types of services, but also new price points for existing services. Consequently, under the NBN Co SAU, NBN Co might inflate the price paid overall by customers by introducing a new price point for an ancillary service that is required by those customers and that faces no effective substitutes (e.g. a new price point for a new form of fault rectification or installation service).

Telstra considers that it would be in the LTIE to remove the pricing principles (clauses 1D.6 and 2C.5) and the references to these in clauses 11.3.5(b) and 2E.4.4(b), and replace the references in those clauses with a requirement to have regard to the LTIE and the views of RSPs, as expressed in the consultation process through the PDF undertaken pursuant to clauses 11.3.5(a) and 2E.4.4(a). This is consistent with pricing considerations in the telecommunications regulatory environment to date,⁹⁹ and would allow for consultation under the PDF on pricing which would promote the LTIE.

It is also imperative that the ACCC be given oversight of pricing set by NBN Co under clauses 11.3.5(b) and 2E.4.4(b). This could be done by extending regulatory recourse to pricing of new products and zero-priced offers (i.e. products in respect of which there is no individual price commitment in the NBN Co SAU). It is contrary to the LTIE to give NBN Co such broad discretion as to how it will price new products, when such pricing (and associated price increases) will apply for extensive periods. To do so, without regulatory oversight, is also at odds with the approach to regulation of declared services in recent years.

Finally, it is noted that clauses 11.3.5 and 2E.4.4 only cover products, Product Components or Product Features. Telstra notes that there is no commitment in relation to how new Ancillary Services and Facilities Access Services will be priced.

4.2.2. Limited pricing constraint by “anchor” products

NBN Co argues that the prices of ROs will also constrain the pricing of new products (e.g. an offer with a better speed tier) pursuant to Schedules 1I and 2E.

Telstra recognises that some new products might be subject to substitution with existing ROs and NROs, which means that the price of the new product may be constrained or “anchored” by the existing substitute service. However, the extent to which ROs and NROs act as anchor products is, at best, questionable and likely to diminish over time. Given the speedy technological development (and rapid changes in end-user preferences) of the broadband market, ROs are likely to be rapidly outdated. To illustrate with an example, in 2004 the typical

⁹⁹ For example, in making an access determination in relation to the price for a declared service, the ACCC must take into account (inter alia) whether the determination will promote the LTIE (CCA, s 152BCA(1)). The Federal Court has noted that the LTIE must be given “fundamental weight” as against the other relevant factors (*Telstra v Australian Competition & Consumer Commission* (2008) 171 FCR 174).

broadband product offer¹⁰⁰ was a 256/64kbps ADSL Layer 2 service. For at least the last 2 years, 20Mbps ADSL2+ services have been the typical broadband product offer and Telstra queries whether consumers would consider these high-speed services to be substitutable for a 256/64kbps service (particularly given the bandwidth-hungry nature of applications now in common use).

Due to the fixed nature of ROs in Module 1, it would seem unlikely that anchor products will provide an effective means of constraining the pricing of new products. In any event, NBN Co will likely need to develop a service in the future that has limited substitutability or is not substitutable with existing ROs and NROs (for example, corporate point-to-point services, or a type of installation service that is not substitutable with existing installation services). NBN Co would face extremely limited and weak constraints in its pricing for such services.

Accordingly, beyond the very short term, Telstra does not believe that the anchor pricing concept is an effective constraint on NBN Co's pricing for new products. Therefore, as noted above, it is imperative that pricing of new products (as well as zero-priced offers) is subject to regulatory oversight.

4.3. Prudence of spend

The NBN Co SAU aims to establish a pricing methodology where, ultimately, the costs of its investment are recovered. The pricing methodology passes the costs incurred by NBN Co directly through to prices. If inefficient costs are allowed to pass through to prices, then this will impact competition in downstream markets, and dampen the incentives for NBN Co to spend efficiently in the future. Therefore, although Telstra accepts that NBN Co should be able to recover its efficient long term costs, it is concerned to ensure that NBN Co does not recover costs which are imprudently or inefficiently incurred.

Cost efficiency will only be achieved when a firm faces strong incentives to continuously improve efficiency and return part of those efficiencies to consumers of the firm's services. Cost efficiency over a long period can only be achieved if the relevant firm faces strong incentives to be cost efficient over the relevant period (and, for NBN Co, the deployment period in particular, as this is when the majority of costs will be incurred). Accordingly, to be satisfied that the NBN Co SAU is reasonable and promotes the LTIE, the ACCC would need to be satisfied that NBN Co is subject to sufficient incentives against spending inefficiently (which would then be permitted to be recovered through prices).

As currently drafted, Telstra does not believe that NBN Co is sufficiently incentivised to be cost efficient. Indeed, even if industry and the ACCC found irrefutably that NBN Co had inefficiently incurred cost, there would be nothing that could be done about it should the NBN Co SAU be accepted. Instead, those inefficient costs will be passed into the cost base and in the Initial Cost Recovery Period will be carried forward at the WACC thereby being inflated over time. This results in inefficient prices for end-users, and also dampens productivity improvements in the supply of telecommunication services, which, in turn, dampens economic growth and consumer welfare. This would not be in the LTIE.

This is explained below. In addition to the submissions below, in its Previous Submission Telstra made submissions on prudence of spend and refers to the ACCC to section 4 of that

¹⁰⁰ The latest statistics from the ABS show that nearly half of all Australian broadband subscribers are now on advertised download speeds of between 8Mbps and 24Mbps, or 24Mbps or greater. Over 90% of all Australian broadband subscribers are on advertised download speeds of at least 1.5Mbps (less than 10% are on advertised download speeds of 256kbps). Refer to: ABS, Internet Activity, Australia, June 2012 (Cat no 8153.0)

submission.

To address its concerns, Telstra considers that the NBN Co SAU should include an appropriate structure of incentives for NBN Co to spend efficiently, and provide for adequate oversight to ensure that it is doing so. This is discussed in below.

NBN Co is not incentivised to be cost efficient

In Ordovery and Shampine's report, the authors assume that NBN Co is like any other firm in that it has an incentive to maximise profit and, therefore, to be cost efficient.¹⁰¹

Telstra does not agree with this assumption.

Private sector firms face strong cost efficiency incentives that are closely linked to competition and the strong profit motivations of shareholders. In a competitive market, cost inefficiency can lead to comparative disadvantage and relatively poor returns to shareholders. Even without competition, private sector shareholders are strongly motivated by profit, which in turn places pressure on firms to be cost efficient. Governance and ownership structures for private firms are established to ensure that shareholders are getting value for the money that they have invested in the firm.

In comparison, GBEs such as NBN Co typically face specific expectations from their shareholder, typically aligned to the policy priorities of Government, that may conflict with cost efficiency incentives. Pursuant to NBN Co's Statement of Corporate Intent 2012-2015¹⁰², the current expectations of NBN Co include to:

- establish a wholesale-only, open-access network, subject to ACCC scrutiny, to support the Government's objective of structural market reform;
- offer open and equivalent access to wholesale services via Layer 2 bitstream services, which in time will help enable multi-operator delivery of data, voice and video services;
- comply with the Statement of Expectations' coverage requirements for provision of FTTP technology to Australian homes, schools and businesses designed to offer its RSP customers wholesale broadband speeds of up to 100 megabits per second;
- serve all remaining premises with a combination of leading-edge fixed-wireless and satellite technologies providing peak download speeds of up to 12 megabits per second; and
- provide fibre in:
 - all new developments of 100 or more premises, (broadacre or infill), which receive Stage 5 (civil works) planning approval after 1 January 2011;
 - in developments, irrespective of size or type, in areas where NBN Co has already rolled out fibre and the fibre is ready and capable of connection; and
 - in areas NBN Co has publicly identified as a rollout region.

NBN Co may also provide infrastructure in smaller developments where practical to:

¹⁰¹ See Ordovery and Shampine Expert Report, September 24 2012, p 22.

¹⁰² NBN Co, *Statement of Corporate Intent 2012-2015*, tabled in Parliament on Tuesday 9 October 2012, page 5.

- charge access seekers uniform national wholesale pricing within technologies and uniform national entry level pricing across technologies consistent with the Government's objective of providing uniform national wholesale prices. Where new technologies become available, NBN Co will seek to maintain this principle; and
- implement the Telstra Definitive Agreements and the Optus HFC Agreement.

These expectations are valid and clearly align with Government policy. Telstra does not dispute them.

However, the expectations of NBN Co (as a GBE) do not appear to be to maximise profit or minimise costs in the process of attempting to meet the expectations of its government shareholder. The only incentive on NBN Co to be cost efficient appears to be based on the requirement to report to the Minister. Again, this is not a criticism of the Government's expectations, just that there needs to be additional prudency controls on NBN Co's spend to ensure that it has the right cost efficiency incentives to promote the LTIE. In addition, the expectations on GBEs are susceptible to change by current and future governments (and potentially in a way that detracts from cost efficiency), such that the ACCC cannot place too much weight on them as a long-term means by which NBN Co faces an incentive to spend efficiently. However, the NBN Co SAU proposes that the vast majority of its cost be deemed prudent without any initial or ongoing assessment of efficiency.

Looking to other cost efficiency incentives that private firms face, these also would not appear to apply to NBN Co:

- **NBN Co does not face competition like most private firms do.** While profit motivated shareholders of private firms might replace leadership (or leadership might replace management) as a result of losing market share due to cost inefficiency, there is no such consequence for NBN Co. NBN Co's market share would be largely independent of its efficiency relative to competitive benchmarks because competition to NBN Co will be limited.
- **NBN Co does not face the risks associated with cost performance that private firms do.** It is not clear what consequence NBN Co would face if it delivered all the Government's expectations, but at an inefficient cost. Private firms on the other hand would again face the risk of leadership or management change.
- **If NBN Co does incur cost inefficiencies, these are not converted into financial losses.** Cost inefficiencies incurred by NBN Co are "stored" under the LTRC and are, in fact, inflated at the WACC for recovery in later periods. This is in contrast to private firms who receive no guaranteed opportunity to recover previously incurred losses caused by inefficiency. Even regulated monopoly service providers typically face some prospect of financial loss if they incur cost inefficiencies, since there are typically incentive schemes in place which penalise the business for efficiency losses (no such scheme is proposed by NBN Co).
- **There appears to be no incentive for NBN Co to change its engineering model in light of future technological advancement.** Instead, technology appears locked in to the network design rules with little pressure to update them if that would become more efficient.

Given there are few other incentives for NBN Co to be cost efficient, the NBN Co SAU becomes particularly important. As currently drafted, however, the NBN Co SAU has little in it to encourage efficient investment in and use of infrastructure.

- First, NBN Co has sought a particular network design whereby all spend that fits within that network design in the rollout period is deemed prudent, without review of expenditure by the ACCC nor the establishment of an expenditure efficiency benchmark. This is not likely to provide sufficient constraint to curb inefficiency.
- Second, the ICRA rolls forward any inefficient losses incurred in the rollout period to the remaining period of the NBN Co SAU.

The acceptance of the NBN Co SAU in its current form would not be in the LTIE given the lack of incentives for NBN Co to spend prudently.

This can be contrasted with the incentives facing most regulated utilities, which are typically subject to efficiency incentive schemes and face incentives to seek out efficiency gains in order to “beat” forecasts set by a regulator.¹⁰³ The aim being that the regulator promotes behaviours by the regulated firm that are similar to those faced by an operator in an effectively competitive market.

Telstra believes that a provision in the NBN Co SAU giving power to the ACCC to penalise NBN Co over time if it becomes demonstrably inefficient, much like an effectively competitive market would penalise inefficient competitors, could provide a means of ensuring cost efficiency, and hence of promoting the LTIE. This is particularly important given that NBN Co is in a unique situation relative to other access providers that are operating under building block regimes. For instance, NBN Co:

- is in the early phase of its investment planning, while access providers in other regimes have established operations;
- has signalled it will build its entire network very quickly, whereas access providers in other regimes have built their networks incrementally over time;
- faces considerable, albeit diversifiable, risks with respect to technology and political outcomes that make investment planning decisions difficult;
- has a spend target of \$37 billion that was determined prior to NBN Co deploying the network, whereas access providers in other regimes have ex-ante investment forecasts subject to ACCC review and endorsement; and
- has a new organisational framework to manage and control cost.

These unique circumstances suggest that NBN Co’s spend should be subject to greater prudence incentives and regulatory review than would normally be expected for a more established network service provider.

¹⁰³ For example under the NER, the revenue allowances for electricity businesses are based on forecasts set by the regulator and the business faces an incentive to beat these forecasts since it will keep any benefit of this, at least within the regulatory period. Additionally, an efficiency benefit sharing scheme (EBSS) established by the regulator allows the business to keep the benefit of any operating efficiency gain (or continue incurring penalties associated with efficiency losses) for a full five years.

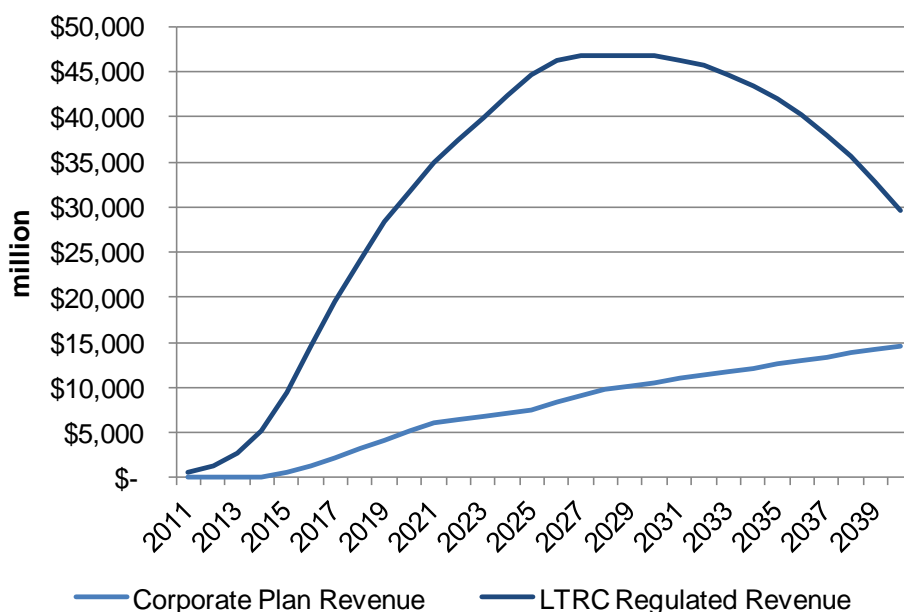
4.4. Concerns with the LTRC

The LTRC is the mechanism intended to allow for NBN Co's recovery of costs over the term of the NBN Co SAU. NBN Co considers that the LTRC will provide an effective cost-based constraint on prices in Module 2. Telstra does not agree. The LTRC in the NBN Co SAU seems to set a revenue constraint that is significantly higher than those forecast to be incurred by NBN Co in its Corporate Plan and which result in a 7% internal rate of return.

Figure 7 below illustrates NBN Co's Corporate Plan revenue forecasts until 2040, which broadly corresponds to the term of the NBN Co SAU. NBN Co projects those revenues will be sufficient to recover its costs and deliver a 7% internal rate of return.

Figure 7 below also illustrates the allowable revenue under the LTRC, calculated from a working spreadsheet model of the LTRC (Attachment 2) as defined in the NBN Co SAU including values for each of the inputs based on NBN Co's most recent Corporate Plan. As illustrated, the LTRC appears to set a revenue constraint that allows for more than the costs (including a 7% return to NBN Co) as forecast to be incurred by NBN Co in its Corporate Plan.

Figure 7: LTRC vs. Corporate Plan Costs



Notes: NBN Co's revenue is forecast to recover cost and deliver a 7% IRR. Source: Attachment 2, extracted from NBN Co *Corporate Plan 2012-15*

Figure 7 also suggests that the LTRC is unlikely to impose any binding constraint on NBN Co's pricing at any time during the term of the NBN Co SAU. NBN Co's planned revenue profile is well within the constraint imposed by the LTRC, which means that NBN Co will not be prevented by the LTRC from pricing pursuant to its own commercial objectives. In fact NBN Co could raise prices substantially above those reflected in its Corporate Plan revenue projections and still be well within the constraint imposed by the LTRC.

Without a working version of the LTRC from NBN Co it is difficult to identify whether this reflects the design of the LTRC that was intended by NBN Co and, if so, whether the outcomes are reasonable in the context of the LTIE. Telstra would welcome a reconciliation of the LTRC

to the Corporate Plan, the latter of which has become the document that guides industry's expectations of likely outcomes with respect to NBN Co's costs and revenues.

In the absence of a reconciliation that shows that the LTRC provides an effective constraint on NBN Co's pricing (consistent with the costs NBN Co is reasonably forecast to incur), Telstra proposes that the Corporate Plan forecasts should form the basis from which to set a cost-based constraint on pricing. As suggested above, this could involve using a CPI-X global price cap where the X is aligned to the average revenue growth assumed in the Corporate Plan. This would provide NBN Co with the opportunity to recover costs and a 7% return as they are defined in the Corporate Plan, and better promotes the LTIE.

4.4.1. LTRC inputs between Initial and Subsequent Regulatory Periods

In the Initial Regulatory Period, the ABBRR is based on actual spend incurred each financial year and is subject to a reporting framework by which NBN Co is required to publish high-level information on the critical variables underlying the operation of the LTRC.¹⁰⁴ NBN Co also provides the ACCC with powers to seek additional information that will presumably be used to obtain detailed data and used to calculate the high-level information and a working model of the LTRC.

However, in the Subsequent Regulatory Period, those requirements fall away. Instead, the ABBRR is calculated on NBN Co's forecast spend, which are not subject to any reporting, review or endorsement.¹⁰⁵ This raises two concerns.

- First, not only would NBN Co have the discretion to forecast amounts in a way that promotes its own interests, it appears that there are no ongoing reporting requirements that would allow any other party to test and verify those forecasts or the operation of the LTRC.
- Second, it introduces the possibility for perverse outcomes, where NBN Co has an incentive to over-forecast losses in order to raise the revenue ceiling. The shortfalls between revenue and cost that are carried into future years in the LTRC are determined by reference to NBN Co's forecasts, rather than by reference to actuals. This in effect raises the potential to prolong the accumulation of the ICRA.¹⁰⁶

For illustrative purposes, Table 5 below illustrates a stylised situation where NBN Co forecasts costs (ABBRR) in the Subsequent Regulatory Period to be 5% higher than the actual costs incurred in the same period. This example demonstrates that even a modest over forecasting of costs results in the ICRA accumulating for a significantly longer period than when the ICRA is based on actual spend. Note, even if the overcast was only to occur in one financial year, this would still have adverse impact on the recovery of costs over time.

See the following page for Table 5.

¹⁰⁴ NBN Co SAU, cl 1G.1.

¹⁰⁵ NBN Co SAU, Cl 2D.2.

¹⁰⁶ Where the Initial Cost Recovery Account is defined in NBN Co SAU, Module 1, cl1F.4 and Module 2, cl 2D.4 where the Unrecovered Cost is specified in cl 1.F.4.1 and cl2D.4.3.

