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## Submission

February 2023

# NBN Co Special Access Undertaking (**SAU**) Variation (November 2022)

Submission by the Australian Communications Consumer Action Network (**ACCAN**) to the Australian Competition and Consumer Commission (**ACCC**)

## **About ACCAN**

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards communications services that are trusted, inclusive and available for all.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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## Executive Summary

The Special Access Undertaking (**SAU**) Variation lodged by NBN Co represents a significant step forward in terms of consumer protections and regulatory and pricing certainty. However, there are limitations which require addressing prior to the ACCC's acceptance of the SAU Variation. The regulatory framework of NBN Co, as a national monopoly provider of an essential service, is critical to ensuring the benefits of digital technologies can be felt across the nation.

Whilst the NBN Co may face competitive pressures at the margins, households have limited choice in how they connect and engaged with the digital economy. As such, it is imperative that the regulatory settings are appropriate and in the long-term interests of end users (**LTIE**).

This submission focuses on the questions posed in the ACCC's consultation paper and the key changes ACCAN recommends NBN Co make to the Variation prior to its acceptance, including:

- Post-2032, the ACCC should not be required to have regard to NBN Co's ability to achieve and maintain, for the duration of each regulatory cycle, a stand-alone investment grade credit rating, when setting NBN Co's Annual Building Block Revenue Requirement (**ABBRR**).
- The SAU should provide the ACCC the ability to introduce incentive schemes into the framework.
- The framework for consultation and engagement should be strengthened by specifying appropriate minimum timeframes for consultation, requiring detailed business cases to be provided and consulted on, and funding necessary for best practice consultation.
- NBN Co should be required to develop a product targeted to low-income consumers that is endorsed by representatives of low-income consumers within the first 12 months of the SAU's acceptance.
- The low-income forum proposal should be amended to ensure that the goal of improving affordability of the network is achieved.

ACCAN welcomes a number of NBN Co's proposals including the shift to a flat rate pricing construct, the reduction of the Initial Cost Recovery Account (**ICRA**), the Replacement Module Application (**RMA**) process and the introduction of the Weighted Average Price Cap (**WAPC**). Despite this, there remain significant changes that need to be made to the Variation so that we can be confident that it is in the LTIE.

## List of Recommendations

### General Regulatory Framework and Modular Structure

**Recommendation 1:** Clause 5.7(a), which requires NBN Co to consult with Access Seekers and Consumer Advocacy Groups prior to providing a Replacement Module Application, should be amended to specify a minimum 90-day consultation period prior to NBN Co providing a Replacement Module Application.

**Recommendation 2:** NBN Co should fund resources necessary for best practice consultation and engagement regarding consultation required ahead of submitting a Replacement Module Application.

**Recommendation 3:** The SAU should contain sufficient stop the clock provisions and appropriate incentives for NBN Co to consult with consumer advocates and prevent delays to the Replacement Module Application processes.

**Recommendation 4:** The SAU should require NBN Co to provide the ACCC with a notice of intent to sell within 24 months of the sale date.

**Recommendation 5:** Clauses 3A.1.2(b), 3B.3(c) and 2G.4.2(b)(i)(A), which require the ACCC, in setting NBN Co's Annual Regulated Revenue Allowance, to provide NBN Co with the reasonable opportunity to achieve and maintain a stand-alone investment grade credit rating, should be removed from the SAU.

**Recommendation 6:** Clause A3.1.2, which outlines the process for the ACCC to provide NBN Co with a Statement of Approach, should be amended so that the ACCC is required to provide the Statement of Approach within a minimum of 180 days prior to NBN Co lodging their replacement module application.

### Pricing and Product Constructs

**Recommendation 7:** The monthly recurring charge for the Bundled TC-4 Offers for 25-50/5-20 Mbps and 50/20 Mbps listed in Attachment E should remain at \$45.00 at the beginning of Module 4.

**Recommendation 8:** The SAU should require NBN Co to develop a product targeted to low-income consumers that is endorsed by representatives of low-income consumers within the first 12 months of the SAU's acceptance.

**Recommendation 9:** The SAU should require that the low-income forum be chaired independently, focus only on affordability issues and convened on a bi-annual basis.

**Recommendation 10:** Clause 2B.7(a), which requires NBN to establish a multilateral working group to identify targeted initiatives to improve access to the NBN for low-income, vulnerable and unconnected end users, should be redrafted to identify targeted initiatives for low income or vulnerable consumers.

**Recommendation 11:** In having regard to maintaining affordable access to the network, NBN Co should be required to demonstrate how their pricing proposals are likely to increase take up of services amongst low-income consumers.

**Recommendation 12:** The SAU should require NBN Co to develop a data capped product prior to the end of Module 3.

**Recommendation 13:** Clause 11.5.4, which specifies the process regarding product withdrawal required by law or directed by Shareholder Ministers should be amended to remove any reference to Shareholder Ministers.