Table 5: Stylized example of LTRC outcomes in the Subsequent Regulatory Period

Year		2024	2025	2026	2027	2028	2029	2030
Revenue	forecast/actual	1	1	1	1	1	1	1
ABBRR	forecast	1.05	1.05	1.05	1.05	1.05	1.05	1.05
	actual	1	1	1	1	1	1	1
ICRA (end)	actual	0	0	0	0	0	0	0
	forecast	-0.05	-0.10	-0.15	-0.20	-0.25	-0.30	-0.35

Telstra does not believe that such a framework will promote the right incentives for NBN Co to generate efficient outcomes. Telstra cannot identify any means in the NBN Co SAU by which the ACCC can change NBN Co's forecasts or alter the operation of the NBN Co SAU to prevent this. Therefore, to prevent such incentives and outcomes the NBN Co SAU would need to be changed to:

- carry forward profits and losses from one period to the next by reference to revenues and costs that have been subject to consultation, regulatory review and approval by the ACCC; and
- require NBN Co to commit to a substantial and transparent reporting process on the operation of its LTRC beyond the Initial Regulatory Period, or alternatively the ACCC use its information gathering powers to require NBN Co to publically report the inputs to the LTRC.

Telstra has previously highlighted this issue and the importance of an incentive framework to ensure the inclusion of only efficient costs in the LTRC, so as to promote the LTIE.¹⁰⁷

4.4.2. Additional concerns with the LTRC

Telstra also has the following concerns in relation to the operation of the LTRC as defined in Module 1 of the NBN Co SAU.

- **Tax expenses** – Tax expenses are calculated on the basis of the Net Tax Allowance as defined in clause 1F.8.3. NBN Co should apply the WACC to carry forward the Net Tax Allowance from one year to the next. With the exclusion of the WACC, NBN Co may understate its tax costs and impact the calculation of ABBRR and Unrecovered Cost. Further the net tax allowance should exclude any capital losses incurred, for example, when disposing assets, and any other amounts not entitled to be treated as a tax deduction under tax law.
- **Depreciation** – Telstra seeks further clarity for the purposes of determining regulatory depreciation as defined in clause 1F.8.1 a. For the calculation of the Straight Line

¹⁰⁷ Telstra, *NBN Co Special Access Undertaking: Telstra's response to the ACCC's supplementary consultation paper*, 5 April 2012, p 37-40.

Depreciation where the asset lifetime for each Asset Type is defined by $L_{i,t}$ (asset lifetime of the asset type in year t). Telstra seeks further explanation from NBN Co under what particular circumstances would result in $L_{i,t} = n/a$. This is not clearly defined and open to interpretation.

- Accounting system – There appears to be an error with the accounting system used by NBN Co to operate the LTRC. The LTRC uses a mix of nominal and real values for depreciation, asset inflation, and cost of capital. The result is that the PV of the ABBRR payments is greater than the initial investment cost, which is a failure of the NPV=0 test. This is illustrated in Attachment 2. Attachment 2 also includes an alternative accounting system that would calculate the ABBRR as the sum of real depreciation and the nominal WACC applied to the real RAB, which satisfies the NPV=0 test.

4.4.3. Concerns with specific fixed principles governing LTRC

The operation of the LTRC is to be governed by a series of fixed principles that are set out in Module 2 of the NBN Co SAU. As noted elsewhere in this submission, Telstra does not, *per se*, object to the use of fixed principles as a design feature. However, Telstra has concerns with a number of the fixed principles that have been proposed by NBN Co in relation to the operation of the LTRC – these are set out in Table 6 below, along with possible solutions which may resolve these concerns.

Table 6: Telstra’s concerns with LTRC fixed principles

Provision of NBN Co SAU	Telstra comment / concern	Possible solution
2D.2 (Annual Building Block Revenue Requirement)	Under clause 2D.2.1, the ABBRR is specified only as including certain cost items. However the ABBRR is not definitively specified by reference to a formula. This potentially offers substantial discretion to NBN Co in relation to calculation of the ABBRR.	Define ABBRR more clearly and definitively, with reference to a formula to be used in calculation.
	The nominal vanilla WACC described in clause 2D.2.1(a)(iii)(A) is defined very broadly. This offers little certainty or predictability in relation to the WACC that will be used, and potentially gives NBN Co substantial discretion in determining the WACC to apply. The definition in clause 2D.2.1(a)(iii)(A) is also inconsistent with the definition of the WACC in Module 1.	Define WACC calculation more clearly. Consider specifying parameter values to be used in calculation and/or a method of determining these parameter values.
	The NPV=0 test in clause 2D.2.1(b) is drafted in such a way that it is difficult to understand how it will operate in practice. The difficulty here is compounded by the fact that a working forecast of the LTRC has not been provided. While Telstra supports the inclusion of a NPV test, it needs to be more clearly drafted so that it can be well understood by all stakeholders. An NPV test should apply as an ex-ante test, not an ex-post test, and that test should account for	Clarify drafting and intended operation of NPV test.

Provision of NBN Co SAU	Telstra comment / concern	Possible solution
	changes to the value of NBN Co's assets at the time of any asset sale.	
2D.4 (Initial Cost Recovery Account)	Clause 2D.4.3 states in the initial cost recovery period the unrecovered cost shall be calculated by reference to <i>forecast</i> revenue and ABBRR. This is inconsistent with the definition in Module 1, which references actual revenue and ABBRR. Use of forecast amounts in this calculation potentially introduces an incentive for NBN Co to over-state its forecasts of ABBRR and under-state its forecast of revenue.	Clause 2D.4.3 should allow for appropriate reporting and oversight of forecasts.
2D.5 (Building Block Revenue Period)	Amounts to be carried forward between Regulatory Cycles are by reference to the difference between actual revenue and NBN Co's forecast ABBRR, not actual ABBRR. This creates an incentive to over-forecast ABBRR (and forecast revenue) to create a shortfall which will be carried forward into the next regulatory cycle, even if no shortfall actually exists.	Clause 2D.5 should allow for appropriate reporting and oversight of forecasts.
2D.6 (Relevant Considerations for Forecasts)	Considerations for forecasts are too open to judgement and confer too much discretion to NBN Co. There is no regulatory oversight of such forecasts.	Telstra does not support the inclusion of clause 2D.6. Instead, there should be proper regulatory oversight of expenditure forecasting.
2D.8 (Network Design Rules)	Clause 2D.8.3 gives NBN Co significant discretion to update the Network Design Rules. There is no assurance that the Network Design Rules (as updated) will continue to constrain NBN Co to only implement prudent and efficient network design, over the full term of the NBN Co SAU.	Telstra does not support the conferral of discretion on NBN Co to update the Network Design Rules.

If the issues set out in Table 6 are not addressed (for example, as proposed in that table), Telstra would be concerned with those clauses remaining fixed principles.

4.5. Tax pass-through

Pursuant to clauses 1C.5 and 1D.5 of the NBN Co SAU, NBN Co has ability in Module 1 to increase the maximum regulated price of ROs and NROs in the event of a "Tax Change Event". In Module 2, pursuant to clause 2C.3, NBN Co will be entitled to increase the price of ROs and NROs as well as amend its annual revenue forecasts and its ABBRR forecast.

Telstra has concerns with the nature and extent of these tax pass through rights.

First, the scope of a “Tax Change Event” as defined in Attachment C to the NBN Co SAU, should be limited to only including tax events which result in NBN Co becoming liable to pay an amount of tax – either directly or because of a third party supplier genuinely passing through a tax charge to NBN Co, which that third party is itself liable to pay. For instance, it might be inappropriate for NBN Co to pass through what it might define as a tax, but is in fact some form of penalty.

In addition, it is unclear why a Tax Change Event is defined differently in the Initial Rollout Period, and thereafter.

To address these concerns, we propose the following mark-up to the definition of a “Tax Change Event”:

Tax Change Event means any of the following events:

~~(a) during the Initial Regulatory Period:~~

(i) any Tax other than GST that becomes law and is effective after the SAU Commencement Date ~~(including any increase in such a Tax after it becomes effective)~~ is assessed, levied or imposed on NBN Co, the NBN Co Network or any facilities or land used, occupied or accessed in connection with the NBN Co Network, or the supply of Product Components, Product Features, Ancillary Services or types of Facilities Access Service, or anything used, occupied or accessed in connection with the supply of Product Components, Product Features, Ancillary Services or types of Facilities Access Service, **and NBN Co becomes liable to pay an amount in respect of such Tax;**

(ii) any Tax ~~(or any amount payable in respect of any Tax)~~ other than GST already assessed, levied or imposed on NBN Co, the NBN Co Network or any facilities or any land used, occupied, accessed in connection with the NBN Co Network, or the supply of Product Components, Product Features, Ancillary Services or types of Facilities Access Service, or anything used, occupied or accessed in connection with the supply of Product Components, Product Features, Ancillary Services or types of Facilities Access Service is increased, **causing a corresponding increase in NBN Co’s liability to such a Tax; or**

(iii) any amount is charged by **a third party any person**, to NBN Co and **that charge is** specifically identified by that person as a charge for a Tax of the same or similar nature to a Tax described in paragraphs (i) or (ii), or an increased Tax under paragraph (ii), and is an amount that third party is required to pay, **provided that the third party is required to pay that Tax; or.**

~~(iv) any amount is charged by any person to NBN Co arising from a Tax imposed on facilities, land or infrastructure used, occupied or accessed in connection with the NBN Co Network; and~~

~~(b) during the Subsequent Regulatory Period, any new or increased Tax (or any increase in the amount payable in respect of any Tax) other than GST is assessed, levied or imposed on, or charged to, NBN Co either directly or indirectly.~~

These mark ups are necessary to ensure that NBN Co is only recovering the costs it incurs, and is not over recovering any amounts to which it is not liable to pay.

Second, Telstra believes that, in order that RSPs have certainty as regards to when it may be subject to an increase in the maximum regulated price it can be charged, the application of the pass through clauses must be time limited. A 30 day implementation period would be appropriate. It is in RSPs and in end-users' legitimate interests to understand when maximum price changes can occur.

Third, there is no clarity on the methodology to be applied by NBN Co in determining the impact on it of a Tax Change Event and how this will be passed through to service charge increases. The tax pass through provisions leave this to NBN Co's discretion, with a reasonableness requirement. Telstra considers that an increase to the Maximum Regulated Price of a RO or NRO pursuant to clauses 1C.5, 1D.5 and 2C.3 should be subject to ACCC oversight upon application by an RSP, and that, in this context, reasonableness should be assessed with reference to the objectives in Part XIC of the CCA.

Finally, the tax pass through provisions (and the definition of a Tax Change Event) provide NBN Co with the discretion to pass through a tax *increase* without dealing with the corresponding right of RSPs to benefit from any tax decreases or removal of taxes in future. Without a mechanism to address the reduction or removal of a tax imposed on NBN Co (or on others which are passed through to NBN Co), NBN Co SAU will be in a position of over-recovering under the NBN Co SAU. Telstra is concerned that this be addressed in the NBN Co SAU. Under the NER, a regulated business may seek the approval of the AER for a positive pass through (i.e. an increase in revenue) and must notify the AER of negative pass through events within 90 days of becoming aware of the event occurring –the business cannot just effect a pass-through without AER approval and they must notify negative pass-throughs.¹⁰⁸ The NBN Co SAU does not require ACCC endorsement of each individual pass-through. However, in addition to a requirement on NBN Co to notify RSPs and the ACCC of negative pass through events, it is also critical to ensure that NBN Co is required to carry through these changes its cost recovery and pricing to ensure that NBN Co is not over-recovering to the detriment of end-users.

¹⁰⁸ NER, cl 6.6.1(c), cl 6.6.1(f).

5. Non-price terms and conditions

5.1. General observations and structure

5.1.1. Context

The NBN Co SAU takes a unique approach to both the setting and regulating of “non-price terms and conditions” over the term of the NBN Co SAU. The approach relies on an inextricable link between the NBN Co SAU and the SFAA.

NBN Co’s undertakings in relation to the NPTCs have the following key features:

- very detailed provisions (akin to those one may find in a comprehensive contractual arrangement) relating to certain terms and conditions, notably confidentiality, intellectual property, risk management and dispute management;¹⁰⁹
- a commitment from NBN Co to include these detailed provisions within the SFAA for the Initial Regulatory Period (which may, in fact, be a shorter period if the Midpoint Review leads to ACCC intervention or an update from NBN Co); and
- information dissemination commitments in relation to network rollout, POI rollout and the opening, closure and relocation of POIs.

Importantly, the NBN Co SAU:

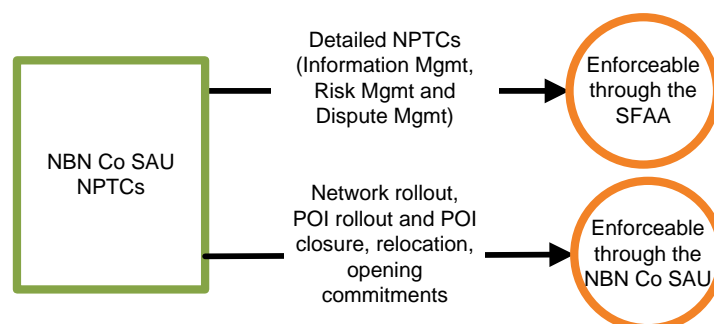
- includes other terms and conditions that may also be categorised as “non-price terms and conditions”, including service level commitments and detailed processes relating to product development (in fact, Telstra notes that the ACCC categorises “service levels” as NPTCs in its Consultation Paper). Telstra’s comments in relation to each of these subject matters are set out in section 3 (Product Terms and Conditions) to this submission; and
- does not include other NPTCs that have proven difficult to settle through the CDP, including those relating to responsibilities at end-user premises and compliance with downstream regulatory obligations.

The NBN Co SAU approach to the NPTCs (and the unique interplay between the NBN Co SAU and the SFAA) is summarised in Figure 8.

See the following page for Figure 8.

¹⁰⁹ The NBN Co SAU uses the same mechanism to deal with service levels. Detailed comments on these are set out in section 3 (Product Terms and Conditions) to this submission. Comments in this section 5 (Non-price terms and conditions) relating to the NBN Co SAU / SFAA implementation model also apply to the implementation of service levels.

Figure 8 – NPTC interplay between the NBN Co SAU and the SFAA



5.1.2. Impact of NBN Co's approach

While Telstra is comfortable that implementation and enforcement of certain NPTC commitments will occur through the SFAA, Telstra believes NBN Co's approach creates a number of material concerns, particularly in the short-to-medium term.

The NPTCs set out in Schedule 1H of the NBN Co SAU are very detailed. While many of these terms and conditions are a marked improvement on those that are currently set out in the short term WBA (Telstra agrees with NBN Co's statement in its 18 December 2012 letter to the ACCC that the "...changes introduced in to the Amended SAU result in improved and clearer terms for customers and end-users..."), they **do not** currently reflect a meeting of minds between NBN Co and its customers.

Inclusion of the NPTCs in the NBN Co SAU effectively precludes the content of these NPTCs from regulatory oversight (whether through the legislative regime under Part XIC of the CCA or through the regulatory oversight provisions proposed by NBN Co in the NBN Co SAU itself). This is because the statutory hierarchy gives primacy to the NBN Co SAU over BROCs / ADs to the extent of any inconsistency, and the NBN Co SAU itself (through Schedule 1B) effectively excludes the terms of the NBN Co SAU (including the NPTCs) from "Regulatory Oversight". Telstra notes and acknowledges, however, that these NPTCs are subject to the proposed Midpoint Review.

Telstra's concerns about the content of Schedule 1H lie both in the detailed drafting of the clauses and in the overriding principles that have driven the content. Telstra has provided very detailed feedback to NBN Co as part of the CDP (including, in certain circumstances, drafting suggestions) in relation to each of the Schedule 1H NPTCs. In Telstra's view:

- the confidentiality provisions continue to contain rights for NBN Co to use and disclose RSP confidential information in a manner that has the potential to compromise commercially valuable information;
- the intellectual property regime still requires refinement to ensure the scope of NBN Co's licence to RSPs is appropriately broad and the RSP licence back to NBN Co is appropriately confined;
- the risk management terms and conditions reflect a risk allocation model that seeks to push material risk to RSPs and their customers and end-users (both when considered as a set of standalone provisions and when considered as an integrated component with the other provisions of the NBN Co SAU and SFAA); and

- NBN Co’s approach to dispute management (in which NBN Co effectively manages the adjudicators of its own disputes and controls enforcement of the dispute management rules) has the potential to be unpredictable and give rise to apprehended bias.

Given these concerns (as detailed further in this submission and in Telstra’s detailed CDP responses), Telstra believes that “locking-in” these particular NPTCs (through the NBN Co SAU) is premature, and fails to recognise that these NPTCs do not reflect an “agreed” position with industry and are likely to undergo further refinement in the short term, as NBN Co’s systems, processes, service delivery and risk profile evolve. For the same reasons, Telstra also believes that “locking-out” these NPTCs from regulatory oversight (which is a bi-product of inclusion in the NBN Co SAU), even for limited periods, is inappropriate.¹¹⁰

5.1.3. Proposed non-price commitments

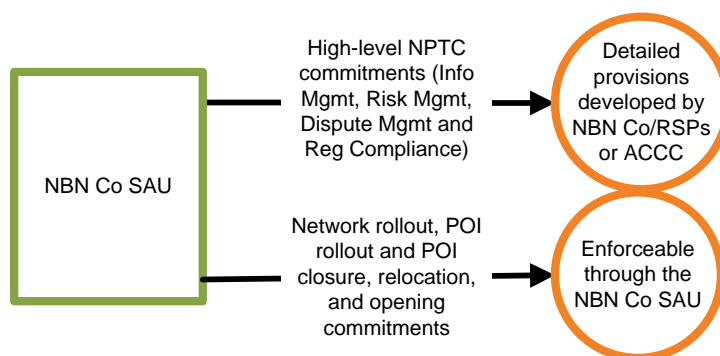
Despite the above, Telstra still believes that the NBN Co SAU can provide a mechanism through which NBN Co can achieve certainty in relation to these NPTCs while enabling them to evolve, either through further industry engagement or regulatory intervention.

Accordingly, Telstra proposes that the NBN Co SAU contains a series of high-level NPTC commitments (**SAU NPTC Commitments**). These commitments would not consist of detailed drafting, but would instead provide a set of principle-based commitments. NBN Co’s SAU commitment would then be to include detailed terms and conditions in the SFAA that are consistent with the SAU NPTC Commitments, and the implementation of these would in turn be subject to ACCC oversight (provided any ACCC Regulatory Decision was not inconsistent with the relevant SAU NPTC Commitment(s)).

This approach would provide a framework within which NBN Co and industry can continue to negotiate and settle the detailed drafting (a process which Telstra remains committed to). It will also allow the detailed drafting to be implemented by NBN Co once an appropriate balance has been reached (or, if not, potentially provided by the ACCC through its BROCC or AD powers).

This proposal is illustrated in Figure 9 below:

Figure 9 – SAU NPTC Commitment Approach



¹¹⁰ Telstra acknowledges that the NBN Co SAU does contain a role for the ACCC as part of its Midpoint Review and through the approval of Replacement Modules. Telstra has expressed material concerns in relation to both of these processes, and these concerns are compounded by the lack of regular regulatory oversight in relation to the NPTCs.

5.1.4. Outline of this section

This section contains Telstra's detailed feedback on the Schedule 1H NPTCs.

Telstra has also included a set of high-level SAU NPTC Commitments in relation to each of the Schedule 1H NPTCs, drawn from a variety of industry standard positions, international best practice and various non-price terms and conditions that have been published by the ACCC. The SAU NPTC Commitments are set out at the end of each subsection below.

Telstra would welcome the opportunity to work with NBN Co, the ACCC and industry more generally to develop an appropriate set of SAU NPTC Commitments. Telstra reserves its right to provide detailed comments on the specific drafting set out in Schedule 1H in the event that an approach based on SAU NPTC Commitments is not adopted.

5.2. Dispute Management (Schedule 1H: Annexure 1)

5.2.5. Background

To be effective, a process for resolving disputes must be respected and regarded as legitimate by all of the parties to it.

Telstra considers that the characteristics of an effective dispute resolution regime are efficiency, transparency, certainty and fairness achieved through natural justice and independence of the decision maker(s).

Telstra acknowledges that, in some respects, the NBN Co SAU is consistent with these characteristics,¹¹¹ including through the following features:

- the ability for third parties to apply to be joined as parties to the dispute where the outcome of the dispute could materially affect their interests;
- referral of any disagreement about appointments of the Resolution Advisor and Pool members to an independent authority, namely, the President of the IAMA;
- the use of arbitration, under the *Commercial Arbitrations Act 2010 (NSW) (CAA)*, as the default dispute resolution process; and
- prescribing a timeframe for the resolution of the dispute by Panel Arbitration (with provision for any necessary extensions of time).

However, Telstra is concerned that, while the dispute management regime in Schedule 1H: Annexure 1 has some of these fundamental characteristics, it still falls short in a number of very key areas.

This section 5.2 assesses NBN Co's position, as evidenced in the NBN Co SAU, and proposes a number of higher level SAU NPTC Commitments that Telstra believes need to replace the detailed drafting in the NBN Co SAU. The proposed SAU NPTC Commitments still provide sufficient detail to ensure all parties are clear on the fundamental principles, however they will provide the scope for NBN Co (in negotiation and consultation with

¹¹¹ Telstra notes that the Dispute Management Rules have been largely derived from the dispute resolution process under Chapter 8 of the National Electricity Rules (the NER Process), a process which has now been in effect for more than a decade. However, the regimes differ in material respects (most notably in relation to apprehended bias) and the telecommunications industry is a significantly more dynamic sector.

industry) and the ACCC (if necessary) to create the requisite detail to fill the gaps.

Further, if there is any conjecture in relation to a particular SAU NPTC Commitment, Telstra believes it is better that the NBN Co SAU is silent on this point, to enable scope to further negotiate with NBN Co and seek ACCC intervention (through the use of ACCC Regulatory Decisions and the regulatory recourse rights in the NBN Co SAU¹¹²), as required.

5.2.6. Assessing NBN Co's position

At a structural level, Telstra agrees with the use of an arbitral dispute resolution regime, rather than court-based dispute resolution. This is likely to result in greater efficiency and certainty (in terms of knowing how quickly a dispute will be resolved and that the resolution is relatively final) for the parties.

However, it is fundamentally important that the dispute resolution process has integrity and is, and is seen to be, predictable and impartial (including through adjudication by independent adjudicators). If arbitration is the primary dispute resolution option, then it needs to be implemented through a regime that both NBN Co and RSPs can trust. Telstra believes the regime currently proposed has the potential to be unpredictable and to give rise to apprehended bias.

At its core, Telstra has a material concern with the role that NBN Co will play in the establishment and management of disputes to which it is invariably a party. This regime is too important for industry for it to be structured in a way that does not look to positively exclude NBN Co from the detail of its establishment and management, particularly given the intention to exclude access to the courts.

Further details on Telstra's key concerns with NBN Co's proposed dispute management regime are set out below.

Impartiality and lack of independence of adjudicators

As currently proposed, NBN Co:

- nominates the Resolution Advisors and dispute adjudicators¹¹³ (and there is no ability for an RSP to submit its own nominees, as is often the case in commercially agreed dispute management arrangements);
- sets the terms of the Resolution Advisors' and adjudicators' engagement,¹¹⁴ and
- has the sole power to terminate the Resolution Advisors' and adjudicators' appointment¹¹⁵ (a feature specifically noted by the ACCC in its Consultation Paper).¹¹⁶

¹¹² As discussed in this submission, the regulatory recourse provisions in the NBN Co SAU still need to be materially improved.

¹¹³ Pursuant to the NBN Co SAU, Sch 1H, Annexure 1 cl 11.1(a), NBN Co nominates the Resolution Advisor who, pursuant to Sch 1H, Annexure 1 cl 2.2(a), appoints the arbitral Panel from the Pool. Pursuant to Sch 1H, Annexure 1 cl 12.1(a), NBN Co nominates the members of the Pool from which Panel members are drawn.

¹¹⁴ NBN Co SAU, Sch 1H, Annexure 1, cl 11.1(a) and 12.1(a) provide that the Resolution Advisor and Pool members, respectively, will be appointed "on such terms as NBN Co and each[candidate / member] may agree."

¹¹⁵ Pursuant to NBN Co SAU, Sch 1H, Annexure 1, cl 13.1(a), NBN Co may terminate a Resolution Advisor or Pool member for a variety of reasons. Pursuant to Sch 1H, Annexure 1, cl 13.2, Customer may request termination of an appointee and NBN Co must consider – but is not obliged to act upon – the request.

This is in contrast to the National Electricity Rules (**NER**) regime, in which the Australian Energy Regulator (**AER**), an independent statutory authority, appoints the Resolution Advisor.¹¹⁷ The Resolution Advisor then, after consultation with the parties, appoints a panel of three arbitrators (unless the parties agree to fewer).¹¹⁸ Finally, if any party to the dispute “believes that a person appointed to a [dispute resolution panel] has an interest which may conflict with the impartial resolution of the dispute... the person must not continue as a member”¹¹⁹.

Despite certain checks and balances in place following nomination,¹²⁰ the nomination, appointment, terms of engagement and tenure of the Resolution Advisor and adjudicators, as well as enforcement of the dispute management rules, are matters that NBN Co essentially manages and controls. For example, while an RSP may raise matters of non-compliance by a Resolution Advisor with the dispute management rules or their terms of appointment, this is subject to the proviso that “if NBN Co agrees, in its discretion, that the Resolution Advisor has failed to comply with the dispute management rules or terms of appointment...in a material way, NBN Co will seek to enforce the Resolution Advisor’s compliance...”¹²¹

These features materially undermine the independence of the dispute management regime, as well as its fairness both actual and perceived.

With regard to the termination of Resolution Advisors and adjudicators, the ACCC has been allocated a “review and veto” role.¹²² However, it is unclear:

- whether the ACCC has agreed (or will agree) to perform this role; and
- the criteria that the ACCC will apply in determining whether the event or circumstance giving rise to NBN Co’s proposed termination “provides a reasonable basis” for termination.

Telstra is not convinced that the NBN Co SAU should be used as a vehicle to impose these obligations on the ACCC and has not received any indication from the ACCC as to whether it accepts its proposed role.

Moreover, with all the diligence and the best will in the world, the ACCC cannot be expected to be aware of all matters that may make a particular candidate unsuitable for appointment, and cannot overcome the inherent unfairness in appointees all being identified (and remunerated and terminated) by one disputant rather than a range of disputants. RSPs cannot, therefore, be confident that this check will be effective or permanent.

¹¹⁶ “However, the ACCC notes that only NBN Co can terminate a resolution advisor or pool member. On the other hand, the ACCC may veto a termination.” ACCC, NBN Co Limited Special Access Undertaking Consultation Paper, November 2012, p 89.

¹¹⁷ National Electricity Rules, cl 8.2.2(a).

¹¹⁸ National Electricity Rules, cl 8.2.6A(c) – (e).

¹¹⁹ National Electricity Rules, cl 8.2.6A(h).

¹²⁰ For example, there is a requirement that NBN Co and Customer agree on the appointment of a Resolution Advisor or Pool member, failing which the appointment will be referred to the President of IAMA (NBN Co SAU, Sch 1H, Annexure 1 cl 11.1(a),(c) and cl 12.1(a),(c)). In addition, the ACCC may issue a notice of objection to the appointment (NBN Co SAU, Sch 1H, Annexure 1 cl 11.1(e) and cl 12.1(e)).

¹²¹ NBN Co SAU, Sch 1H, Annexure 1, cl 11.2(b).

¹²² NBN Co SAU, Sch 1H, Annexure 1, cl 13.1(b)-(c) contains a mechanism by which the ACCC can veto a proposed termination.

Inconsistent adoption of Commercial Arbitration Act (CAA) provisions

Contrary to NBN Co's assertion in its Supporting Submission that disputes (other than those resolved by internal escalation or (if elected) mediation or expert determination) will be resolved by "*arbitration in accordance with the Commercial Arbitration Act 2010 (NSW)*",¹²³ the terms of Schedule 1H: Annexure 1 inconsistently adopt the CAA provisions.

Specifically, Schedule 1H: Annexure 1 adopts certain limitations in the CAA (for example, of procedural fairness standards¹²⁴ and appeal rights¹²⁵), but does not adopt the provisions intended to protect the integrity of the process and prevent apprehended bias, for example, the requirement that the parties agree on the method of appointment of the arbitral Panel and the procedural rules for the arbitration.

Lack of procedural certainty

Contrary to NBN Co's assertion in its Supporting Submission that the dispute management rules will provide "*certainty as to the process to be followed if a dispute arises*,"¹²⁶ the process is insufficiently detailed in Schedule 1H: Annexure 1 and accordingly it is not possible to predict with certainty how it will run.

To illustrate this lack of certainty, the ACCC Consultation Paper notes that the first step of a "three-step dispute resolution approach" in Schedule 1H: Annexure 1 is "*resolution through the parties' specified points of contact*",¹²⁷ yet the dispute management rules do not require any steps to achieve such resolution to be taken. Rather, the dispute management rules state that a referral to a Resolution Advisor may occur if the party that considers that a dispute has arisen "*is satisfied that the dispute cannot be satisfactorily resolved through the parties' respective Relationship Points of Contact*".¹²⁸ This does not amount to a positive obligation to attempt resolution of the dispute in this way, nor does it prescribe a process by which negotiation between the Relationship Points of Contact is to proceed. In contrast, clause 8.2.4 of the NER sets out detailed requirements (including time limits) for initial negotiations between the disputants' respective points of contact.

Classification and arbitration of disputes as "Bilateral" or "Industry Relevant"

The grounds on which a dispute is classified as an Industry Relevant Dispute are overly broad.¹²⁹ On this basis, there is a real risk that most (if not all) disputes will be classified as "Industry Relevant Disputes". This, in combination with the broad joinder criteria,¹³⁰ is likely to create significant complexity for industry and, as discussed below, ongoing risk of confidential information leakage (a natural consequence and weakness in any industry generic dispute management regime).

Telstra believes that bilateral dispute resolution, with an independent third party adjudicator, may (more often than not) be more appropriate. Any concerns associated with the application of NBN Co's Non-Discrimination Obligations could be addressed by way of NBN

¹²³ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p 140.

¹²⁴ NBN Co SAU, Sch 1H, Annexure 1, cl 10.3, Cf. NER, cl. 8.2.6C(f)(2).

¹²⁵ NBN Co SAU, Sch 1H, Annexure 1, cl 9.1.

¹²⁶ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p 139.

¹²⁷ ACCC, *NBN Co Limited Special Access Undertaking Consultation Paper*, November 2012, p 88.

¹²⁸ NBN Co SAU, Sch 1H, Annexure 1, cl 2.1(a)

¹²⁹ Pursuant to Schedule 1H: Annexure 1, cl 3(b), the Panel must classify a dispute as an Industry Relevant Dispute if it considers that "*resolution of the dispute will, or is likely to, materially affect Other NBN Co Customers*".

¹³⁰ NBN Co SAU, Sch 1H, Annexure 1, cl 7.3(d),(e)

Co making available the outcome of any resolved bilateral dispute available to other NBN Co customers in the same class (see further comment on this below).

In its Supporting Submission, NBN Co asserts that a separate dispute resolution process with each RSP would be “*time-consuming and expensive*”.¹³¹ However, from an RSP perspective, this may in fact operate in reverse, i.e. Industry Relevant Dispute arbitrations may well be more time-consuming and expensive than Bilateral Dispute arbitrations. While Telstra is not opposed to the use of Industry Relevant Dispute arbitrations as a means of efficient dispute resolution, this must be implemented in a balanced and reasonable manner and in a way which does not indiscriminately shift the temporal and fiscal burden from NBN Co to RSPs (while also being mindful of the increased risk of transmission of confidential information in an Industry Relevant Dispute arbitration).

Finally, in its Supporting Submission NBN Co asserts that engaging in multiple bilateral dispute resolution processes in relation to the same issues would make it “*virtually impossible for NBN Co to comply with its non-discrimination obligation*”.¹³² As above, bilateral dispute resolution need not impact on non-discrimination concerns. In many cases, the resolution may require no change to an RSP’s Access Agreement. If a change to an RSP’s Access Agreement is required, then, if required in order for NBN Co to comply with its Non-Discrimination Obligations (as determined under and in accordance with Part XIC of the CCA) those same terms may subsequently be offered to access seekers in the same class.¹³³

Time limits for making of awards are too short

The 30 and 50 Business Day time limits in relation to the making of Awards by the Panel for Bilateral Disputes and Industry Relevant Disputes respectively¹³⁴ are too short, in particular when up to 10 of those Business Days might be taken up with the preliminary issue of whether the dispute is industry-wide.¹³⁵

Furthermore, extensions of time should not be decided by agreement between the parties¹³⁶ (potentially giving an advantage to the party who will benefit from the other running out of time), but by the Panel, who can take into account the consequences of any delay including injustice to a party.

Asymmetry of appeal rights

It is inappropriate for NBN Co’s appeal rights to exceed an RSP’s appeal rights,¹³⁷ as is currently the case. Any rights of appeal (which Telstra acknowledges should be limited to protect the integrity of the process) must be symmetrical.

No express right to petition the ACCC, the ACMA, the Minister or any other government body to exercise its powers or functions

Schedule 1H: Annexure 1 should expressly permit RSPs to petition the ACCC, the ACMA,

¹³¹ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p 140.

¹³² *Ibid.*

¹³³ ACCC, *Part XIC non-discrimination guidelines – ACCC explanatory material relating to the Part XIC anti-discrimination provisions and the form of Statements of Differences*, April 2012, p 4.

¹³⁴ NBN Co SAU, Sch 1H, Annexure 1, cl 5.3, cl 8.2.

¹³⁵ NBN Co SAU, Sch 1H, Annexure 1, cl 3(a) and cl 3(e).

¹³⁶ NBN Co SAU, Sch 1H, Annexure 1, cl 5.3 and cl 8.2.

¹³⁷ NBN Co SAU, Sch 1H, Annexure 1, cl 9.1(b).

the Minister or any other government body to exercise its powers or functions to guard against an argument that such a right is impliedly excluded.

5.2.7. SAU NPTC Commitments – dispute management

Telstra submits that the SAU NPTC Commitments set out in Table 7 below be included in the NBN Co SAU, in place of the detailed terms and conditions in the current NBN Co SAU. Telstra believes that these dispute management commitments provide the basis for a fair and robust alternative dispute resolution regime, with the detail to be included in the SFAA or otherwise set by the ACCC through ACCC Regulatory Decisions.

Primary amongst these commitments is independence of the dispute adjudicator(s). Any apprehension of bias of the dispute adjudicator(s) will irretrievably undermine the parties' confidence in the process. The SAU NPTC Commitments in Table 7 below therefore include several that are necessary to ensure that the dispute adjudicator(s) appointed are truly independent.

Table 7 –SAU NPTC Commitments – dispute management¹³⁸

Concept	Relevant SAU NPTC Commitment(s)
Preferability of ADR	<p>The dispute management regime will allow for and support the resolution of disputes through alternative dispute resolution processes (internal escalation or mediation, if agreed by the parties), failing which an arbitral (rather than court-based) dispute resolution or expert determination (as agreed by the parties) procedure will be implemented.</p> <p>The provisions of the <i>Commercial Arbitration Act 2010 (NSW) (CAA)</i> will apply to arbitrations, except where expressly provided in these dispute management commitments.</p>
Appointment and role of Resolution Advisors	<p>Resolution Advisors will be appointed to manage a dispute through to resolution. Resolution Advisors will not act as adjudicators.</p> <p>Resolution Advisors will be independent, impartial and have relevant expertise in dispute resolution and knowledge of the telecommunications industry.</p> <p>Each party may nominate one or more proposed Resolution Advisor/s. The Resolution Advisor for a dispute will be appointed from the nominees by agreement between the parties. Failing agreement, appointment will occur through referral to The Institute of Arbitrators & Mediators Australia (IAMA). If called upon to appoint a Resolution Advisor, IAMA will not be informed of the parties' respective nominees.</p> <p>NBN Co will enter into terms of engagement with the Resolution Advisor on its own behalf and as agent for all NBN Co customers.</p> <p>Under the terms of engagement, NBN Co or a relevant RSP may apply for the removal of a Resolution Advisor by submission of a statement of</p>

¹³⁸ For ease of interpretation, in crafting the SAU NPTC Commitments, Telstra has used applicable definitions from the NBN Co SAU. However, the substance of the definitions in the NBN Co SAU may not always be appropriate, and accordingly Telstra reserves its rights to seek amendments to these definitions depending on their use in the SAU NPTC Commitments.

Concept	Relevant SAU NPTC Commitment(s)
	<p>reasons to the Resolution Advisor itself.</p> <p>The Resolution Advisor’s terms of engagement will include a term requiring him or her to cease acting as Resolution Advisor if:</p> <ol style="list-style-type: none"> 1. he or she does not comply with any term in his or her engagement agreement or any of the SAU NPTC Commitments and does not cure that non-compliance within 5 Business Days of the submission; 2. the applying party has a reasonable apprehension of bias on the part of the Resolution Advisor; and/or 3. he or she is otherwise unable to perform his or her role as Resolution Advisor. <p>The Resolution Advisor’s terms of engagement will also include a term under which the Resolution Advisor acknowledges that damages are not an adequate remedy for a breach of items 1-3, above, and in the event of such a breach consents to the court making an order for specific performance of the above term.</p> <p>NBN Co will not charge Customers any separate fees or charges for the costs associated with the appointment, retention and operations of the Resolution Advisor.</p>
<p>Appointment of arbitrators</p>	<p>Arbitrators must be independent, impartial and appropriately qualified.</p> <p>Each party may nominate one or more proposed members of a “Pool” of arbitrators. The Pool members will be appointed from the nominees by agreement between the parties. Failing agreement, appointment will occur through referral to IAMA. If called upon to appoint the Pool members, IAMA will not be informed of the parties’ respective nominees.</p> <p>NBN Co will not charge Customer any separate fees or charges for the costs associated with the appointment, retention and operations of Pool members.</p> <p>In relation to a particular dispute, each party may nominate one or more Pool member/s to act as arbitrator. One or more arbitrators (see “Flexibility” section below) from the nominees will be appointed by agreement between the parties to hear the dispute (the Panel). Such appointment(s) will be facilitated by the Resolution Advisor, having regard to any expertise requirements relevant to a particular dispute. Failing agreement, appointment of the Panel will occur through one of the following means:</p> <ul style="list-style-type: none"> • referral to IAMA; • in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, an arbitrator may be appointed, on the request of a party, by the court; or • in an arbitration with three arbitrators, the parties may appoint one arbitrator each and the third will be appointed by the two appointees or, alternatively, by IAMA.