#### NBN's Approach to the Building Block Model

**Recommendation 14:** The SAU should introduce a financeability test to ensure the internal consistence of NBN Co's Building Block Model.

**Recommendation 15:** The SAU should require NBN Co to provide detailed information regarding capital, operational and replacement expenditure.

#### Expenditure Criteria

**Recommendation 16:** The ACCC should consider how to provide incentives for NBN Co to achieve efficiency gains and reduce capital and operational costs over the duration of the SAU.

**Recommendation 17:** NBN should be required to provide independent assessments and reviews of material business cases.

**Recommendation 18:** The SAU variation should include appropriate incentives for NBN Co to adhere to timeframes for information requests regarding cost pass through applications.

**Recommendation 19:** Clause 2D.5.3, which provides the ACCC the power to notify NBN Co of the occurrence of a Negative Change Event if NBN Co has not provided a cost pass-through application relating to that Negative Change Event, should be amended such that it does not prevent NBN Co from making a cost pass-through application in respect of that Negative Change Event.

**Recommendation 20:** The ACCC should consider the prudence and efficiency of the expenditure allowances made under the Telstra Arrangements and the Optus Arrangements for a given regulatory cycle.

#### Cost Allocation and Accounting Separation

**Recommendation 21:** The balance of the ICRA should be allocated between core and non-core services.

#### Service Quality

**Recommendation 22:** For the SAU to be amended such that it is clear that the ACCC has the power to initiate a mid-regulatory cycle review of benchmark service standards post-2032.

**Recommendation 23:** For the SAU to provide an opportunity for the ACCC to introduce a service standard incentive scheme.

**Recommendation 24:** Benchmarks relating to connection, fault rectification and appointment keeping standards should be amended to a minimum 95%.

**Recommendation 25:** NBN Co should amend timeframes for new connections to allow retailers to meet the timeframes set out in the Customer Service Guarantee (CSG).

Compensation amounts for missed connection timeframes should also be set in line with the current CSG.

ACCC Functions and Powers

**Recommendation 26:** For Clause 6.4(b), which provides NBN Co the opportunity to protect the confidentiality of any information or document that the ACCC has requested to disclose to a third party, to be revised to clarify that the ACCC has the right to disclose information to a third party of NBN where reasonable notice is provided, and it is in the public interest to do so.

## General Regulatory Framework and Modular Structure

The general regulatory framework and modular structure proposed by NBN Co is broadly appropriate but requires further refinement to align with the LTIE. In particular, we support minimum benchmarks for service quality being determined for each regulatory cycle. This allows for NBN Co's expenditure forecasts and pricing proposals to be considered alongside the proposed level of service. It is important that consumers are adequately consulted regarding price-quality trade-offs.

ACCAN considers the replacement module process, where the ACCC has the ability to determine replacement modules via a Replacement Module Determination (**RMD**), an appropriate safeguard. We support proposals to give the ACCC oversight of the length of the regulatory cycle, the Building Block Model (**BBM**) including proposed expenditure, Weighted Average Cost of Capital (**WACC**), regulatory depreciation as well as the Entry-level Offer proposal and service standards proposals.

### Replacement Module Application

Before providing an RMA, NBN Co has proposed to consult with Consumer Advocacy Groups on the relevant expenditure which NBN Co intends to undertake in that regulatory cycle. In doing so, NBN Co will give 'reasonable notice', and a 'reasonable opportunity' to participate in the consultation.<sup>1</sup> The drafting of clause 5.7(a) should be more specific. For ACCAN to reasonably engage in what is likely to be a detailed and complex consultation, we recommend providing at least 90 days for Access Seekers and Consumer Advocacy Groups to provide feedback on the RMA.

Recommendation 1: Clause 5.7(a), which requires NBN Co to consult with Access Seekers and Consumer Advocacy Groups prior to providing a Replacement Module Application, should be amended to specify a minimum 90-day consultation period prior to NBN Co providing a Replacement Module Application.

The proposed framework does not acknowledge the resource constraints on Consumer Advocacy Groups and the limited participants in the sector. There needs to be acknowledgement that ACCAN is one of the only organisations working in consumer advocacy on behalf of telecommunications consumers. The matters that NBN Co has proposed to consult with consumer advocates on are critical, yet these matters are not the only issues ACCAN is called upon to contribute to.

ACCAN encourages the ACCC to consider how the processes outlined in the SAU could be carried out in keeping with best practice. For example, in the energy sector there is significantly more resources available to ensure there are consumer representatives with in-depth knowledge of the issues, and appropriate resources to effectively assess proposals. We recommend that consultation regarding

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<sup>1</sup> NBN Co, 2022, *Variation to NBN Co Special Access Undertaking Variation*, clause 5.7(a).



the replacement module process follow the approach presented in the *Better Reset Handbook*,<sup>2</sup> including:

- Seeking early formal feedback on aspects of regulatory proposals.
- Sincere engagement through genuine commitment from Boards and Executives to give effect to consumer preferences.
- Appropriately equipping consumers through:
  - providing accurate and unbiased information,
  - engaging with qualified and experienced consumer representatives,
  - providing the ability to source independent expert advice and research, and
  - appropriately remunerating consumers for their contribution to the development of proposals.
- Providing engagement plans which outline objectives, engagement issues and the level of participation and influence consumers can expect on the regulatory proposal.
- Consulting on long term outcomes desired by consumers.
- Providing multiple channels of engagement with consumers and their representatives.