Concept	Relevant SAU NPTC Commitment(s)
Challenge to arbitrators	A party may challenge the appointment of an arbitrator to a dispute by way of application (with a statement of reasons) to the Panel itself, then, if the Panel rejects the challenge, to a court of competent jurisdiction.
Independence terms	To the extent that they are absent from the NPTC SAU Commitments, the CAA and the <i>IAMA Rules for the Conduct of Commercial Arbitrations</i> , the procedural rules under which arbitrations will be conducted and guidelines (including joinder guidelines) will be drafted by the Resolution Advisor (see also sections on Procedural Certainty and Classification of disputes and joinder, below).
Termination of arbitrators	A party may seek termination of a Panel member for misconduct (including apprehended bias) by submission to the Panel itself, then, if the Panel declines to terminate the arbitrator, to a court of competent jurisdiction.
Flexibility	<p>The number of arbitrators and nature of the arbitral process will be based on the size and complexity of the dispute:</p> <ul style="list-style-type: none"> • if the dispute is between two parties and the quantum is less than \$500,000 or if the parties otherwise agree, the arbitration will be heard by a sole arbitrator; • if the dispute is between more than two parties and/or the quantum is greater than \$500,000, the arbitration will be heard by three arbitrators; • if the dispute is between two parties and the quantum is less than \$50,000 or if the parties otherwise agree, the arbitration will be heard on the basis of documentary submissions alone; and • in other disputes, unless otherwise agreed by the parties, the Panel will make directions for the lodgement of formal claims and defences, the provision of evidence by each party and the testing of evidence by cross-examination.
Procedural certainty	Arbitrations will be conducted in accordance with the <i>IAMA Rules for the Conduct of Commercial Arbitrations</i> , except where the IAMA Rules are inconsistent with the SAU NPTC Commitments or the CAA.
Classification of disputes and joinder	<p>Before hearing a dispute, the Panel will classify the dispute as either a Bilateral Dispute (between NBN Co and a relevant Customer) or an Industry Relevant Dispute (where the outcome of a dispute is reasonably likely to have a material effect on all other NBN Co customers).</p> <p>In determining whether a dispute is a Bilateral Dispute or an Industry Relevant Dispute, the Panel must consider factors in addition to, and must not make such classification solely based on, whether the:</p> <ul style="list-style-type: none"> • determination may act as a precedent and/or affect the prices payable by all other NBN Co customers; or • outcome of the determination may result in the terms on which access is granted to the NBN Co customer being altered and NBN

Concept	Relevant SAU NPTC Commitment(s)
	<p>Co being required, in order to comply with its Non-Discrimination Obligation (as determined under and in accordance with Part XIC of the CCA), to offer those same terms to access seekers in the same class.</p> <p>Where the Panel determines that a dispute is an Industry Relevant Dispute, it will notify all other NBN Co customers of the dispute and invite them, if they wish, to make submissions as to why they should be joined as parties to the dispute.</p> <p>Where the Panel determines that a dispute is a Bilateral Dispute but that it is likely to have a material effect on one or more (but not all) other NBN Co customers, the Panel will notify the other NBN Co customer/s concerned and invite them, if they wish, to make submissions as to why they should be joined as parties to the dispute. Further, if any other NBN Co customer determines of its own accord (without invitation from the Panel) that the outcome of a dispute is likely to have a material effect on it, the other NBN Co customer can make submissions as to why it should be joined as a party.</p> <p>Other NBN Co customers may be joined to arbitrations for Industry Relevant Disputes or Bilateral Disputes where:</p> <ul style="list-style-type: none"> • the other NBN Co customer applies to be joined to the arbitration; • the Panel is satisfied that the other NBN Co customer has, or is likely to have, a sufficient interest in the subject matter of the dispute which is likely to be materially affected by the outcome of the dispute. Without limitation, a sufficient interest may exist where: <ul style="list-style-type: none"> a) a separate arbitration by the other NBN Co customer would give rise to a common question of law or fact; b) the other NBN Co customer is or would be entitled to the same relief sought in the arbitration; c) the other NBN Co customer may be required to do something to resolve the dispute; d) the other NBN Co customer has agreed to acquire a controlling interest in one of the parties to the dispute; and/or e) the other NBN Co customer has empirical data, knowledge or experience of primary relevance to the issues in dispute; and • the Panel considers that there is minimal risk that commercially sensitive information will be disclosed or that the risk of disclosure could be effectively managed (without materially adding to the cost and duration of the arbitration) by implementation of a confidentiality regime.
Time limits for making of awards	<p>Unless otherwise agreed by the parties, the Panel must make its award in respect of a dispute as soon as reasonably practicable and in any case no later than 100 Business Days (in the case of disputes having more than two parties, whether or not classified as an Industry Relevant</p>

Concept	Relevant SAU NPTC Commitment(s)
	Dispute) and 60 Business Days (in the case of Bilateral Disputes) from the date on which the Panel is convened. The Panel may in its discretion grant extensions of time, having regard to the consequences of any delay including injustice to a party.
Publication of Awards	<p>Before publication of an award, each party will be given an opportunity to submit that an award contains any of its trade secrets or other confidential information that should be redacted.</p> <p>The Panel will then determine whether the information is in fact confidential to the party, with the owner of the confidential material being entitled to seek injunctive relief from a court if the Panel decides against redaction.</p>
Appeal rights	A party may exercise arbitral appeal rights under and in accordance with the CAA.
Natural justice	Procedural fairness standards must be generally preserved (not only as they appear in the CAA).
Petition rights	Each party will have the right to, at any time, petition the ACCC, the ACMA, the Minister or any other government body to exercise its powers or functions.
Enforceability	An award will be binding on the parties (subject to appeal rights as set out in the CAA).
Expert determination	<p>The parties may elect to resolve a dispute through expert determination. Experts must be independent, impartial and appropriately qualified. Experts must act as experts and not as arbitrators.</p> <p>Either party may nominate a proposed Expert. An Expert will be appointed from the nominees to hear a dispute by agreement between the parties, as facilitated by the Resolution Advisor. Failing agreement, appointment will occur through referral to IAMA.</p> <p>Expert determination must be conducted in accordance with the IAMA Expert Determination Rules.</p> <p>The determination of an Expert is final and binding on the parties, subject to a party's right to appeal such determination in a court of competent jurisdiction.</p> <p>The costs of an Expert will be borne equally between NBN Co and Customer.</p>
Non-discrimination obligation	Any matters relating to NBN Co's non-discrimination obligation in relation to dispute resolution must be determined in accordance with Part XIC of the CCA (including by preserving the role of the Federal Court of Australia as the ultimate arbiter of these matters).

5.3. Confidentiality (Schedule 1H: Annexure 2)

5.3.1. Background

Each party's obligations of confidence and rights to disclose confidential information must be clear. Given its monopoly over upstream supply, NBN Co is necessarily going to hold confidential and commercially sensitive information for each RSP. Managing information of this nature requires great care.

Telstra has assessed Schedule 1H: Annexure 2 with this context in mind and believes that contractual protections need to be proscriptive, at least in the short-to-medium term, to ensure that NBN Co's systems and processes are developed within a clear and robust framework.

This section 5.3 assesses NBN Co's position, as evidenced in the NBN Co SAU, and proposes a number of SAU NPTC Commitments that Telstra believes need to replace the detailed drafting in the NBN Co SAU. The proposed SAU NPTC Commitments still provide sufficient detail to ensure all parties are clear on the fundamental principles, however, they will provide the scope for NBN Co (in negotiation and consultation with industry) and the ACCC (if necessary) to create the requisite detail to fill the gaps.

Further, if there is any conjecture in relation to a particular SAU NPTC Commitment, Telstra believes it is better that the NBN Co SAU is silent on this point, to enable scope to further negotiate with NBN Co and seek ACCC intervention (through the use of ACCC Regulatory Decisions and the regulatory recourse rights in the NBN Co SAU¹³⁹), as required.

5.3.2. Assessing NBN Co's position

Context

Telstra acknowledges that the confidentiality provisions set out in Schedule 1H: Annexure 2 only apply to "business as usual" activities, i.e. activities other than product development. Telstra's submission in respect of the confidentiality aspects of product development are set out in section 3 (Product Terms and Conditions).

Telstra supports the ACCC basing its assessment of the confidentiality regime on whether it adequately balances the interests of both NBN Co and its customers.¹⁴⁰ While Telstra considers that improvements have been made to the confidentiality provisions through the CDP, Telstra still has a number of concerns with the proposed regime.

The ACCC notes that "*NBN Co is not currently providing retail services... 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*".¹⁴¹ While Telstra acknowledges NBN Co's wholesale only status (and appreciates the underlying incentives inherent in such a model, as noted by the ACCC), Telstra does not believe this justifies a lesser standard or provides the basis for a less rigorous confidentiality regime.

In fact, it is not the potential for NBN Co to exploit confidential information for its own

¹³⁹ As discussed in this submission, the regulatory recourse provisions in the NBN Co SAU still need to be materially improved.

¹⁴⁰ ACCC, *NBN Co Limited Special Access Undertaking Consultation Paper*, November 2012, p 86.

¹⁴¹ *Ibid.*

commercial gain that creates the biggest risk for RSPs, rather it is the potential for NBN Co systems and processes to lack the rigour (particularly in the early stages of its development) to ensure confidential information is not (perhaps unintentionally) “leaked” into the market. These concerns are heightened given the extent of NBN Co’s disclosure rights and the manner in which NBN Co has quarantined itself from end-user exposure through its approach to risk management.¹⁴²

Standard of confidentiality protection

At its most fundamental level, the confidentiality regime imposes obligations on a recipient to exercise the greater of the degree of care that a reasonable person with knowledge of the confidential nature of the information would apply and the degree of care that the recipient would apply to its own confidential information of an equivalent nature.¹⁴³ While Telstra fully intends to apply appropriate rigour to protect NBN Co’s confidential information (and so is not concerned by meeting its own standards in this regard), the construct is inherently discriminatory. These standards will differ both between RSPs and as between RSPs and NBN Co.

Telstra supports the application of a contextual “reasonable person” test¹⁴⁴ alongside a regime that relies on a core obligation to “keep information confidential”.

Disclosure rights

Telstra remains very concerned with the scope of disclosure rights afforded to NBN Co under the confidentiality regime. Telstra acknowledges that NBN Co has now sought to “*increase the number of reciprocal disclosure rights to the extent appropriate and reasonable*” and “*where possible and while still allowing NBN Co to comply with its regulatory obligations and scope of required activities, narrowing the scope of NBN Co’s disclosure rights*”.¹⁴⁵

Reciprocity does not necessarily go to the heart of the concern. It is the breadth of NBN Co’s disclosure rights, and the lack of certainty in relation to those rights, that creates the most risk for RSPs. Telstra’s concerns are illustrated through the following examples:

- NBN Co’s use and disclosure rights relate to matters “*in connection with the SAU*”,¹⁴⁶ which potentially covers a broad range of circumstances over which RSPs have neither influence nor necessarily visibility.
- NBN Co has rights to disclose confidential information (which are very broad and often triggered despite there being no binding requirement from these identified persons to do so):
 - to comply with a requirement of any “*Government Agency*”¹⁴⁷ or “*Regulator*”;¹⁴⁸

¹⁴² For example, under NBN Co SAU, Sch 1H: Annexure 3 (Risk management) cl 2.7(a)(ii) NBN Co excludes all liability for “Downstream Customer Losses”.

¹⁴³ NBN Co SAU, Sch 1H, Annexure 2 cl 1.1(b)(i).

¹⁴⁴ The reasonable person test is set out in NBN Co SAU, Sch 1H, Annexure 2, cl 1.1(b)(i).

¹⁴⁵ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p142.

¹⁴⁶ See for example NBN Co SAU, Sch 1H, Annexure 2 cl 1.2(b)(i) – (ii).

¹⁴⁷ NBN Co SAU, Sch 1H, Annexure 2 cl 1.2(b)(iv)(A). “Government Agency” is broadly defined to include “any court or tribunal of competent jurisdiction or any agency, authority, board, department, government, instrumentality, ministry, official or public or statutory person of the Commonwealth or of any State or Territory of Australia, and any local or municipal government or governmental bodies” - NBN Co SAU, Attachment C.

- to the extent necessary to “*plan, develop, test, trial and supply Products*”;¹⁴⁹
 - to financiers or investors (including their professional advisers);¹⁵⁰ and
 - “*where required or authorised by law or NBN Co’s constitution, to any Commonwealth government minister, their respective government departments and/or their delegates, and, otherwise to any Regulator*”.¹⁵¹
- The use and disclosure rights for RSPs are similarly unclear. For example, under the NBN Co SAU, RSPs may disclose confidential information to “*Downstream Customers who are not End-users, to whom disclosure is necessary in order for the Recipient to perform its obligations or exercise its rights...*”¹⁵² In practice, and on a strict reading, it will be difficult to work out when such disclosure is “necessary” on these grounds. Telstra favours a right to disclose to downstream customers (including end-users) “*where reasonably necessary for that recipient to enjoy the benefit of a Customer Product or Downstream Product*”. This will enable downstream customers (including end-users) to be provided with such information as they need, in the most efficient manner possible, in order to make use of the NBN as intended.
 - Certain disclosure rights are treated inconsistently within the NBN Co SAU itself, in particular between the reciprocal disclosure regime and the NBN Co specific disclosure regime. For example, NBN Co has rights to disclose in order to comply with law in two different places within the regime, and each are subject to different protections.¹⁵³

The net effect of the disclosure regime is that there is ambiguity about the terms and conditions that apply and a real risk that RSP confidential information will be inappropriately disclosed, without consent or reasonable rights of control. Even the constraints on disclosing confidential information to other RSPs¹⁵⁴ (which goes to the heart of Telstra’s concerns) appear to be subject to these broad disclosure rights.

Telstra believes that NBN Co’s approach is not consistent with industry standard positions, nor are NBN Co’s broad rights to disclose confidential information necessary for it to meet its statutory obligations or any overriding policy or appropriate commercial objectives.

Data security and privacy

Data security and privacy issues are of particular concern to Telstra, especially if there is a risk that RSP information could be stored or used off-shore (unless appropriately managed). This is a very sensitive issue for end-users, and indeed has significant potential to cause

¹⁴⁸ NBN Co SAU, Sch 1H, Annexure 2 cl 1.2(b)(iv)(A). “Regulator” is broadly defined to include “the Commonwealth government minister(s) responsible for administering Part XIB and/or Part XIC of the CCA and the Telecommunications Act, the ACCC, the ACMA, the Telecommunications Industry Ombudsman, and any other Commonwealth government minister, Government Agency or parliamentary committee whose activities impact on NBN Co’s business” – NBN Co SAU, Sch 1H, Annexure 2 cl 6.1.

¹⁴⁹ NBN Co SAU, Sch 1H, Annexure 2 cl 1.2(b)(v)(B)).

¹⁵⁰ NBN Co SAU, Sch 1H, Annexure 2 cl 1.2(b)(vi) – (vii).

¹⁵¹ NBN Co SAU, Sch 1H, Annexure 2 cl 1.3(c).

¹⁵² NBN Co SAU, Sch 1H, Annexure 2 cl 1.2(b)(i).

¹⁵³ See NBN Co SAU, Sch 1H, Annexure 2 cl 1.2(b)(iv)(B), which requires the proposed recipient for a disclosure required by law to be subject to equivalent confidentiality obligations, versus NBN Co SAU, Sch 1H, Annexure 2 cl 1.3(a)(ii) (available to NBN Co only), which requires the relevant information to be ‘de-identified’ but does not oblige equivalent confidentiality obligations.

¹⁵⁴ NBN Co SAU, Sch 1H, Annexure 2 cl 1.4.

financial and reputational detriment to both RSPs and NBN Co if not appropriately managed.

Telstra notes that NBN Co has sought to clarify the data security and privacy obligations in the NBN Co SAU. Again, however, these obligations remain difficult to interpret or ascertain with any certainty. For example, it is unclear what comprises “reasonable” security standards.¹⁵⁵ Clear, rigorous and robust protections are very important in this regard, and accordingly Telstra advocates a more detailed and certain data security regime be implemented in the NBN Co SAU. Moreover, the NBN Co SAU should stipulate a regime specifically applicable to NBN Co as the industry wholesaler, in which role it will collect data from all of its customer RSPs. SAU NPTC Commitments relating to these protections are set out in section 5.3.3 below.

Telstra further believes that rights to store and use data off-shore must be balanced against appropriate protections for the RSP and its customers. At times, this balance may well need to enable RSPs to prevent use or disclosure. Again, Telstra believes that the NBN Co SAU must contain clearly articulated principle based commitments in this regard, with flexibility around the detail to enable RSPs to seek protection from the ACCC if required.

Rollout and migration communications

Telstra does not agree with the manner and extent to which NBN Co can mandate RSPs to effect NBN Co rollout and migration communications,¹⁵⁶ particularly where the communications are customer agnostic. Information campaigns of this nature can be expensive and, more often than not, should properly be conducted by NBN Co. There is a risk that NBN Co can use the NBN Co SAU to effectively outsource its own communication campaigns and the costs associated with these to RSPs, which is not an appropriate outcome.

5.3.3. SAU NPTC Commitments – confidentiality

Telstra submits that the SAU NPTC Commitments set out in Table 8 below be included in the NBN Co SAU, in place of the detailed terms and conditions in the current NBN Co SAU. Telstra believes that these confidentiality commitments provide the basis for a fair and robust “business as usual” regime, with the detail to be included in the SFAA or otherwise set by the ACCC through ACCC Regulatory Decisions.

See the following page for Table 8.

¹⁵⁵ NBN Co SAU, Sch 1H, Annexure 2 cl 2.1.

¹⁵⁶ NBN Co SAU, Sch 1H, Annexure 2 cl 4.

Table 8 – Confidentiality SAU NPTC Commitments¹⁵⁷

Concept	Relevant SAU NPTC Commitment
<p>Scope of Confidential Information</p>	<p>Confidential Information covers all information of a disclosing party (Discloser), in whatever form and including third party information disclosed under permission, which is disclosed to a receiving party (Recipient) and which is confidential or can reasonably be inferred to be confidential from the circumstances in which it is disclosed.</p> <p>Confidential Information does not include information legitimately in the public domain, information lawfully known by or in the possession of the Recipient (including from a third party entitled to disclose it), or Aggregated Network Information (see below).</p> <p>Where an RSP is the Discloser, Confidential Information includes Network Information and Downstream Customer Details.</p>
<p>Protection of Confidential Information</p>	<p>A Recipient must keep Confidential Information confidential and must not use or disclose that Confidential Information unless expressly permitted to do so in a manner consistent with the use and disclosure rights below.</p> <p>In maintaining confidentiality, the Recipient must exercise a degree of care that a reasonable person with knowledge of the Confidential Information would apply.</p>
<p>Use and disclosure rights</p>	<p>Except where the Discloser has provided its prior written consent (and in that circumstance, subject to the conditions of that consent), a Recipient may only use and/or disclose the Discloser's Confidential Information to the extent necessary:</p> <ul style="list-style-type: none"> • to exercise its rights or perform its obligations under an Access Agreement (including to its personnel and related entities for such purposes); • where an RSP is the Recipient, for the use of products by the RSP (including its personnel and related entities); for the supply of Customer Products to (and use by) downstream customers (including end-users); and/or to communicate matters to downstream customers (including end-users) concerning the provision of services over (or utilising) the NBN; • to obtain professional advice in relation to matters arising under or in connection with the Access Agreement; • to its auditor to the extent necessary to permit that auditor to perform its audit functions; • to comply with any law, court order or binding directive of a Regulator (being a Commonwealth government minister(s) responsible for administering Part XIB and/or Part XIC of the

¹⁵⁷ For ease of interpretation, in crafting the SAU NPTC Commitments, Telstra has used applicable definitions from the NBN Co SAU. However, the substance of the definitions in the NBN Co SAU may not always be appropriate, and accordingly Telstra reserves its rights to seek amendments to these definitions depending on their use in the SAU NPTC Commitments.

Concept	Relevant SAU NPTC Commitment
	<p>CCA and the Telco Act, the ACCC or the ACMA), or applicable stock exchange listing rules (provided the Discloser is notified in advance and, if reasonably requested by the Discloser, the Recipient reasonably assists the Discloser to protect the Confidential Information); or</p> <ul style="list-style-type: none"> to avoid or mitigate the effect of an Emergency, or to protect the safety of any person or equipment. <p>Any additional use and/or disclosure rights must be specifically agreed between NBN Co and RSPs, or determined by the ACCC prior to inclusion in the SFAA.</p>
<p>Specific disclosures</p>	<p>Subject to the proviso below, NBN Co may disclose an RSP's Confidential Information to:</p> <ul style="list-style-type: none"> conduct and review an RSP's credit risk pursuant to the Credit Policy; debt collection agents, to the extent necessary to facilitate debt recovery under an Access Agreement; third parties to the extent necessary to (a) perform pull-through activities and investigate and rectify faults on cables in lead-in conduits, (b) enable facilities access for the supply of Ordered Products, (c) disconnect premises from third party networks, or (d) be provided with access to or ownership of parts of a third party network; or a third party (other than any actual or potential other NBN Co customer) to the extent necessary to plan, develop and test the NBN Co Network.¹⁵⁸ <p>Subject to the proviso below, an RSP may disclose NBN Co's Confidential Information to third parties to the extent necessary to plan, develop, test and trial products.</p> <p>The above rights will only be available where, prior to any disclosure:</p> <ul style="list-style-type: none"> the Recipient ensures that a proposed third party recipient is subject to substantially equivalent confidentiality obligations as those set out in the SFAA; or if this is unreasonable in the circumstances, the Recipient: (a) gives the Discloser notice of the proposed disclosure; and (b) ensures that the proposed third party recipient is subject to reasonable confidentiality obligations in respect of that disclosure.
<p>Disclosure to other RSPs</p>	<p>Except as agreed between the parties in writing, NBN Co must not disclose RSP Confidential Information to any actual or potential other NBN Co customer.</p>

¹⁵⁸ Note there is a separate product development confidentiality regime under the PDF.

Concept	Relevant SAU NPTC Commitment
<p>Network Information</p>	<p>Network Information means information about a particular product or service supplied to an RSP which is generated within the NBN Co Network as a result of the supply of products or services by NBN Co to an RSP.</p> <p>Network Information does not include Aggregated Network Information (see below) or information falling within the exceptions to Confidential Information (see above).</p> <p>Network Information is Customer Confidential Information and is therefore subject to the protection obligations referred to above.</p> <p>In disclosing any Network Information (subject to the protection obligations referred to above), NBN Co must ensure that, where possible, such information is not identifiable with a particular RSP or downstream customer (including end-users).</p>
<p>Aggregated Network Information</p>	<p>Aggregated Network Information means Network Information that has been aggregated with other information of a similar or related nature, such that it cannot reasonably be used to identify any particular RSP or downstream customer (including end-users).</p> <p>Aggregated Network Information is information of both NBN Co and an RSP and may be used by either party (and may be published by NBN Co or disclosed by NBN Co to all RSPs in an equivalent way).</p>
<p>Return of Confidential Information</p>	<p>Recipient must return, destroy or delete Discloser's Confidential Information on demand by the Discloser, except where impracticable to do so, or as necessary to comply with internal governance processes or applicable law.</p>
<p>Injunctive relief</p>	<p>A party is entitled to seek specific performance or injunctive relief for an actual, anticipatory or reasonably suspected breach of confidentiality obligations.</p>
<p>Data security and personal information</p>	<p>NBN Co must ensure the protection of data or information (including Confidential Information) of RSPs that NBN Co (or its related entities, agents or contractors) collects, stores, uses or discloses, including by:</p> <ul style="list-style-type: none"> • establishing and maintaining rigorous and robust data security safeguards against the destruction, loss, alteration or unauthorised disclosure of RSP's data or information; and • segregating all data received from an RSP from that of any other NBN Co customer or provider (other than Aggregated Network Information). <p>The above data security standards apply both inside and outside Australia.</p> <p>Each party must comply with all laws and regulations in respect of the collection, use, disclosure, transfer or handling of Personal Information, including the National Privacy Principles as if that party was an "organisation" as defined in the <i>Privacy Act 1988 (Cth)</i>.</p>

Concept	Relevant SAU NPTC Commitment
<p>Downstream Customer Details</p>	<p>NBN Co may request an RSP to provide Downstream Customer Details in circumstances where (and only where):</p> <ul style="list-style-type: none"> • NBN Co requires those details in order to supply an Ordered Product, or to perform any work to the NBN Co Network (or other item licensed, owned or controlled by NBN Co) in order to supply an Ordered Product; and • NBN Co does not have access to, or cannot otherwise obtain within a reasonable period of time, those details. <p>Downstream Customer Details are Customer Confidential Information and subject to the various protections (and exclusions) detailed above.</p> <p>Each party must comply with Privacy Laws with respect to Downstream Customer Details.</p>
<p>Downstream Customer communications</p>	<p>Subject to the below, RSPs have primary responsibility for communications with downstream customers (including end-users).</p> <p>Where NBN Co wishes to communicate information that is “customer agnostic” and relates to the rollout of the NBN to downstream customers (including end-users) or to its network or services generally, then NBN Co will be responsible for doing this, and if RSPs are required to assist, they will do so at NBN Co’s expense.</p>

5.4. Intellectual Property (Schedule 1H: Annexure 2)

5.4.1. Background

Recognition and appropriate treatment of IPRs (both current and future) is fundamentally important to preserving the value of those assets and enabling a collaborative working environment between NBN Co and RSPs.

Telstra believes that any contractual regime dealing with an RSP’s IPR must not compromise or undermine the economic and competitive value of IPR to RSPs and their shareholders. It must also provide an incentive for future innovation and collaboration. Without this, RSPs, downstream customers, end-users and ultimately the industry itself will be negatively impacted.

This section 5.4 assesses NBN Co’s position, as evidenced in the NBN Co SAU, and proposes a number of SAU NPTC Commitments that Telstra believes need to replace the detailed drafting in the NBN Co SAU. The proposed SAU NPTC Commitments still provide sufficient detail to ensure all parties are clear on the fundamental principles, however, they will provide the scope for NBN Co (in negotiation and consultation with industry) and the ACCC (if necessary) to create the requisite detail to fill the gaps.

Further, if there is any conjecture in relation to a particular SAU NPTC Commitment, Telstra believes it is better that the NBN Co SAU is silent on this point, to enable scope to further negotiate with NBN Co and seek ACCC intervention (through the use of ACCC Regulatory

Decisions and the regulatory recourse rights in the NBN Co SAU¹⁵⁹), as required.

5.4.2. Assessing NBN Co's position

Context

Following extensive consultation throughout the CDP, Telstra was pleased to see that progress had been made towards the inclusion of an IPR regime that seeks to “*provide for an appropriate and commercially workable balance between providing Customers control over their IPR and protecting NBN Co from infringement claims*”.¹⁶⁰ However, while there have been numerous improvements in this respect, there remain certain deficiencies in the IPR regime included in the NBN Co SAU.

NBN Co has stated that “*in essence, the IPR regime comprises an upfront IP licence from NBN Co to Customers for the term of the signed agreement, a right to sub-licence NBN Co IPR and an IP warranty from NBN Co*”.¹⁶¹ While this is true to an extent, Telstra notes that some of the specific drafting in relation to these features appears to undermine NBN Co's stated objectives.

Licence to NBN Co IPR

The grant by NBN Co to RSPs of an IPR licence should enable RSPs and their customers to enjoy the benefit of any products or other materials made available under an SFAA. Telstra is concerned that the scope of the NBN Co licence is insufficient to achieve this purpose and RSPs may not be able to use or access NBN Co IPRs (included as embodied within products) with confidence, nor contract with downstream customers (including end-users) with sufficient certainty as to IP ownership, risk and responsibility.

Telstra's concerns with the scope of the current NBN Co IPR licence include the following:

- Telstra does not consider that the terms “*use and commercialise*”¹⁶² are sufficiently broad to provide the necessary authority for modification and development. The concepts of “*use*” and “*commercialise*” do not, in and of themselves, necessarily include the more specific rights of “*reproduction, modification, adaptation or development*”, all of which may well occur, and should occur, as part of the development of customer products. A more appropriate purpose would permit RSPs to “*use, reproduce, modify, adapt, develop or exploit*”;¹⁶³
- the licence (and related representation and warranty¹⁶⁴) only applies to “*Ordered Products*” which, by definition, have been ordered and accepted.¹⁶⁵ RSPs will likely need to deal with NBN Co products prior to their order, including in relation to

¹⁵⁹ As discussed in this submission, the regulatory recourse provisions in the NBN Co SAU still need to be materially improved.

¹⁶⁰ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p 142.

¹⁶¹ *Ibid.*

¹⁶² NBN Co SAU, Sch 1H, Annexure 2 clause 5.2(a) – (c).

¹⁶³ Telstra notes that the short term WBA contains references more aligned with Telstra's proposal (see, for example, clause D5.2(d) of the short term WBA), and indeed this approach is consistent with language used in s 31 of the *Copyright Act 1968*. Despite this, the NBN Co SAU appears to step back from this position and adopt the “*use and commercialise*” language instead.

¹⁶⁴ NBN Co SAU, Sch 1H, Annexure 2 c 5.2(d).

¹⁶⁵ NBN Co SAU, Sch 1H, Annexure 2 c 5.2(a) – (d).

marketing activities and collateral, and accordingly the licence should apply to all NBN Co products and NBN Co produced collateral supplied to RSPs;

- the current third party IP licence is limited to Third Party IPR to which NBN Co has obtained a licence pursuant to the PDF (and dependent on the terms of that licence).¹⁶⁶ This limitation is not consistent with industry practice and fails to recognise that products may well be developed outside of the PDF; and
- NBN Co's representation and warranty that use of an Ordered Product will not infringe Third Party IPR must not be qualified "*to the best of NBN Co's knowledge*".¹⁶⁷ As is usual commercial practice (and as is consistent with the IPR indemnity in the risk management section of the NBN Co SAU¹⁶⁸), NBN Co must in absolute terms stand behind and assume the risk in relation to any product it supplies (as above, this should be any product, not just "Ordered Products").

Licence to Customer IPR

The NBN Co SAU provides for a default "internal use" licence of Customer IPR to NBN Co.¹⁶⁹

As noted in Telstra's Previous Submission, Telstra does not believe there is anything inherent in the nature of the NBN Co / RSP supply relationship that justifies a "transfer" (whether by assignment, transfer or licence) of "Customer IPR" to NBN Co in order to exercise rights and perform obligations under the SFAA and an SAU (i.e. as a condition of supply).

Despite this, Telstra has been willing to work with NBN Co to develop an "internal use" licence regime and has done so throughout the course of the CDP. Unfortunately, and despite material progress in relation to these matters, the NBN Co SAU still falls short of an acceptable solution. Telstra notes, in particular:

- what constitutes "internal use" is not defined and this licence is currently structured in a manner that has the potential to permit a very broad range of uses by NBN Co, which may in fact erode the commercial value inherent in the supplied Customer IPR;
- the term of the licence remains unclear and appears to be a licence in perpetuity (in contrast to NBN Co's licence for the term of the Access Agreement);
- the entire concept of a default licence runs contrary to the principle that NBN Co should not obtain any rights in and to Customer IPR unless expressly granted, and in fact may serve to inhibit contributions of materials from RSPs rather than encourage them;
- implementation of this licence will present practical difficulties for both NBN Co and RSPs, for example in determining, monitoring and managing activities to ensure that they clearly fall within the terms of NBN Co's proposed licence (and the consequences if they do not); and
- the need for this licence in relation to business as usual activities is unclear. Indeed, it seems to Telstra that this concept may have some relevance in a product development

¹⁶⁶ NBN Co SAU, Sch 1H, Annexure 2 cl 5.2(b).

¹⁶⁷ NBN Co SAU, Sch 1H, Annexure 2 cl 5.2(d).

¹⁶⁸ NBN Co SAU, Sch 1H, Annexure 3 cl 3.2.

¹⁶⁹ NBN Co SAU, Sch 1H, Annexure 2 cl 5.3.

context, but not for business as usual activities.

Telstra proposal

Notwithstanding the above, and in recognition of NBN Co's likely desire to access Customer IPRs from time to time (as well as the need to balance the parties interests through the IP regime), Telstra would be agreeable to a very limited "internal use" licence to Customer IPR which:

- permits NBN Co to internally consider materials submitted to it by an RSP for the sole purpose of NBN Co making a determination of whether NBN Co has an interest in utilising the Customer IPR. If NBN Co does wish to utilise the Customer IPR for any further purpose, then that use will be subject to, and only permitted upon, a separate written licence agreement being entered into between NBN Co and the RSP;
- applies only for the applicable term of the signed Access Agreement; and
- is subject to the usual confidentiality constraints.

If following internal consideration NBN Co does wish to use any Customer IPR subsisting in materials submitted by an RSP, then an IPR identification process and IPR licence negotiation process would commence.

As a condition of this arrangement, however, the NBN Co SAU must be absolutely and expressly clear that, outside of the limited "internal use" licence described above:

- there is no default or mandatory licence to NBN Co of any Customer IPR;
- NBN Co cannot use, reproduce or exploit Customer IPR without negotiating and entering into a separate written agreement to do so; and
- RSPs are in no way compelled to enter into any licence (transfer or assignment) of their IPR, and are free to do so on whatever terms they see fit.

It is important to note that Telstra's proposal above is a compromise position in order to arrive at a mutually acceptable and practicable outcome. Telstra further notes that this is not an industry standard arrangement at this time. If NBN Co does not accept the principles of this proposal, then Telstra's strong preference is to remove the "internal use" licence described in the NBN Co SAU in its entirety, and to have an express acknowledgement that no Customer IPR transfers to NBN Co (whether by assignment, transfer, licence or otherwise) unless the terms of that transfer are agreed in writing.

IPR identification

In support of Telstra's "internal use" licence proposal above, Telstra is generally agreeable to the process whereby Customer IPRs in "Proposed Use Materials" are identified¹⁷⁰ (although again Telstra notes that this is not an industry standard position). This acceptance is given on the basis of:

- the "internal use" licence being limited as above (Telstra notes therefore that the scope of the "permitted use" will change);

¹⁷⁰ NBN Co SAU, Sch 1H, Annexure 2 cl 5.4.

- as above, it being made absolutely and expressly clear in the NBN Co SAU that there is no default or mandatory licence to NBN Co of any Customer IPR, irrespective of whether NBN Co has identified any Proposed Use Materials. Use of Customer IPRs can only be concluded by a negotiated written agreement; and
- inclusion of the usual confidentiality constraints.

Third Party IPR

Telstra is comfortable with each party being responsible for procuring Third Party IPR to the extent required to perform its obligations under the SFAA,¹⁷¹ provided that it is clear that NBN Co is responsible for such procurement in relation to all products (not just “Ordered Products”) in a manner which permits the intended development, downstream use and on-supply of Customer Products and Downstream Products.

As above, RSPs may be given access to a product prior to it being formally ordered and accepted, and there is no reason why NBN Co’s procurement obligations should not apply in this scenario.

Trademarks and branding

Telstra requires further certainty with regard to the use of trademarks and branding. In particular:

- Telstra is concerned that, through the brand guidelines published by NBN Co (and by virtue of trade mark applications filed by NBN Co), NBN Co has sought to claim rights in and impose restrictions on the use of the acronym “NBN” (when represented in simple type and not in a logo format), both on its own and as part of other phrases. Telstra considers that the simple type “NBN” acronym is generic and descriptive, being simply a shortened version of the words “national broadband network”. As such, RSPs should be free to use it and the NBN Co SAU should provide for this; and
- Telstra notes that NBN Co has circulated various forms of “brand guidelines”. This creates a very difficult environment within which RSPs are required to operate, and Telstra submits that more discipline should be brought to bear in this regard.

5.4.3. SAU NPTC Commitments – intellectual property

Telstra submits that the SAU NPTC Commitments set out in Table 9 below be included in the NBN Co SAU, in place of the detailed terms and conditions in the current NBN Co SAU. Telstra believes that these IPR commitments provide the basis for a fair and robust “business as usual” regime, with the detail to be included in the SFAA or otherwise set by the ACCC through ACCC Regulatory Decisions.

See the following page for Table 9.

¹⁷¹ NBN Co SAU, Sch 1H, Annexure 2 cl 5.5.

Table 9 – IPR SAU NPTC Commitments¹⁷²

Concept	Relevant NBN Co SAU Commitment
General principles	<p>Unless specifically and expressly agreed in writing, nothing in the NBN Co SAU or SFAA will serve to transfer or assign ownership of IPR or licence use of IPR. Consistent with this principle, the SFAA must not include any potentially misleading statements as to IPR ownership or use (for example by asserting ownership, or an ability to use, without an express grant or licence).</p> <p>Except as expressly provided (see below), nothing in the NBN Co SAU or SFAA confers on a party any right, title or interest in or to, any of the other party's (or any third party's) IPR.</p>
NBN Co IPR	<p>Under the terms of the SFAA, NBN Co will grant to an RSP an irrevocable, non-exclusive, royalty-free, non-transferable, worldwide licence for the term of the applicable Access Agreement to the NBN Co IPRs and any Third Party IPRs subsisting in, or otherwise required to properly benefit from, NBN Co products, to the extent required for an RSP (directly or through its personnel) to:</p> <ul style="list-style-type: none"> • use, reproduce, modify, adapt, develop or otherwise exploit any product; and • perform its obligations and exercise its rights under the SFAA. <p>An RSP may sub-licence any of the above rights to its related entities (on the same terms) or downstream customers (including end-users) (in respect of Customer Product or Downstream Product use), provided that the RSP remains liable for the acts / omissions of its sub-licensees in this respect.</p> <p>NBN Co must represent and warrant to an RSP that the supply and use of a product in accordance with the Access Agreement will not infringe the IPR of any person, and will indemnify the RSP in relation to the same.</p> <p>In the event of an infringement claim, NBN Co will, at an RSP's request and at no cost to the RSP (a) use reasonable endeavours to procure the right for the RSP to continue using the product or (b) modify / replace the product so that it is non-infringing.</p>
Customer IPR	<p>There must be no mandatory or default acquisition (including licence, transfer or assignment) of Customer IPR (both RSP originated IPR and Third Party IPR acquired by the RSP) to or by NBN Co, or its related entities or personnel.</p> <p>An RSP grants to NBN Co an irrevocable, non-exclusive, royalty-free, non-transferable, worldwide licence, for the term of the signed Access Agreement, to use any Customer IPR embodied or subsisting in</p>

¹⁷² For ease of interpretation, in crafting the SAU NPTC Commitments, Telstra has used applicable definitions from the NBN Co SAU. However, the substance of the definitions in the NBN Co SAU may not always be appropriate, and accordingly Telstra reserves its rights to seek amendments to these definitions depending on their use in the SAU NPTC Commitments.