Genuine engagement requires funding for an independent committee of consumer representatives with a budget to fund independent research and access to expert staff. Whilst we are supportive of broadening points of consultation, there needs to be resources provided to support this, following best practice.

Recommendation 2: NBN Co should fund resources necessary for best practice consultation and engagement regarding consultation required ahead of submitting a Replacement Module Application.

Consultation with consumers is critical to ensuring the replacement module process works in the best interest of consumers. Failure to undertake consultation with Consumer Advocacy Groups should result in a financial penalty. A reduction in the value of the ICRA due to non-compliance with RMA consultation requirements will act as an appropriate incentive for NBN Co to adhere to the requirements.

## Replacement Module Determination

The ACCC can only issue a RMD after the date by which NBN Co has given the ACCC an RMA and at least 20 days before the last day of the regulatory cycle. If the ACCC has not issued an RMD within this timeframe, then NBN Co's RMA is to take effect. NBN Co cannot submit an RMA in no less than 9 months and no more than 18 months prior to the end of the then-current regulatory cycle. The ACCC can decide the due date for NBN Co to provide the RMA within this timeframe.

The forementioned timings provides that there will be at least a 9-month timeframe for the ACCC to make a decision on NBN Co's RMA, and potentially issue an RMD. It is likely that the ACCC would require the full 18-month timeframe in order for the ACCC to consult on both NBN Co's RMA, and its

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<sup>2</sup> AER, 2021, *Better Resets Handbook Towards Consumer Centric Network Proposals*, [www.aer.gov.au/system/files/Better%20Reset%20Handbook%20-%20December%202021.pdf](http://www.aer.gov.au/system/files/Better%20Reset%20Handbook%20-%20December%202021.pdf).

own draft RMD before formally issuing an RMD. Given a regulatory cycle could be as short as 3 years, we consider that the timeframes proposed in the SAU are appropriate to allow for NBN Co to see the full effects of the then-current regulatory cycle before submitting a subsequent RMA.

There is a risk of delays to the process which may result in NBN Co's RMA being accepted by default should the ACCC miss the timeframes set out in the SAU Variation. There should be sufficient 'stop the clock' provisions in instances when there has been undue delay responding to the ACCC's information requests in relation to NBN Co's application. It is appropriate the ACCC is given time to sufficiently assess the information it requires to make a decision. This will ensure appropriate regulatory oversight of the replacement module process.

Additionally, there needs to be appropriate disincentives for NBN Co to delay the process to avoid a situation where the current regulatory cycle is extended indefinitely. Similarly to introducing a financial penalty for not undertaking appropriate consultation, ACCAN encourages the ACCC to consider introducing penalties for extensive delays to information sharing such as a reduction in the recoverable ICRA.<sup>3</sup>

Recommendation 3: The SAU should contain sufficient stop the clock provisions and appropriate incentives for NBN Co to consult with consumer advocates and prevent delays to the Replacement Module Application processes.

## Change in Control Provisions

ACCAN supports the proposal to bring forward the SAU end date should there be a change of control of the NBN. However, there should be additional provisions regarding the change of control over the NBN and the role of the ACCC in this process.

Whilst there is a legislated process for the Productivity Commission to conduct an inquiry into the regulatory, budgetary, consumer and competition matters,<sup>4</sup> there would be merit in the ACCC having adequate time to conduct its own regulatory review prior to the sale of the network. The ACCC's inquiry will have a narrower scope, being focused solely on the LTIE with the purpose of examining the future regulatory framework of the network. ACCAN supports an ACCC inquiry to focus on the appropriate regulatory arrangements for the NBN, where the ACCC will be able to leverage existing experience to inform efficient settings. It is imperative that this review occur prior to the sale of the network.

At a minimum the ACCC should be given a notice within 24 months of the NBN sale date to provide sufficient time for the ACCC to conduct a review with the intent to inform any revisions to regulatory framework governing the NBN.

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<sup>3</sup> Noting that the AER has the power to seek court orders requiring compliance with mandatory notification to give data or documents. AER, 2021, "Stronger penalties demand energy businesses prioritise compliance with the law", <https://www.aer.gov.au/news-release/stronger-penalties-demand-energy-businesses-prioritise-compliance-with-the-law>.

<sup>4</sup> National Broadband Network Companies Act 2011 (Cth), s47.

Recommendation 4: The SAU should require NBN Co to provide the ACCC with a notice of intent to sell within 24 months of the sale date.