Concept	Relevant NBN Co SAU Commitment
	<p>Customer Material submitted under the Access Agreement, solely within NBN Co, and for the sole purpose of NBN Co making a determination of whether NBN Co has an interest in utilising the Customer IPR (this being “internal use”). If NBN Co does wish to utilise the Customer IPR for any further purpose, then that use will be subject to, and only permitted upon, a separate written licence agreement being entered into between NBN Co and the RSP. This licence is at all times subject to applicable confidentiality constraints.</p> <p>Except for the “internal use” licence above, NBN Co’s access to Customer IPR must be separately agreed in writing between the parties (without such agreement NBN Co will not be permitted to use or access Customer IPR). In that context, an RSP is not compelled to agree to licence, transfer or assign Customer IPR, and is free to do so on whatever terms it sees fit.</p> <p>An RSP’s representations and warranties in relation to Customer IPR should not be included in the SFAA (on the basis that there is no default acquisition of Customer IPR), but rather be the subject of the (to be agreed) separate commercial terms.</p> <p>If NBN Co receives any licence of Customer IPR (as part of the (to be agreed) separate commercial terms), NBN Co must not use that licence as security, including for the purposes of the <i>Personal Properties Securities Act 2009</i>(Cth). Accordingly, any licence, or other right, granted for the benefit of NBN Co should be non-transferable (or an undertaking signed that it cannot be used for the purposes of security).</p>
New IPR	<p>Customer IPR (whether derived from an RSP or a third party) must never be subject to mandatory acquisition by NBN Co through categorisation of “New IPR” (whether through licence, transfer, assignment or otherwise).</p>
Third Party IPR	<p>NBN Co will be responsible for procuring, at its cost, licences for Third Party IPR embodied in any product to enable an RSP to supply any Customer Product (and for downstream customers (including end-users) to supply any Downstream Product), and for downstream customers (including end-users) to use such Customer Products or Downstream Products.</p>
Trade marks	<p>A party must not use a trade mark of the other party without the other party’s written consent (which may be withheld or given subject to conditions).</p> <p>The SFAA should include an express acknowledgement that the simple type acronym “NBN” may be used freely by RSPs as a shortening for the words “national broadband network”, and an assurance that NBN Co will not do anything to undermine this.</p>

5.5. Risk Management (Schedule 1H: Annexure 3)

5.5.1. Background

Telstra believes that NBN Co's risk management regime should reflect certain accepted commercial requirements, namely that the regime:

- allocates risk to the party best able to control the circumstances from which the risk arises (however, not in a way that obfuscates core and fundamental responsibilities);
- provides a balanced, fair and reasonable approach;
- takes into account the impact of any regime on the industry and consumers, generally; and
- maximises certainty and minimises ambiguity to allow for the efficient conduct of business operations.

Telstra acknowledges that NBN Co's position with respect to the risk management provisions in the SFAA and the NBN Co SAU have evolved following multilateral and bilateral engagement through the CDP. Telstra also acknowledges that the risk management provisions now include certain changes that were requested by Telstra.

However, Telstra continues to have fundamental concerns with the risk management provisions (and in particular the residual level of limited risk assumed by NBN Co), both when considered as a set of standalone provisions and when considered as an integrated component with the other provisions of the NBN Co SAU and SFAA.

This section 5.5 assesses NBN Co's position, as evidenced in the NBN Co SAU, and proposes a number of SAU NPTC Commitments that Telstra believes need to replace the detailed drafting in the NBN Co SAU. The proposed SAU NPTC Commitments still provide sufficient detail to ensure all parties are clear on the fundamental principles, however, they will provide the scope for NBN Co (in negotiation and consultation with industry) and the ACCC (if necessary) to create the requisite detail to fill the gaps.

Further, if there is any conjecture in relation to a particular SAU NPTC Commitment, Telstra believes it is better that the NBN Co SAU is silent on this point, to enable scope to further negotiate with NBN Co and seek ACCC intervention (through the use of ACCC Regulatory Decisions and the regulatory recourse rights in the NBN Co SAU¹⁷³), as required.

For the purpose of this section 5.5, "downstream customer" is taken to refer to an RSP's downstream customers, including end-users.

5.5.2. Assessing NBN Co's position

NBN Co has stated that "*the primary goal in developing terms and conditions for risk management and liability is to achieve an appropriate allocation of risk that is fair and reasonable and reflects the activities and responsibilities of NBN Co and RSPs, thereby providing certainty, clarity and transparency for all parties*".¹⁷⁴ While this is an appropriate goal, Telstra does not believe the current risk management regime achieves this. Nor does it

¹⁷³ As discussed in this submission, the regulatory recourse provisions in the NBN Co SAU still need to be materially improved.

¹⁷⁴ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p 143.

provide an appropriate allocation of risk which reflects the “accepted commercial requirements” set out above.

Risk allocation

The risk management regime must be considered not only as a standalone regime, but must also be considered in the context of NBN Co’s general obligations with respect to quality assurance and service provision. As presently drafted, the limited extent to which NBN Co is exposed to risk with respect to the products and services it supplies over the NBN falls short of what Telstra would expect for a commercial enterprise. In such circumstances, the benefit of the risk management regime are illusory – where NBN Co accepts no liability, the provisions of the risk management regime will not apply.

Further, the risk management regime effectively allocates risk to RSPs (and, ultimately, downstream customers (including end-users)) arising from NBN Co non-performance in circumstances where such entities are unable to control or mitigate that risk (for example, network equipment is supplied by NBN Co-engaged service providers and owned by NBN Co). The ability of an RSP to manage service quality issues is therefore limited, given the extent to which it can control the NBN and NBN Co (and NBN Co’s suppliers). As such, any risk management regime which, in effect, transfers the risk of NBN performance to RSPs while abrogating NBN Co from liability fails to present a “fair and reasonable” allocation of risk.

Other areas where the risk allocation is unacceptable to Telstra include:

- the general approach of excluding all liability and then providing for specific acceptance of liability¹⁷⁵ must not operate to avoid legitimate liability which a party would otherwise have under law;
- the extent to which Service Level Rebates are an RSP’s sole and exclusive remedy is unclear. In particular, it is unclear whether this principle applies only with respect to the failure to meet the corresponding service level, or whether it also extends to the underlying circumstances which gave rise to the failure to meet the service level (which it should not). If the application of Service Level Rebates is not limited in this way the Service Level Rebates themselves provide a further level of liability capping). The Service Level Rebate regime also needs to be appropriately “future-proofed” from the impacts of judicial determination;¹⁷⁶
- the liability caps¹⁷⁷ (both the proposed annual aggregate cap and the single event cap) which do not provide for an acceptable level of recovery taking into account the risk profile to which RSPs are exposed and are not comparable with existing industry practice. In any case, the current liability caps are to an extent redundant given the broad liability exclusions available to NBN Co. Further, while the liability caps are expressed as applying mutually, this does not, ipso facto, result in a balanced liability regime as it assumes the risk profile of NBN Co and access seekers is the same (which it is not);

¹⁷⁵ NBN Co, SAU, Sch 1H: Annexure 3, cl 2.1(b) and (c).

¹⁷⁶ For example, *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30.

¹⁷⁷ NBN Co SAU, Sch 1H, Annexure 3, cl 2.3 and 2.4.

- the excessively broad categories of loss which are excluded from any recovery¹⁷⁸ and the failure of such categories to adequately take into account the risk profile to which RSPs are exposed. Again, this is not comparable with existing industry practice; and
- while Telstra acknowledges NBN Co's wholesale only status, it is unreasonable for NBN Co to effectively exclude liability (and in some cases be indemnified) to the extent that it is in relation to downstream losses,¹⁷⁹ noting the stated policy intentions associated with the NBN, the fact that NBN Co's revenue will necessarily and ultimately be derived from downstream customers, and that any wrongful act or omission by NBN Co will be likely to have a direct impact on downstream customers.

Certainty, clarity and transparency

NBN Co has stated that “*NBN Co considers that it is in the interests of both NBN Co and RSPs to have a self-contained, clear articulation of respective liability positions. 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*”.¹⁸⁰

While Telstra does not disagree with this as a matter of principle, the benefit of a self-contained regime is only as good as the rights contained within that regime. That is, if a “code” inappropriately allocates risk, deliberately or inadvertently excludes rights that a party would legitimately expect to retain, or is unclear in its constituent terms, then the code is not appropriate. This is the case with the current risk management regime.

Telstra also notes NBN Co's assertion that codification “*is particularly important to NBN Co at this point in the development of its activities*”.¹⁸¹ Telstra does not agree with this assertion, particularly as no basis is proposed in support of this assertion and no clear path is proposed to migrate to replacement terms once the indeterminate temporal and/or roll out constraints are overcome.

While Telstra acknowledges that NBN Co is in the “network build” phase, NBN Co can nevertheless be easily distinguished from a genuine “start-up” or high risk venture in terms of its employee size and reach, extent of network already in the ground, extent of its financial viability and its ability to secure leading industry experts both as personnel and upstream service providers. Indeed, the fact that NBN Co might be in its infancy as an organisation (which it should be noted so too are RSPs in relation to migrating to the NBN) does not mean that NBN Co should be entitled to assume uncommercial and non-industry standard risk positions through the guise of codification.

It is also noteworthy that, as alluded to above, the relationship between the risk management regime and other aspects of the SFAA / NBN Co SAU (for example, the Service Levels Schedule and the change management provisions) is very complex, and further serves to undermine certainty in the interpretation and implementation of the risk management regime (and the SFAA as a whole). In particular, the Service Levels Schedule is of key importance in determining the appropriateness or otherwise of the risk management regime. This is especially the case when Service Level Rebates are designated as an RSP's sole and

¹⁷⁸ See, in particular, NBN Co SAU, Sch 1H, Annexure 3, cl 2.5(a)(ii).

¹⁷⁹ NBN Co SAU, Sch 1H, Annexure 3, cl 2.7(a) and 3.5 (noting that the impact of any indemnity is to create a payment on demand regime with respect to a very broad definition of Loss and without any need for costs to be incurred prior to enforcing an indemnity right).

¹⁸⁰ NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, p 143.

¹⁸¹ *Ibid.*

exclusive remedy.

However, it is also important to consider the extent to which NBN Co accepts clear and definitive contractual obligations (as opposed to obligations to use reasonable efforts or similar contractual formulations which dilute responsibility and contractual certainty), where the position of NBN Co is currently lacking in necessary detail (for example, with respect to maintenance commitments) and where NBN Co reserves to itself the ability to amend terms and conditions (including the amendment of supporting, but critical, documentation such as the Operations Manual) or the products/services themselves.

As a practical consideration, a risk management regime which is difficult to navigate is a disappointing outcome for industry, and does not promote the LTIE.

Effect on downstream customers

The ACCC has stated that, in its assessment of the risk management regime, it will consider “*the implications for NBN Co’s Customers when entering into Downstream Customer contracts*”.¹⁸²

Telstra believes the aggregate impact of the risk management regime proposed by NBN Co will likely manifest itself in RSPs acting rationally (where they can) through a combination of:

- “risk pricing” of products to downstream customers (reflecting the extent to which risk is absorbed by RSPs); and
- terms and conditions between RSPs and downstream customers which seek to limit RSPs’ own liability (in effect engineering a “pass through” of the risk profile retained by NBN Co).¹⁸³

Such an impact would clearly not be in the LTIE and runs contrary to the policy intention of facilitating end-user access to a high speed, national broadband network.

Further, it should be acknowledged that RSPs will not necessarily be able to ensure that a “risk neutral” (i.e. full pass through) position is the outcome with respect to downstream customers, taking into account:

- the commercial realities arising in negotiations with customers, particularly sophisticated customers and government agencies;
- the limitations on freedom of contract principles imposed by the unfair contracts terms included in the Australian Consumer Law; and
- practical limitations on the ability of an RSP to recover amounts from customers where the RSP is liable to NBN Co with respect to customer activities. In this circumstance, the RSP in effect acts as the insurer with respect to its customer activities and NBN Co is insulated from standard business/credit risks.

At present, the risk management provisions fail to account for or appropriately manage the above limitations, exposing RSPs to disproportionate risk in their role as the “conduit”

¹⁸² ACCC, *NBN Co Limited Special Access Undertaking Consultation Paper*, November 2012, p 84.

¹⁸³ In effect, this aspect of the regime proposed by NBN Co includes significant adverse impacts to any RSP if it does not exclude, restrict or limit its liability subject only to the extent that liability could have been excluded, restricted or limited “at law”, see NBN Co SAU, Sch 1H, Annexure 3, cl 2.7(a)(i).

between NBN Co and an RSP's downstream customers.

5.5.3. SAU NPTC Commitments – risk management

Telstra submits that the SAU NPTC Commitments set out in Table 10 below be included in the NBN Co SAU, in place of the detailed terms and conditions in the current NBN Co SAU. Telstra believes that these risk management commitments provide the basis for a more reasonable risk allocation taking into account the risk profiles of both NBN Co and the RSP, with the detail to be included in the SFAA or otherwise set by the ACCC through ACCC Regulatory Decisions.

Table 10 – SAU NPTC Commitments – risk management¹⁸⁴

Concept	Relevant NBN Co SAU Commitment
General application of risk management	<p>A party is not required to accept liability for the liability regime to apply. The liability regime will apply regardless of the legal basis or theory through which liability arises.</p> <p>A party accepts liability arising from the acts and omissions of its related bodies corporate and the personnel (employees, contractors, subcontractors, third party suppliers) of it and its related bodies corporate and for the impact of its network and equipment.</p> <p>NBN Co is responsible for all NBN Co-owned or NBN Co-supplied equipment and for the operation of the NBN Co network up to and including the NBN Co network boundary. Each RSP is responsible for the delivery of its products as from the NBN Co network boundary (without compromising NBN Co's obligations associated with upstream supply and matters on its side of the network boundary).</p>
Service Level Rebates	<p>Service Level Rebates must not operate as a de facto cap on NBN Co's liability.</p> <p>Service Level Rebates are the sole and exclusive remedy only with respect to the failure to meet the service level corresponding to that Service Level Rebate and not with respect to the underlying causes of that failure.</p>
Liability Caps	<p>An aggregate cap for liability arising in each 12 month service period will apply. The relevant cap will be equal to the amounts paid and payable by the RSP in that service period.</p>
Exclusion / Reduction of loss	<p>With the exception of claims for loss of profit and loss of data, any exclusion of loss provision must be limited to those losses which the common law would regard as "indirect" (being losses which do not arise naturally from the relevant breach, action or inaction). With respect to:</p>

¹⁸⁴ For ease of interpretation, in crafting the SAU NPTC Commitments, Telstra has used applicable definitions from the NBN Co SAU. However, the substance of the definitions in the NBN Co SAU may not always be appropriate, and accordingly Telstra reserves its rights to seek amendments to these definitions depending on their use in the SAU NPTC Commitments.

Concept	Relevant NBN Co SAU Commitment
	<ul style="list-style-type: none"> • claims for loss of profit, neither party may claim any amounts with respect to the loss of its profit; and • claims for loss of data, neither party may claim any amounts with respect to the loss of data provided that: (a) reasonable costs arising from data reload/reconstruction which is necessary as a result of loss of data remain claimable; and (b) a party may claim amounts in respect of loss of use of data to the extent that those amounts arise naturally. <p>The above exclusion will not apply in the circumstances described in the first 2 bullet points of the “Uncapped losses” section below.</p> <p>A party’s liability is reduced to the extent that:</p> <ul style="list-style-type: none"> • the other party or persons for which that other party is responsible do not take reasonable steps to minimise/mitigate losses incurred; and • losses of the other party are caused by any wrongful act or omission of the other party or persons for which that other party is responsible.
Downstream customer impacts	<p>NBN Co will be liable for downstream customer losses in the ordinary course (subject to the application of these SAU NPTC Commitments) with the exception that liability for or in respect of any claim brought against an RSP by a downstream customer of the RSP will be precluded to the extent the RSP could reasonably have excluded or limited its liability to the downstream customer.</p>
Uncapped losses	<p>The cap on liability will not apply to:</p> <ul style="list-style-type: none"> • acts or omissions for which a party is liable and which cause or contribute to death or personal injury (including liability under indemnity 3 (see “Indemnities” section below)); • acts or omissions for which a party is liable and which cause or contribute to damage to tangible property (including liability under indemnity 4 (see ‘Indemnities’ section below)); • fraudulent acts of the party or persons for which the party is responsible; • liability arising from any breach of obligations, negligent act or indemnity with respect to the use or misuse of intellectual property rights (including liability under indemnity 2 (see “Indemnities”: section below)); • liability arising from any breach of obligations, negligent act or indemnity with respect to the disclosure or misuse of Confidential Information (including liability under indemnity 1

Concept	Relevant NBN Co SAU Commitment
	<p>(see “Indemnities” section below);</p> <ul style="list-style-type: none"> • fines or penalties imposed by any government agency on a party as a result of any acts or omissions for which the other party is liable (as clarified above); and • under s118A of the <i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i> (Cth).
Indemnities	<p>A party must indemnify the other party, its related bodies corporate and their respective personnel and, in the case of RSPs, RSPs’ downstream customers (“indemnified persons”) for all losses incurred by the indemnified persons arising from the following:</p> <ol style="list-style-type: none"> 1 any misuse of Confidential Information by the party or persons for which the party is responsible (related bodies corporate and the personnel (employees, contractors, subcontractors, third party suppliers) of it and its related bodies corporate); 2 any claim brought by a third party against any of those indemnified alleging an infringement of intellectual property rights with respect to any right assigned, transferred or granted (including the use of products and services supplied); 3 personal injury to the extent caused or contributed to by any negligent or wilful act or omission by the party or persons for which the party is responsible (as clarified above) or any breach of obligations; and 4 damage to tangible property (including the making good of the relevant property) to the extent caused or contributed by any negligent or wilful act or omission by the party or persons for which the party is responsible (as clarified above) or any breach of obligations.
Indemnity procedures	<p>It is not necessary to incur expense or make payment before enforcing a right of indemnity.</p> <p>Where a third party brings a claim against an indemnified person, the indemnified person must:</p> <ul style="list-style-type: none"> • notify the indemnifying person as soon as is reasonably practicable of the claim; • give the indemnifying party (subject to the indemnifying person demonstrating that it is able to meet all its obligations under the relevant indemnity) the option to conduct the defence of the claim; • the indemnifying person: <ul style="list-style-type: none"> – must not do anything during the course of any defence or

Concept	Relevant NBN Co SAU Commitment
	<p>settlement which adversely affects the indemnified person's business or reputation;</p> <ul style="list-style-type: none"> – must consider in good faith any submissions made by the indemnified person; and – must obtain the consent of the indemnified person (not to be unreasonably withheld) to the terms of any settlement. No consent is needed where the settlement solely consists of the payment of amounts; and <ul style="list-style-type: none"> • the indemnified person must <ul style="list-style-type: none"> – promptly provide all assistance reasonably requested by the indemnifying person (at the indemnifying person's cost); and – not make any admissions in relation to the claim.

5.6. Rollout progress information (section 1H.2)

5.6.1. General comments

Telstra supports the ACCC position that “*rollout information should give access seekers clarity and certainty as to the progress of the rollout of the network, in order to enable them to efficiently plan for operations and investment in downstream services, networks and facilities*”.¹⁸⁵

For this reason, Telstra welcomes NBN Co's commitment to publish:

- a 3 year construction rollout plan, on an annual basis;
- a 1 year construction rollout plan, on a quarterly basis;
- a ready for service rollout plan; on a monthly basis; and
- a historical footprint list and historical region list, on a weekly basis.