## Post-2032 Arrangements

NBN Co has proposed the introduction of a new Module 3, to take effect from 1 July 2032, where the replacement module process would continue during this time. This replacement module processes differs from Module 2 in that the ACCC is able to set maximum prices. There appears to be less detail in Module 3 compared to Module 2, presenting a trade-off between future flexibility and certainty in the regulatory framework.

ACCAN is concerned that the proposed arrangements for Module 3 do not currently provide an appropriate balance between providing regulatory certainty and flexibility to determine arrangements that better respond to conditions at the time. ACCAN shares the ACCC's concerns regarding the requirement for a Module 3 RMD to provide the NBN Co with:

- a reasonable opportunity to earn, in a regulatory cycle, the sum of the revenue allowance for each financial year of the cycle, which is based on the ABBRR and on drawing down the ICRA, and;
- a reasonable opportunity to achieve and maintain, for the duration of the regulatory cycle, a stand-alone investment grade credit rating with a stable outlook.

Whilst we consider the objective of NBN Co achieving a stand-alone investment grade credit rating is a merit worthy policy objective, we note:

*“the Competition and Consumer Act requires the ACCC to consider the extent to which the SAU is likely to result in the achievement of the following objectives:*

- *promoting competition in markets for listed services*
- *achieving any-to-any connectivity in relation to carriage services that involve communications between end-users*
- *encouraging the economically efficient use, and economically efficient investment in the infrastructure by which services are supplied, and any other infrastructure by which these services are, or are likely to become capable of being supplied.*

*The ACCC cannot consider any other objectives in assessing the LTIE.”<sup>5</sup>*

Thus, the objective of NBN Co achieving a stand-alone investment grade credit rating is not relevant to the SAU and reference to it should be removed.

Whilst it could be argued that NBN Co's credit rating does indeed impact NBN Co's ability to efficiently invest in infrastructure, we consider that this is only relevant to the extent that the NBN Co is not under government ownership. Up until that point, NBN Co does not require a stand-alone

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<sup>5</sup> ACCC, 2023, *Proposed variation to NBN Co Special Access Undertaking Consultation paper*, Annexure B, p70.

investment grade credit rating to continue to efficiently invest in the infrastructure given the Government's implicit guarantee.

Indeed, the requirement for the ACCC to have regard to NBN Co's ability to achieve and maintain an investment grade credit rating is not in the LTIE given the provision risks NBN Co being able to increase revenues to pay down its debt over a brief timeframe at the beginning of Module 3. This could potentially result in price shock and unaffordable prices for consumers as well as inefficient bypass of the network. It is ACCAN's view that the provision works against providing regulatory certainty following 2032.

Recommendation 5: Clauses 3A.1.2(b), 3B.3(c) and 2G.4.2(b)(i)(A), which require the ACCC, in setting NBN Co's Annual Regulated Revenue Allowance, to provide NBN Co with the reasonable opportunity to achieve and maintain a stand-alone investment grade credit rating, should be removed from the SAU.

## ACCC Statement of Approach

The SAU variation states that the ACCC must provide a Statement of Approach before the date for which NBN Co submits its RMA to the ACCC. However, the benefits of the Statement are unclear due to the timeframes in which the ACCC can provide the Statement of Approach.

The Statement of Approach will have limited use if the ACCC provides NBN Co with the Statement within too short a timeframe for NBN Co to effectively consider and respond to the Statement. The SAU should require the ACCC to provide NBN Co with a Statement of Approach at least 180 days prior to NBN Co lodging its RMA, to allow NBN Co sufficient time to incorporate the feedback into their application.

Recommendation 6: Clause A3.1.2, which outlines the process for the ACCC to provide NBN Co with a Statement of Approach, should be amended so that the ACCC is required to provide the Statement of Approach within a minimum of 180 days prior to NBN Co lodging their replacement module application.

## Pricing and Product Constructs

### Pricing Construct

ACCAN supports NBN Co's proposal to provide a flat monthly charge for residential grade 100 Mbps and higher offers, as well as the transition of the remaining lower bandwidth residential grade bundled offers of less than 100 Mbps to flat rate offers by 2026. We support charging Connectivity Virtual Circuit (CVC) overage for bundled offers on the basis of CVC capacity utilised rather than provisioned. These measures will work towards improving price certainty.

### Pricing Proposals

We support the pricing proposals for the 100 Mbps, 25 Mbps and what is essentially the voice-only offer, which sees price reductions. We do not support the proposed price increase of the bundled

TC-4 Offer for the 50 Mbps service from \$45 to \$50. Consumers will be frustrated by price increases not accompanied by any material improvements to service quality.

The proposed increase in price of the 50 Mbps service will have the effect of raising the cost of services for over 4 million households. ACCAN estimates that the increased cost will equate to an additional \$200 million per annum to households purchasing this service speed. Whilst NBN Co has proposed price decreases on some less popular services, we note that overall these changes are expected to increase the average revenues per user that NBN Co earns, with minimal uplift to service quality.