Without limiting the generality of the commitments referred to above, the reporting could be further improved by:

- including an obligation to produce a rolling 6 monthly proposed ready for service rollout plan on a monthly basis;
- NBN Co being obliged to notify RSPs as and when it updates these reports; and
- NBN Co committing to produce a set of standards and timeframes to ensure data integrity and address error rectification.

¹⁸⁵ ACCC, *NBN Co Limited Special Access Undertaking Consultation Paper*, November 2012 p. 91-92.

Of course, Telstra considers that NBN Co should continue to engage with and report to industry in an open and transparent manner regarding rollout activities and progress, and should not be constrained by the commitments set out in the NBN Co SAU (i.e. these should act as minimum requirements only).

5.7. Points of interconnect (section 1H.3, 1H.4)

5.7.1. POI rollout progress

Please refer to Telstra's comments above regarding rollout progress information, which apply equally in relation to POI rollout information.

In addition, the NBN Co SAU should specify:

- a maximum number of allowable temporary POIs at any given time;
- a maximum number of services connected to individual temporary POIs at any given time; and
- the maximum period during which a temporary POI remains in service (i.e. a sunset period).

5.7.2. Closure, relocation and new POIs

Telstra is generally supportive of the commitments given in relation to closure, relocation and new POIs, however submits that the process could be improved further through inclusion of the following additional principles in the NBN Co SAU:

- any notification of closure or relocation of an Established POI¹⁸⁶ should include the information presently set out in clause C13.1(c) of the WBA, as well as information regarding the process for migration to the relocated (or new) POI, including timeframes (a minimum period for transition should be set);
- the notice period for closure or relocation of a temporary POI should be at least 12 months (not 6 months as stated by the NBN Co SAU).¹⁸⁷ These arrangements should align with requirements to close or relocate an established POI;
- similarly, notification of closure or relocation of a temporary POI should include the same information as for closure or relocation of an established POI. See above comments in this regard; and
- a restriction such that notification of any POI closure or relocation cannot precede the establishment, availability and "ready for service" status of the replacement POI.

5.8. Downstream regulatory compliance

5.8.1. Background

In Telstra's Previous Submission, it submitted on a number of additional "non-price" areas where it considered inclusion in an SAU would assist in creating certainty for both NBN Co and RSPs. Telstra has not sought to repeat these suggestions in this submission, largely on

¹⁸⁶ NBN Co SAU, Sch 1H cl 1H, 4.1(b).

¹⁸⁷ NBN Co SAU, Sch 1H cl 1H, 4.5(b).

the condition that the absence of those additional non-price terms would leave scope for the ACCC to intervene (i.e. remaining silent in the NBN Co SAU would enable the ACCC to issue BROCs or ADs to fill the gaps, if required). It is this position that forms the basis for Telstra's support of the 2 yearly SFAA reset proposal.

Despite this, Telstra remains concerned with NBN Co's positioning around an RSPs' legal and regulatory obligations vis-à-vis its downstream customers. Given this, Telstra takes this opportunity to reinforce, and restate, the position set out in its Previous Submission, which remains valid in the context of the NBN Co SAU.

Telstra acknowledges that NBN Co operates in a legislative environment governed by a number of obligations that are specific to it.¹⁸⁸ RSPs, in turn, operate downstream with their own regulatory obligations,¹⁸⁹ many of which may not be directly imposed on NBN Co and/or may be unique to a particular RSP. By way of example, at this time:

- Telstra faces service performance obligations under the Universal Service Obligation (**USO**)¹⁹⁰ and its licence condition to provide Priority Assistance (**PA**); and
- all RSPs are subject to the legislated Customer Service Guarantee (**CSG**) standard obligations,¹⁹¹ to the Australian Consumer Law (**ACL**)¹⁹² and to important obligations under the *Privacy Act 1988 (Cth)*.

There are also a variety of industry specific codes that are registered under Part 6 of the Telco Act.

Regulatory obligations on RSPs will also evolve over time. While it is right to consider the regulatory environment at this point in time, and these commitments should drive the content of the SFAA to enable immediate compliance, it is also important to have a regime in place that can adapt to a changing legal and regulatory landscape.

Given NBN Co will (indirectly) set the terms and conditions of downstream supply through the NBN Co SAU and its SFAA, an RSP's ability to meet its own regulatory commitments, whether now or in the future, will be directly affected by the extent to which NBN Co enables this compliance.

5.8.2. Assessing the NBN Co SAU

In many respects, the NBN Co SAU does not address the issues raised above, nor does it (or the SFAA) look to set commitments to address downstream regulatory obligations as they evolve.

Further, while these factors have a direct "compliance" effect on the RSP, ultimately RSP non-compliance will impact upon end-users.

¹⁸⁸ Not least of all the *National Broadband Network Companies Act 2011 (Cth)* and the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011 (Cth)*.

¹⁸⁹ For the purposes of this section, reference to "regulatory obligations" is a reference to all obligations applicable to the RSP at law, whether under statute, regulatory instrument/direction, licence condition or otherwise.

¹⁹⁰ *Telecommunications Act 1997 (Cth)*; *Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth)*.

¹⁹¹ *Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth)*; Australian Media and Communications Authority (Cth), *Telecommunications (Customer Service Guarantee) Standard 2011*, F2011L00413, 11 March 2011.

¹⁹² CCA, sch 2.

Although the SFAA recognises certain downstream obligations (e.g. CSG and PA), it remains Telstra's view that the SFAA does not currently adequately address or enable compliance with downstream regulatory obligations.

In relation to the ACL specifically, it is not clear under the WBA whether RSPs will be able to back-to-back their upstream commitments in the face of "Unfair Contract Terms" obligations.¹⁹³ This places RSPs in an untenable position, in which they must choose between including terms in contracts with downstream customers (including end-users) that are potentially unfair and risk breaching of the ACL, or leaving these terms out of their downstream contracts and complying with the law, but bearing the risk of the upstream commitments without appropriate contractual protection. Examples of this include:

- Obligations to comply with "Business Rules" applicable to the supply of a product or to comply with the terms of supply to NBN Co by a Third Party Supplier (in relation to disconnection).¹⁹⁴ Given that: (a) "Business Rules" are very broadly defined and can essentially be issued and amended by NBN Co at any time subject only to limited consultation rights; and (b) RSPs are highly unlikely to have any visibility of NBN Co's terms of supply with third party suppliers, the imposition of terms giving effect to the obligations may be considered unfair terms.
- Indeed, the possibility of the unilateral introduction of Business Rules which may constrain the use of a product or service by a downstream customer (including end-users) might be considered unfair, insofar as it permits one party to (potentially detrimentally) vary the terms of the contract.
- Similar issues arise in relation NBN Co's Fair Use Policy, which requires inclusion of certain provisions in downstream contracts prohibiting a downstream customer (including end-users) from engaging in "unfair use".¹⁹⁵ However, given that the Fair Use Policy does not clearly or exhaustively articulate what might constitute unfair use (and indeed affords NBN Co discretion to make such determination), the effect of this clause is currently unknown. End-user conduct might, for example, result in disconnection or deactivation of their products or services.

5.8.3. SAU NPTC Commitments – downstream regulatory compliance

Telstra takes very seriously its responsibility to comply with its customer facing (including consumer protection) legislation. RSPs should not be put in the position of needing to choose between complying with their Access Agreement and complying with their regulatory obligations.

Therefore, Telstra believes that the NBN Co SAU should contain a set of regulatory compliance enabling provisions and commitments, including:

- an express acknowledgement of the role that NBN Co plays in enabling compliance with downstream regulatory obligations (both current and future), and a commitment that NBN Co will develop and maintain its terms of supply to enable this compliance;
- a commitment from NBN Co that it will ensure that the manner in which it supplies products and services to RSPs, and the associated terms of supply, will, at all times,

¹⁹³ See "Unfair Contract Terms" provisions in Part 2-3 of Schedule 2 (Australian Consumer Law) to the CCA.

¹⁹⁴ WBA, cl C5.3(b).

¹⁹⁵ NBN Co *Fair Use Policy*, 30 November 2011, cl 2.2(a).

enable RSPs to comply with their regulatory obligations or other obligations at law that relate to the resupply of those products and services, including specific commitments from NBN Co to ensure downstream regulatory compliance by providing adequate “headroom” referable to RSP regulated timeframes, deferring to RSP legislative or regulatory instruments as a baseline for setting this “headroom”;

- commitments from NBN Co that minimum service delivery standards will be set to enable downstream regulatory compliance (noting that these service delivery standards should not be a proxy for performance targets, but rather a performance minimum);
- RSP contractual relief if compliance with a downstream regulatory obligation would result in non-compliance with an Access Agreement;
- RSP rights to withhold amounts due to NBN Co, or be recompensed for amounts paid to end-users, in circumstances where NBN Co does not enable regulatory compliance; and
- a review mechanism through which an RSP can request an independent third party (the ACCC may well be appropriate given the end-user impact) to ensure the terms of supply enable compliance.

Attachment 1: Responses to ACCC consultation questions

Item	ACCC Question	Response
Relationship between the SAU, Access Agreements, Standard Forms of Access Agreement and other ACCC powers		
1	<p>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:</p> <ul style="list-style-type: none"> 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)? 	<p>There remain a number of components of the NBN Co SAU that have unclear enforcement protocols. Telstra believes that the NBN Co SAU needs to be clearer about whether substantive commitments are to be enforced through commercial arrangements or through the NBN Co SAU itself. For example, it is unclear how RSP rights and obligations associated with the PDF are expected to be enforced and managed given they do not appear to be effected through NBN Co's SFAA.</p> <p>Telstra also provides feedback relating to this interaction in its discussion on the design of the NBN Co SAU.</p> <p>Refer to section 2.</p>
2	<p>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?</p>	<p>As discussed in section 2.4, the NBN Co SAU should not impinge on the ACCC's ability to make binding ACCC Regulatory Decisions which may take effect immediately, to the extent they are not inconsistent with either the NBN Co SAU or a current Access Agreement. Telstra notes that the statutory hierarchy clearly intends such decisions will have effect on their own terms.</p> <p>While Telstra supports the inclusion of these ACCC Regulatory Decisions within the scope of the regulatory recourse mechanism (i.e. so that they are incorporated in the SFAA through the two-yearly update mechanism) it should also be clear that the operation and enforcement of such decisions independently of this mechanism is not limited by the NBN Co SAU and that such determinations may take effect on their own terms.</p> <p>Refer to section 2.</p>
3	<p>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</p>	<p>As discussed in section 2.1.2, there are no external factors (for example, an alternative set of supply terms or competitive tension) to drive genuinely arms-length commercial arrangements. This is one of the reasons</p>

Item	ACCC Question	Response
	<p>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?</p>	<p>why ongoing ACCC oversight is so important.</p> <p>The NBN Co SAU (and the current consultation process) has now become the primary means through which RSPs are able to table, and potentially resolve, key outstanding concerns.</p> <p>In relation to Module 1 specifically, Telstra has expressed concern with the nature of the proposed engagement model.</p> <p>Refer to section 2.3.</p>
4	<p>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?</p>	<p>Telstra welcomes the inclusion of the commitments that have been given by NBN Co in relation to the Facilities Access Service and accepts that these commitments (including commitments regarding the proposed Facilities Access Decision process) are given in recognition of NBN Co's interconnection obligations under section 152AXB(4) in relation to the NBN Access Service and Ancillary Services.</p>
5	<p>Does the ACCC's role in the Midpoint Review mean that the regulatory recourse arrangements are likely to remain reasonable during Module 1?</p>	<p>Telstra believes a construct that gives the ACCC to provide alternative (or replacement) terms is a positive feature of the Midpoint Review. However, this alone will not be sufficient to ensure the provisions remain reasonable for the Initial Regulatory Period.</p> <p>Telstra's comments on the proposed regulatory recourse mechanism are set out in section 2.4, and comments of the proposed Midpoint Review for Module 1 are in section 2.3.2.</p>
6	<p>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?</p>	<p>As discussed in section 2.4, there appears to be no reason why the operation of the regulatory recourse provisions should be limited to the term of Module 1. Telstra considers that appropriate regulatory recourse provisions should be operative for the full term of the NBN Co SAU by inclusion in each replacement module. Telstra also makes specific comments on certain Module 2 fixed principles in sections 2.2.2 and 4.4.4.</p>
7	<p>Regarding the SAU commitments about NBN Co including certain terms and conditions in SFAAs, is it important for</p>	<p>The NBN Co SAU must be clear about whether substantive commitments are to be enforced through commercial arrangements</p>

Item	ACCC Question	Response
	the SAU to also require NBN Co to comply with the substance of these terms and conditions?	<p>or through the NBN Co SAU itself. As noted above in response to question 1, there remain a number of components of the NBN Co SAU that have unclear enforcement protocols.</p> <p>Telstra is concerned to ensure appropriate non-price terms are enforceable but, a number of its concerns at this stage are more fundamental and relate to the content of the terms and conditions themselves (rather than their implementation).</p> <p>Refer to sections 2 and 5.</p>
Operation of the SAU		
8	<p><i>Content of the different modules</i></p> <p>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?</p>	<p>As discussed in sections 2.2.2 and 4.4.4, Telstra has concerns regarding the scope of certain provisions that are locked in for the full term or those that are locked in for the first five years of the Initial Regulatory Period.</p> <p>Refer to sections 2, 3 and 4 for further feedback, including in relation to the use of fixed principles terms and conditions.</p>
9	<p><i>Fixed principles and replacement modules</i></p> <p>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?</p>	<p>As noted above in response to question 8, Telstra has concerns regarding a number of NBN Co's proposed fixed principles. Telstra does not consider that the proposed "qualifying circumstances" will provide sufficient flexibility to address these concerns and therefore proposes that these provisions not be included as fixed principles.</p>
10	<p>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?</p>	<p>Refer to section 2.5.</p>
11	<p>Do the processes for submission of proposed replacement modules provide</p>	<p>Refer to section 2.5.</p>

Item	ACCC Question	Response
	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?	As discussed in section 2.5, the proposed replacement module regime potentially disincentivises NBN Co to submit timely and reasonable Replacement Module applications.
13	<i>Midpoint Review</i> 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?	Refer to section 2.3.2.
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?	Refer to section 2.3.2.
15	Is it clear how the ACCC's decisions apply when the ACCC does not accept NBN Co's proposals and makes substitute terms?	Refer to section 2.3.2.
16	Are there any elements of NBN Co's service descriptions that are unclear or incomplete?	Refer to section 3.2
17	Does NBN Co's proposed service description for the NBN Access Service describe a service that is 'end-to-end' across the NBN?	Refer to section 3.2.1
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?	Refer to section 3.2.2
19	Is it clear which commitments in the SAU do and do not apply to Ancillary Services and the Facilities Access Service?	Telstra believes that this continues to be an area of ambiguity. In this submission Telstra has identified specific areas where the treatment of Ancillary Services and the Facilities Access Services needs to be clarified (for example, whether product development commitments, as well as the

Item	ACCC Question	Response
		scope of the specific PDF Processes, apply to Ancillary Services and Facilities Access Services), however, Telstra strongly supports further clarification of this issue in the NBN Co SAU more broadly.
20	Do NBN Co's proposed service descriptions meet the minimum elements previously specified by the ACCC for a bitstream access service?	Refer to section 3.2
Product development and withdrawal		
21	<p>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:</p> <ul style="list-style-type: none"> • 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 	Refer to section 3.4

Item	ACCC Question	Response
	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?	Refer to section 3.4. In particular, refer to Telstra's submissions regarding the factors to be taken into account by NBN Co when considering product withdrawals and variations.
Price-related matters		
23	<p><i>Price structures</i></p> <p>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:</p> <ul style="list-style-type: none"> • 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. 	As discussed in section 4.1, Telstra is concerned that there is the potential for pricing structures under the NBN Co SAU to evolve over time in such a way that while it may recover its costs in the longer term and overall achieve a 7% return, in the absence of any positive incentives or appropriate constraints, it will recover costs over time a manner that will distort retail market outcomes and RSPs business models and fail to promote the efficient use of the NBN or efficient investment in complementary infrastructure.
24	<p><i>Reference offers</i></p> <p>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?</p>	Refer to section 3.2
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?	<p>As stated in section 2.5, Telstra considers that the term of each Replacement Module must be no longer than 3 years. Consistent with this, Telstra considers that the process for updating Reference Offers must ensure that the composition of the Reference Offers is reviewed no less frequently than each 3 years.</p> <p>It should also be clear that NBN Co's product development commitments (including the PDF Processes) will apply to the development of new Reference Offers. Refer to section 3.4 for Telstra's specific comments regarding the product development</p>

Item	ACCC Question	Response
		commitments in the NBN Co SAU.
26	<p><i>Initial prices and price controls</i></p> <p>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?</p>	Refer to section 4.2.
27	Does the level of the initial prices for reference offers provide for a smooth migration of access seekers to the NBN?	<p>Given the increase in usage we remain concerned about the impact of CVC pricing on any migration path for Access Seekers acquiring ROs and NROs. We also have concerns about some of the initial prices for NROs. For example, the wholesale price for the enhanced service level 12 in NBN Co's SAU is currently the same as Telstra's retail price for the service.</p> <p>Telstra's concerns about CVC pricing and the way this pricing will evolve over time on a per end-user or SIO are addressed in detail in section 4.1</p>
28	Does the level of the CPI-1.5% price control raise any concerns?	Refer to section 4.1.
29	Should there be an opportunity for NBN Co's maximum regulated prices to be 're-balanced' over time as Customer preferences change?	As noted in section 4.1.2, it may be necessary for prices to be re-balanced over time. However Telstra believes that NBN Co's proposal is unlikely to allow for such rebalancing. An alternative solution which may address this issue is discussed in section 4.1.3.
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?	In the absence of any specific commitment in the NBN Co SAU, the general statement of intent from NBN Co is not sufficient to ensure that CVC pricing will evolve over time in a way that promotes the LTIE. As outlined in section 4.1.3, Telstra believes that a definitive commitment about CVC pricing when combined with the proposed global price cap would reduce price uncertainty to RSPs and provide NBN Co with greater flexibility and stronger incentives to rebalance CVC prices in a way that promotes the LTIE. However, in absence of this, Telstra considers that CVC pricing must be subject to regulatory recourse. This

Item	ACCC Question	Response
		should include a consideration and review of the broader re-balancing of AVC and CVC prices.
31	<p><i>Initial prices for new products</i></p> <p>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?</p>	Refer to section 4.2.
32	Do the initial pricing principles provide an appropriate constraint on NBN Co in its setting of initial prices for new products?	As discussed in section 4.2.1, the proposed initial pricing principles are likely to impose little or no constraint.
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?	As discussed in section 4.2.1, although there is a requirement for consultation, ultimately NBN Co retains considerable discretion as to how it sets initial prices for new products.
34	<p><i>Other issues</i></p> <p>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?</p>	Refer to section 4.5.
35	Are there any concerns with NBN Co's ability to change prices of individual products more than once in a single year?	As highlighted in the submission Telstra has significant concerns that the proposed CPI-1.5% price cap on individual products will result in a much higher wholesale price increases than CPI-1.5% being faced by RSPs for the basket of services (i.e. the AVC, CVC, ancillary service and other services) on a per end user basis. (Refer to section 4.1.) The ability to change prices more than once a year serves to exacerbate Telstra's existing concerns that the pricing constraint will be ineffective.
36	<p>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:</p> <ul style="list-style-type: none"> Is it appropriate that the WACC is calculated by applying 350 basis points to the ten-year government 	As discussed in section 4.4, Telstra has a number of concerns in relation to the design of the LTRC.