NBN Co should be encouraging consumers to take up higher speed tiers through lowering the price of the services, rather than increasing the price of lower speed tiers. There needs to be appropriate price differentials between speed tiers to offer consumers genuine choice of speed. Furthermore, converging the price of the 50 Mbps service and the 100 Mbps service is inequitable for consumers who are currently unable to receive 100 Mbps service because of issues with their access technology.

Recommendation 7: The monthly recurring charge for the Bundled TC-4 Offers for 25-50/5-20 Mbps and 50/20 Mbps listed in Attachment E should remain at \$45.00 at the beginning of Module 4.

### *Managing individual AVCs*

The ACCC's consultation paper questions whether it is feasible for retail service providers (**RSPs**) to individually manage Access Virtual Circuits (**AVC**) to encourage consumers to move to higher speed tiers in order to achieve cost savings. Whilst we are not in a position to comment on the technical ability of retailers in managing consumers onto higher speed tiers, ACCAN encourages the ACCC to consider the competitive implications this could have. For example, smaller RSPs may not be able to manage this function as well as larger RSPs, giving them a competitive disadvantage. Additionally, consideration should be had to the responsiveness of which RSPs could manage individual AVCs which would have a direct impact on consumers.

### *Low-income forum*

ACCAN supports the NBN's proposal to maintain the low-income forum until 2032 rather than the previously proposed timeframe of 2 years. A suitably empowered low-income forum has the potential to drive positive outcomes in the public interest and is consistent with the LTIE. Appropriately pricing NBN services will drive uptake of NBN services and utilisation of the network.

ACCAN agrees with the ACCC that the effectiveness of the low-income forums could depend on a high level of engagement from low-income representatives and NBN Co having a strong incentive to respond to their recommendations. ACCAN's consultation with low-income representatives to date indicates that representatives are willing to engage on affordability issues.

However, it should be noted that many in the sector suffer 'consultation fatigue' and feel that their feedback is often ignored by policy and decision makers. Likewise, many low-income representatives

are time and budget constrained, so representatives will need to feel that engaging with the process is 'worth their time'.

Engagement must be predicated on commitment to take tangible action to address affordability issues. Noting that the community has already engaged in extensive consultation with NBN Co regarding this issue over the last 5 years and there has been minimal progress. Low-income advocates have expressed concerns to ACCAN regarding the likelihood of action being facilitated by the proposed forum.

Currently the SAU Variation requires NBN Co to have regard to the forum's outcomes in changing or setting prices. However stronger commitment from NBN Co to respond to the forum's recommendations will likely encourage greater engagement from participants. The SAU should require that NBN develop a product targeted to improving affordability of the NBN which can be endorsed by representatives of low-income consumers.

**Recommendation 8:** The SAU should require NBN Co to develop a product targeted to low-income consumers that is endorsed by representatives of low-income consumers within the first 12 months of the SAU's acceptance.

For the low-income forum to be successful, ACCAN considers that the terms of reference should be restricted to discussing affordability issues, rather than digital inclusion more broadly. The forum will have limited time and resources to discuss all features of digital inclusion. Further we consider that as an infrastructure company NBN Co's focus should remain on those aspects of digital inclusion that NBN Co can effectively advance, namely affordability and access. While NBN Co may be able to contribute to a broader dialogue concerning matters of digital capability we consider that this could be best progressed through pre-existing forums, rather than expanding the remit of the low-income forum.

Noting that access issues are being actively advanced by NBN Co, and that affordability remains the key matter of concern of Consumer Advocacy Groups and low-income representatives, we consider the forum should have a narrower focus on affordability. Accordingly, we consider restricting the terms of reference to exclusively affordability concerns will ensure the forum is effective in achieving the goal of improving affordability of the network.

Furthermore, we see merit in the forum being chaired independently and being convened on a bi-annual basis. An independent chair will ensure that the agenda of the forum is set based on feedback of all parties involved, rather than by reference to NBN Co's corporate objectives.

**Recommendation 9:** The SAU should require that the low-income forum be chaired independently, focus only on affordability issues and convened on a bi-annual basis.

It should also be noted that the SAU Variation proposes that the identified target initiatives are for 'low income, vulnerable and unconnected' end users.<sup>6</sup> This drafting suggests that initiatives will not seek to remedy the financial stress experienced by households already connected to the NBN.

ACCAN receives regular feedback from the community and our members that there are many low-income households who are already connect to the NBN, and the continued cost of the service puts them in financial hardship. ACCAN recommends that the purpose of the low-income forum should be to identify targeted initiatives to improve affordability of the NBN for all end users.

Recommendation 10: Clause 2B.7(a), which requires NBN to establish a multilateral working group to identify targeted initiatives to improve access to the NBN for low-income, vulnerable and unconnected end users, should be redrafted to identify targeted initiatives for low income or vulnerable consumers.

### *Pricing principles*

NBN Co has proposed that in changing or setting new prices, they must have regard to its Pricing Principles. Clause 2B.2.1(c) of the Pricing Principles requires NBN Co to have regard to the objective of maintaining affordable access to the network. ACCAN considers that greater detail regarding what NBN considers 'affordable' would strengthen this clause. We consider that NBN Co should be required to prove that they have had regard to affordability by demonstrating how their pricing proposals are likely to increase take up of services amongst low-income consumers.

People on low incomes experience greater difficulty affording their telecommunications services.<sup>7</sup> Efforts should be made by NBN Co to increase uptake of the network amongst low-income households, this will work to increase the efficient use of the infrastructure.

Recommendation 11: In having regard to maintaining affordable access to the network, NBN Co should be required to demonstrate how their pricing proposals are likely to increase take up of services amongst low-income consumers.

### *Low use consumers*

There is a risk that when NBN Co moves to a flat rate monthly charge for all residential speed tiers in July 2026, low use consumers could be priced out of the market if NBN increases access charges to make up the lost revenue previously made from variable charges. To mitigate this risk, the SAU should require NBN Co to develop a data-capped product which it can provide to Access Seekers by the end of Module 4. The development of such a product will assist low-income households who do not require higher speeds, or unlimited data, to connect to and utilise the network.

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<sup>6</sup> NBN Co, 2022, *Variation to NBN Co Special Access Undertaking Variation*, clause 2B.7.

<sup>7</sup> ACCAN, 2022, *Consumer Check in: Affordability Snapshot*, <https://accan.org.au/ACCAN%202022%20Research%20Snapshot%20Affordability.pdf>.

Recommendation 12: The SAU should require NBN Co to develop a data capped product prior to the end of Module 3.

### *Product withdrawals*

Overall, ACCAN supports the proposed process regarding product withdrawals. However, we consider that clause 11.5.4 which prevents the process of regulatory scrutiny regarding product withdrawals to occur where the shareholder has requested the product be withdrawn, should be removed. We see no reason that the bypass of regulatory consideration of product withdrawals should occur where the shareholder of NBN Co has requested it.

Recommendation 13: Clause 11.5.4, which specifies the process regarding product withdrawal required by law or directed by Shareholder Ministers, should be amended to remove any reference to Shareholder Ministers.

## Price Controls and Transparency Measures

ACCAN supports NBN Co's proposal for price controls to feature a WAPC and individual price caps of annual CPI increases on the Entry Level offer and annual pricing increases that are the higher of CPI or 5% for other residential grade products. Until NBN Co's annual revenue recovery exceeds its ABBRR, the annual increase in the WAPC will be limited to CPI.

Following this, overall price increases will be capped at a percentage which allows NBN Co's forecast annual revenue to equal the revenue requirement, where the revenue requirement will be based on NBN Co's Core Services ABBRR plus a portion of the ICRA. Through the WAPC, NBN Co will be incentivised to grow revenue through volume and introducing new products.

Until 2032, NBN Co has proposed:

- Pricing Principles that NBN Co would be required to have regard to in setting new or changing prices.
- Publishing a Statement of Pricing Intent for each regulatory cycle.
- Publishing annually a binding tariff list for the forthcoming year and Pricing Roadmap for the two subsequent years.

Whilst NBN Co is able to change prices for individual products from the published roadmap, this is limited based on a relativity commitment that would keep relativities in monthly tariff prices to within \$1 of those in the previous roadmap. ACCAN welcomes all the forementioned proposals as they work to increase pricing certainty for the industry and consumers.

ACCAN also welcomes the requirement that NBN Co would have to propose, and the ACCC determine a service as an entry level service for each regulatory cycle. This would ensure that as consumer preferences evolve, the tighter price control relating to the entry level service remains fit for purpose.

It is ACCAN's view that in the post-2032 period, greater cost certainty could be achieved by having a limitation on the amount the WAPC can grow each year. This will be particularly beneficial if the



ACCC is required to ensure NBN Co is able to achieve and maintain a stand-alone investment grade credit rating when setting the ABBRR. As previously mentioned, this poses a risk of price shock as NBN Co will have the ability to increase prices significantly to achieve a certain credit rating.

A limitation on the amount the WAPC can increase each year would protect consumers from price shocks going into, and throughout the post-2032 period. Therefore, NBN Co could be given the opportunity to achieve and maintain a stand-alone investment grade credit rating subject to the WAPC not increasing by a certain limit deemed reasonable by the ACCC each year.

## NBN's Approach to the Building Block Model

The BBM forms the basis for the revenues NBN Co will be allowed to recover. Moving away from maximum regulated prices and having a WAPC set based on the ABBRR means it is imperative that NBN Co's expenditure is prudent and efficient. As any increases to NBN Co's Regulated Asset Base (**RAB**) and subsequent ABBRR can be passed along to consumers through higher prices. Key changes to NBN Co's BBM include changes to asset lives for certain asset classes, grouping detailed asset classes into a smaller number of aggregated asset classes and the removal of the financeability test.