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	<p>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?</p> <ul style="list-style-type: none"> • 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	<p>Is it appropriate for NBN Co to calculate annual revenue requirements without any explicit role for the ACCC to review or approve these calculations?</p>	<p>Telstra considers that there should be greater regulatory oversight of NBN Co's LTRC calculations and the inputs into these calculations (including expenditure amounts). These issues are discussed in sections 4.3 and 4.4.</p>
38	<p>Should the reporting requirements provide the ACCC with any additional information to help assess NBN Co's compliance with these methodologies?</p>	<p>Telstra considers that more detailed reporting by NBN Co would be required to allow the ACCC to assess NBN Co's compliance. Reporting requirements were addressed in detail in section 4 of Telstra's Previous Submission.</p>
39	<p>Are there any elements of the processes contained in Modules 0 and 2 for developing, submitting and assessing revenue forecasts that raise concerns?</p>	<p>Refer to section 4.3 and section 4.4.4.</p>
40	<p>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:</p> <ul style="list-style-type: none"> • the criteria for developing capital and operating expenditure forecasts (discussed in section 6.3.2); • the criteria for developing forecast 	<p>Refer to section 4.4.</p>

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	<p>depreciation, including the use of a straight-line approach;</p> <ul style="list-style-type: none"> • 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. 	
41	<p>Is NBN Co's proposed approach to determining expenditure levels during the network rollout period reasonable? In your response, please consider:</p> <ul style="list-style-type: none"> • 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 prudency requirements in Module 1 achieve the appropriate balance between prescription and flexibility. 	Refer to section 4.3.
42	<p>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:</p> <ul style="list-style-type: none"> • 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 	Refer to section 4.3.

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	operating environment.	
43	<p>Do the Network Design Rules reflect prudent and efficient network design? In your response, please consider:</p> <ul style="list-style-type: none"> • the network design requirements specified by the Government; • whether the scope of the <i>Network Design Rules</i> 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 <i>Network Design Rules</i> are described in sufficient detail that an independent person can determine whether NBN Co's capital expenditure complies with these rules. 	Refer to sections 4.3 and 4.4.3.
44	Are the various circumstances in which NBN Co can update the Network Design Rules reasonable?	Refer to section 4.4.4.
45	Are there deemed prudent and permitted variations categories that should not be included in the SAU?	Refer to section 4.3.
46	Are the categories sufficiently defined to ensure that they encompass only efficient expenditure?	Refer to section 4.3.
Non-price related matters		
47	<p>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.</p> <p>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?</p>	<p>Telstra does not, per se, have an objection to the inclusion of commitments in the NBN Co SAU that require terms and conditions to be included in the SFAA.</p> <p>However, Telstra does have material concerns about the substance of the terms and conditions as currently included by NBN Co in Annexures 1 to 3 of Schedule 1H and Annexure 1 of Schedule 1J.</p> <p>These clauses have not been agreed with industry (and therefore are still under development), and accordingly Telstra does not believe that these should be "locked-in"</p>

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		<p>to the NBN Co SAU at this stage.</p> <p>For this reason, Telstra has proposed a solution in its submission whereby high-level commitments are included in the NBN Co SAU, and the detail is then included in the SFAA in a manner consistent with the high-level commitments (following further negotiation and engagement with industry, or as set by the ACCC through an ACCC Regulatory Decision (if necessary)).</p> <p>Refer to sections 2.4 and 5.1.3.</p>
48	<p>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?</p>	<p>While Telstra supports the Midpoint Review, Telstra believes it should occur much earlier in the NBN Co SAU term (after 3 years, rather than 5 years).</p> <p>Telstra would also expect that certain "price" terms will be subject to review and the processes need to be improved to ensure the role of the ACCC is effective (subject to further detail in the body of this submission).</p> <p>Furthermore, Telstra has concerns about implementation processes associated with the Midpoint Review, and objects to "deemed" acceptance provisions.</p> <p>Refer to section 2.3.2.</p>
49	<p>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.</p>	<p>Telstra does not believe the approach taken to service levels in the NBN Co SAU will promote the LTIE.</p> <p>Telstra believes the proposed Service Level Schedule, in its current form, still falls short of Telstra (and end-user) service level expectations. Telstra is concerned that:</p> <ul style="list-style-type: none"> • the service level regime, in effect, fixes service levels for an inappropriate length of time; • the service levels are not adequate to facilitate RSP compliance with downstream regulatory obligations; • the service levels proposed are not aligned with current industry and end-user performance expectations; • a number of service levels important to ensuring and promoting the LTIE

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		<p>are not in the NBN Co SAU; and</p> <ul style="list-style-type: none"> the process for ongoing review of, and changes to, service levels is insufficient in light of the dynamic market requirements and evolving NBN Co product and service set. <p>Given these factors, Telstra believes that NBN Co's approach to service levels should be reconsidered.</p> <p>Refer to section 3.3.</p>
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?	<p>Telstra believes that the limited service levels, limited rebate arrangements and a service level regime in which the rebates apply as a sole and sole exclusive remedy, all combine to compromise the proposed service level regime.</p> <p>In relation to the sole and exclusive remedy proposal specifically, it remains unclear whether this principle applies only with respect to the failure to meet the corresponding service level, or whether it also extends to the underlying circumstances which gave rise to the failure to meet the service level.</p> <p>Telstra believes that this regime should not undermine any recourse rights in relation to the underlying circumstances. If the application of service level rebates is not limited in this way, the rebates themselves provide a further and inappropriate level of NBN Co liability capping.</p> <p>Refer to sections 3.3 and 5.5.</p>
51	Is each metric expressed in a manner that is sufficiently clear? Is the manner in which each metric is measured clearly described?	<p>Telstra has not taken the opportunity express a view in its submission on each specific metric. This is because Telstra does not believe it is appropriate to "lock in" service level specifics in the NBN Co SAU, but rather:</p> <ul style="list-style-type: none"> the service level details should be contained in the SFAA, and subject to regulatory oversight (with rights to dispute and intervention options for the ACCC if NBN Co performance against service levels falls short of expectations);

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		<ul style="list-style-type: none"> • the development and enhancement of the service levels should take place according to settled processes and principles set out in the NBN Co SAU; and • the definitions, obligations, processes and principles in respect of service levels in the NBN Co SAU should be subject to annual review (the Midpoint Review proposed under the NBN Co SAU is considered to be insufficient protection to, and will not promote, the LTIE). <p>Furthermore, Telstra proposes an approach to service levels premised on the current NBN Co SAU Schedule 1J “Service Level Commitments” being replaced with the higher level commitments set out in Telstra’s submission.</p> <p>Telstra believes that this alternative approach would generate a framework to create a robust service level regime which will flex as NBN Co products and services evolve and as NBN Co capability increases (thus avoiding distortions in retail market outcomes and limiting detrimental impacts on the LTIE).</p> <p>Refer to section 3.3.</p>
52	Will the commitments enable access seekers to meet their downstream regulatory obligations?	<p>Telstra has noted in the body of this submission that the service levels are not adequate to enable RSP compliance with downstream regulatory obligations.</p> <p>It is for this reason that Telstra has proposed that high-level commitments be included in the NBN Co SAU, including a commitment that service levels must be sufficiently robust, with sufficient headroom, to ensure RSPs are able to rely on NBN Co’s performance to allow RSPs to meet their downstream regulatory obligations.</p> <p>In addition to this, Telstra has also proposed the inclusion of high-level commitments relating to regulatory compliance more generally. Specifically (and amongst other commitments), Telstra believes that the NBN Co SAU must contain a set of regulatory</p>

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		<p>compliance enabling provisions and commitments, including:</p> <ul style="list-style-type: none"> • an express acknowledgement of the role that NBN Co plays in enabling compliance with downstream regulatory obligations (both current and future), and a commitment that NBN Co will develop and maintain its terms of supply to enable this compliance; • a commitment from NBN Co that it will ensure that the manner in which it supplies products and services to RSPs, and the associated terms of supply, will, at all times, enable RSPs to comply with their regulatory obligations or other obligations at law that relate to the resupply of those products and services, including specific commitments from NBN Co to ensure downstream regulatory compliance by providing adequate “headroom” referable to RSP regulated timeframes, deferring to RSP legislative or regulatory instruments as a baseline for setting this “headroom”; and • commitments from NBN Co that minimum service delivery standards will be set to enable downstream regulatory compliance (noting that these service delivery standards should not be a proxy for performance targets, but rather a performance minimum). <p>Refer to sections 3.3 and 5.8.</p>
53	Is the Midpoint Review process likely to ensure that the Service Level regime remains reasonable during Module 1?	<p>Telstra provides detailed comments in the body of this submission in relation the Midpoint Review. In the context of service levels, Telstra’s concerns about the Midpoint Review are particularly acute.</p> <p>Telstra considers that the service level regime proposed in the NBN Co SAU does not reflect a meeting of minds with industry. Furthermore, Telstra believes the proposed Service Level Schedule still falls short of Telstra (and end-user) service level</p>

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		<p>expectations.</p> <p>RSPs must not be “locked in”, for any material length of time, to detailed or specific service levels in the NBN Co SAU. Telstra believes that to “lock in” service levels at this juncture would be detrimental to the LTIE as it would not provide the necessary flexibility to adapt and improve service and performance levels (particularly in the short term) in what is an inherently dynamic and continuously evolving market.</p> <p>Telstra also considers that a 5 year delay for the Midpoint Review is not appropriate.</p> <p>Telstra believes that the definitions, obligations, processes and principles in respect of service levels in the NBN Co SAU should be subject to annual review by the ACCC. The Midpoint Review proposed under the NBN Co SAU is considered to be insufficient protection to, and will not promote, the LTIE.</p> <p>Refer to sections 2.3 and 3.3.</p>
54	<p><i>Modules 0 and 2 and replacement module commitments</i></p> <p>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?</p>	<p>Module 2 gives little real context to the way in which service levels will evolve over time. While the commitment to include service level proposals in replacement modules is welcome, it remains unclear whether these will be set at NBN Co’s discretion and it appears that these will be subject to the replacement module mechanics discussed in detail in section 2 (Design of the NBN Co SAU) of the submission.</p> <p>As discussed above, and in section 3 (Product Terms and Conditions), in order to promote the LTIE, Telstra believes that service levels require continuous development with annual review points.</p> <p>Refer to section 3.3.</p>
55	<p>Do the risk management terms balance the parties’ interests and enable them to efficiently operate and invest in their respective networks, services and facilities?</p>	<p>Telstra has fundamental concerns with the risk management provisions (and in particular the residual level of limited risk assumed by NBN Co), both when considered as a set of standalone provisions and when considered as an integrated component with the other provisions of the NBN Co SAU and SFAA (most notably, the</p>

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		<p>service level regime). Accordingly, Telstra does not consider that the risk management terms appropriately balance the parties' interests.</p> <p>Furthermore, Telstra believes it likely that the risk management positions currently proposed by NBN Co will have a negative impact on the manner in which RSPs' manage their networks, services and customer arrangements, which will ultimately have a negative impact on end-users.</p> <p>Refer to section 5.5.</p>
56	<p>Is it clear to whom and in what circumstances the risk management provisions in Annexure 3 to Schedule 1H apply?</p>	<p>Telstra's primary concerns are not with the construct of Annexure 3 to Schedule 1H, or with the clarity around the application of these terms (i.e. NBN Co's intention appears clear). Rather, Telstra is concerned with NBN Co's approach to managing its risk profile and the manner in which this has been translated into detailed content.</p> <p>For this reason, Telstra has proposed a number of high-level risk management commitments for inclusion in the NBN Co SAU. The detailed implementation of these commitments would then be developed for inclusion in the SFAA through further industry engagement or, if necessary, ACCC intervention.</p> <p>Refer to questions 47 and 55 above, and section 5.5.</p>
57	<p>Is the Midpoint Review process likely to ensure that the risk management terms remain reasonable during Module 1?</p>	<p>Telstra provides detailed comments in the body of this submission in relation the Midpoint Review (refer section 2.3.2).</p> <p>Telstra considers that the risk management terms proposed in the NBN Co SAU do not reflect an agreed position with industry and it is therefore not appropriate to wait until the Midpoint Review before industry concerns are considered and addressed.</p> <p>Refer to questions 55 and 56 above for further context, and section 5.5.</p>
58	<p>Do the confidentiality terms balance the parties' interests and enable them to efficiently operate and invest in their respective networks, services and</p>	<p>While Telstra considers that improvements have been made to the confidentiality regime through the CDP, Telstra still has a number</p>

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	facilities?	<p>of concerns with the regime.</p> <p>Telstra remains particularly concerned with the disclosure rights afforded to NBN Co, which are broad and, in places, ambiguous (and indeed are more extensive than those available to RSPs). Telstra believes that NBN Co's rights to use and disclose RSP confidential information are neither consistent with industry standards nor are they necessarily required for NBN Co to effectively operate its business.</p> <p>Given this, there appears to be a real risk that the confidentiality of RSP information could be compromised, which will serve as a disincentive to constructive exchange of information with NBN Co.</p> <p>Refer to section 5.3.</p>
59	Is it clear to whom and in what circumstances the confidentiality provisions in Annexure 2 to Schedule 1H apply?	<p>Telstra's primary concerns are not with the construct of Annexure 2 to Schedule 1H, or with the clarity around the application of these terms (i.e. NBN Co's intention appears clear). Rather, Telstra is concerned with the approach that NBN Co has taken to managing confidential information (both of NBN Co and RSPs), and the manner in which this has been translated into detailed content.</p> <p>For this reason, Telstra has proposed a number of high-level confidentiality commitments for inclusion in the NBN Co SAU. The detailed implementation of these commitments would then be developed for inclusion in the SFAA through further industry engagement or, if necessary, ACCC intervention.</p> <p>Refer to questions 47 and 58 above, and section 5.3.</p>
60	Is the Midpoint Review process likely to ensure that the confidentiality terms remain reasonable during Module 1?	<p>Telstra provides detailed comments in the body of this submission in relation to the Midpoint Review (refer section 2.3.2).</p> <p>Telstra considers that the confidentiality terms proposed in the NBN Co SAU do not reflect an agreed position with industry and it is therefore not appropriate to wait until the Midpoint Review before industry concerns</p>

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		<p>are considered and addressed.</p> <p>Refer to questions 58 and 59 above for further context, and section 5.3.</p>
61	<p>Do the IPR terms balance the parties' interests and enable them to efficiently operate and invest in their respective networks, services and facilities?</p>	<p>While Telstra has been pleased with progress made in relation to IPR terms through the CDP, there remain a number of deficiencies in the IPR regime included in the NBN Co SAU. These deficiencies primarily relate to:</p> <ul style="list-style-type: none"> • the scope of the licence of NBN Co IPR to RSPs (which does not clearly permit RSPs to use, adapt and further develop NBN Co IPR in a manner enabling RSPs (and customers) to obtain the full benefit of the NBN); • the default "internal use" licence for RSP IPR to NBN Co (which is unclear both as to scope and term); • NBN Co's approach to third party IPR subsisting in its products; • NBN Co's unwillingness to fully 'stand behind' the IPR in its products (for example, by only giving qualified warranty protection); and • restrictions on trademarks and branding, particularly in relation to uncertainty surrounding the operation of the NBN Co Brand Guidelines and use of the acronym "NBN". <p>Refer to section 5.4.</p>
62	<p>Is it clear to whom and in what circumstances the IPR provisions in Annexure 2 to Schedule 1H apply?</p>	<p>Telstra's primary concerns are not with the construct of Annexure 2 to Schedule 1H, or with the clarity around the application of these terms (i.e. NBN Co's intention appears clear). Rather, Telstra is concerned with the approach that NBN Co has taken to managing IPR (of NBN Co, RSPs and third parties), and the manner in which this approach has been translated into detailed content.</p> <p>For this reason, Telstra has proposed a number of high-level IPR commitments for inclusion in the NBN Co SAU. The detailed implementation of these commitments would then be developed for inclusion in the SFAA</p>

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		<p>through further industry engagement or, if necessary, ACCC intervention.</p> <p>Refer to questions 47 and 61 above, and section 5.4.</p>
63	<p>Is the Midpoint Review process likely to ensure that the IPR terms remain reasonable during Module 1?</p>	<p>Telstra provides detailed comments in the body of this submission in relation to the Midpoint Review (refer section 2.3.2).</p> <p>Telstra considers that the IPR terms proposed in the NBN Co SAU do not reflect an agreed position with industry and it is therefore not appropriate to wait until the Midpoint Review before industry concerns are considered and addressed.</p> <p>Refer to questions 61 and 62 above for further context, and section 5.4.</p>
64	<p>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?</p>	<p>Telstra has material concerns with the role of NBN Co in the establishment and management of disputes to which will invariably be a party. Telstra believes that the dispute management regime is too important for it to be structured in a way that has NBN Co central to its establishment and management.</p> <p>It is fundamentally important, particularly given the apparent intention to largely exclude access to the ACCC and the courts, that the regime is predictable and is adjudicated by independent adjudicators. Telstra believes the regime currently proposed has the potential to be unpredictable and to give rise to apprehended bias.</p> <p>Refer to section 5.2.</p>
65	<p>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?</p>	<p>At a structural level, Telstra does not have concerns with an arbitral dispute resolution regime, rather than court-based dispute resolution. Telstra also agrees that this is likely to result in greater efficiency and certainty for the parties.</p> <p>However, it is fundamental that the dispute resolution process has integrity and is, and is seen to be, predictable and free from apprehended bias. Telstra has concerns in this regard.</p>

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		<p>Furthermore, the parties should not be excluded from initiating court proceedings in certain circumstances. Telstra has sought to provide further detail in the body of this submission.</p> <p>Refer to question 64 above, and section 5.2.</p>
66	<p>Is the Midpoint Review process likely to ensure mean that the dispute management terms remain reasonable during Module 1?</p>	<p>Telstra provides detailed comments in the body of this submission in relation to the Midpoint Review (refer section 2.3.2).</p> <p>Telstra considers that the dispute resolution terms proposed in the NBN Co SAU do not reflect an agreed position with industry and it is therefore not appropriate to wait until the Midpoint Review before industry concerns are considered and addressed.</p> <p>Refer to question 64 and 65 above for further context, and section 5.2.</p>
67	<p>Do the timeframes for the processes surrounding ACCC approval of changes to POIs give stakeholders sufficient opportunity to make submissions to the consultation process?</p>	<p>Refer to section 5.7.</p>
68	<p>Is the Midpoint Review process likely to ensure that the terms relating to the changing of POI locations remain reasonable during Module 1?</p>	<p>Telstra provides detailed comments in the body of this submission in relation to the Midpoint Review (refer section 2.3.2). Refer to section 5.7.</p>
69	<p>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?</p>	<p>Refer to sections 5.6 and 5.7.</p>
70	<p>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?</p>	<p>Refer to section 5.6.</p>
71	<p>Is the Midpoint Review process likely to ensure that the terms relating to publication of rollout information remain reasonable during Module 1?</p>	<p>Telstra provides detailed comments in the body of this submission in relation to the Midpoint Review (refer section 2.3.2). Refer to section 5.6.</p>

Attachment 2: LTRC Working Model

Please refer to accompanying Microsoft Excel spreadsheet