### Financeability test

ACCAN expressed concern with regards to NBN Co's previous proposal for a financeability test, in particular the automatic upward adjustment of the ABBRR to ensure a benchmark credit rating is met. NBN Co has now proposed to remove the test from the SAU.

ACCAN is not opposed to a financeability test being introduced into the SAU to determine the internal consistency of the BBM. Indeed, ACCAN considers that the financeability test is useful and should operate similarly to the New South Wales Independent Pricing and Regulatory Tribunal (**IPART**)'s financeability test.<sup>8</sup> This involves the regulator liaising with the regulated entity to confirm the validity of the data, and then identifying the source of a financeability concern if one exists, such as setting the revenue allowance too low, the business taking imprudent or inefficient decisions, or the timing of cash flows. IPART then determines the appropriate remedy based on the source of concern identified.

It is our view that a financeability test remains useful in triggering a review of a RMD before it is made, to ensure that there are no errors and check that debt funding and rate of return on equity are at appropriate levels.

Recommendation 14: The SAU should introduce a financeability test to ensure the internal consistence of NBN Co's Building Block Model.

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<sup>8</sup> IPART, 2018, *Final Report – Review of our financeability test*, <https://www.ipart.nsw.gov.au/sites/default/files/documents/final-report-review-of-our-financeability-test-november-2018.pdf>.

## Asset Lives and Granularity of Asset Classes

In the 2024-2040 BBM, NBN Co have grouped asset classes into a small number of aggregated asset classes which have been assigned an asset life, which might be different to the lives of the detailed asset classes it captures. 2023-2024 calculations of depreciation are only shown at the aggregated asset class level. It is important that depreciation reflects the technical or economic life of the asset, however it is not clear to ACCAN whether the proposed aggregated asset classes reasonably reflect the technical lives of the assets within the classes.<sup>9</sup> The scope of each category of each asset class needs to be clearly defined including detail of each asset and their technical and economic lives.

Access to granular detail on asset classes and asset lives is critical to the scrutiny of proposed depreciation allowances and proposed replacement capex (**repex**). ACCAN considers that considerably greater detail is required to support NBN Co's proposed repex for each regulatory period, and to determine whether it is consistent with prudent and efficient repex.

## Transparency in the Building Block Model

ACCAN welcomes the provision of more granular information on capital expenditure by asset classes compared to the March 2022 SAU Variation. However, compared to regulated entities in other essential services, there is a noticeable lack of information regarding NBN Co's capital and operational expenditure. There needs to be greater scrutiny regarding NBN Co's expenditure, including explanations of why they are proposing to spend certain amounts and the expected consumer benefit. The framework needs to be as detailed as possible.

Examples of best practice can be taken from the *Better Reset Handbook*,<sup>10</sup> where evidence of prudent and efficient decision making consists of providing:

- Identification and evidence of the network's need for the proposal to achieve capital expenditure objectives, with the expectation that the network will explain to the regulator and consumer groups the effects of the proposed expenditure on the service level outcomes.
- Quantitative cost-benefit analysis assessing all feasible options to show that the preferred option maximises net benefits.
- Where relevant, evidence of fully accounted for trade-offs between capital expenditure and operating expenditure to show that the preferred option is prudent and efficient.
- Evidence of genuine consumer engagement on operating expenditure forecasts including consulting on the impact that the business's proposed total operating expenditure forecast will have on service level outcomes and how operating expenditure takes into consideration consumer preferences.

We note that whilst NBN Co has provided expenditure forecasts in Appendix A of Part F of their supporting submission, there is no continuous commitment to provide similar information throughout the duration of the SAU. We also note that a significant amount of information in

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<sup>9</sup> For example, in *nbn 24-40 Public Core Services Building Block Model* it is not clear what 'remediation' is under asset class.

<sup>10</sup> AER, 2021, *Better Resets Handbook Towards Consumer Centric Network Proposals*, [www.aer.gov.au/system/files/Better%20Reset%20Handbook%20-%20December%202021.pdf](http://www.aer.gov.au/system/files/Better%20Reset%20Handbook%20-%20December%202021.pdf).

Appendix A of Part F of NBN Co's supporting submission is commercial in confidence, limiting the extent of scrutiny for significant items of expenditure e.g. labour costs.

Recommendation 15: The SAU should require NBN Co to provide detailed information regarding capital, operational and replacement expenditure.

## Recovery of Accumulated Losses

NBN Co has proposed significant changes to the treatment of its accumulated losses, the ICRA. ACCAN welcomes significantly reducing the ICRA balance. This provides a genuine constraint to prices and reduces the uncertainty created through NBN Co having the opportunity to draw down large amounts through the ICRA.

ACCAN welcomes NBN Co's proposal to set a core services ICRA balance of \$12.5 billion as of 1 July 2023. The methodologies NBN Co has used in developing its proposed opening ICRA balance of \$12.5 billion appears to be an appropriate approach to achieving and maintaining a standalone investment grade credit rating.

We consider that the proposed arrangements are likely to promote efficient use of and investment in infrastructure in the long run. Lowering the ICRA amount will promote the efficient use of the NBN as it creates a genuine revenue constraint and therefore price cap for NBN Co. Prices which are too high creates risk of inefficient bypass of the network. Excessive pricing that results in bypass of the network can result in inefficient infrastructure duplication. Thus, the proposal to remove a significant proportion of the ICRA works to remediate these concerns.

NBN Co will be given the opportunity to recover \$1 billion of the ICRA until 2032, the size of the ICRA drawdowns will be determined through the replacement module process. ACCAN supports this proposal as we consider that the ACCC has sufficient oversight of the replacement module process to reduce the risk of price shocks. Any portion of the \$1 billion that is not recovered by 2032 will be extinguished.

NBN Co will then have the opportunity to recover up to \$11.5 billion of the ICRA in the post-2032 regulatory period. The size of the ICRA drawdown amounts will again be determined by the replacement module process, however the ACCC will be limited due to the requirement to have regard to NBN Co achieving and maintaining a stand-alone investment grade credit rating.

ACCAN welcomes NBN Co's decision to remove the unders and overs mechanism from the SAU Variation, and that no new losses or under-recovered amounts will be included in the ICRA. We are also pleased to see that there are arrangements for the ICRA on finishing the SAU, where the ICRA will be set to \$0 in 2040, removing the uncertainty of what is to happen to the ICRA at the end of the SAU period.

## Expenditure Criteria

ACCAN considers that NBN Co should face greater incentives to increase productivity over the duration of the SAU. We note that in the Module 2 the X factor is set to 0, and in Module 3 the X factor will be determined by NBN Co's BBM, where it could be positive or negative. We recommend

that the ACCC consider how NBN Co can be incentivised to improve efficiency and reduce costs going into the BBM.

ACCAN notes that in other infrastructure industries that productivity factors are currently set to a minimum of 0.5% per annum.<sup>11</sup> While we note that the applicable productivity factor for the telecommunications sector will differ, we consider that it is appropriate for a productivity factor to be applied to NBN Co to set incentives for efficient operation.

Recommendation 16: The ACCC should consider how to provide incentives for NBN Co to achieve efficiency gains and reduce capital and operational costs over the duration of the SAU.

ACCAN welcomes the proposed change of approach regarding definitions of prudence and efficiency. We support NBN Co's proposal to leave these terms undefined and allow the interpretations and application of the terms to evolve over time with best practice. Additionally, NBN Co has proposed numerous changes regarding how expenditures are treated, including how expenditure is treated in the RMAs, expenditures on government-directed projects, forecasting operating and capital expenditures, as well as adjustments to revenue mid-regulatory cycle. Our comments on these changes are provided below.

## New Consultation Obligations

ACCAN welcomes NBN Co's proposal to hold consultation regarding RMA, including on the relevant expenditure which NBN Co proposes to undertake in that regulatory cycle. We consider that longer timeframes and resourcing is required to ensure that this consultation results in genuine engagement.

There needs to be greater detail provided by NBN Co regarding its expenditure. There is no commitment that NBN Co will provide explanation as to why it's spending certain amounts regarding its capital and operational expenditure. This limits the ability of Consumer Advocacy Groups to critically examine expenditure proposals. Whilst NBN Co provides some of this detail in the Appendix of Part F of their supporting submission for the first regulatory cycle, the level of detail is not sufficient compared to other essential service sectors.

We note that it is standard industry practice in the energy distribution sector to share detailed information on proposed expenditure with consumer representatives. This includes but is not limited to historic and trend expenditures for capex and opex by category and detailed briefings on proposed expenditures. Further, information is frequently provided on material business cases, the inputs to these business cases and underpinning economic analysis. We note that NBN Co has not put forward equivalent information as part of its engagement to date, which raises concerns as to the prudence and efficiency of expenditures.

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<sup>11</sup> AER, 2021, *Better Resets Handbook Towards Consumer Centric Network Proposals*, [www.aer.gov.au/system/files/Better%20Reset%20Handbook%20-%20December%202021.pdf](http://www.aer.gov.au/system/files/Better%20Reset%20Handbook%20-%20December%202021.pdf).

The absence of detailed information on these expenditures and redaction of key information raises concerns as to the legitimacy of proposed expenditure. For example, we note that key labour cost information has been excluded from publication and not provided to Consumer Advocacy Groups or stakeholders.

In Part F of NBN Co's supporting submission, NBN Co states that it will be incentivised to put forward business cases or cost benefit analysis to justify its proposed expenditure and the framework allows for the ACCC to assess those business cases and cost benefit analysis. However, ACCAN considers that without a requirement in the SAU, then NBN Co will not be compelled to provide a business case unless the ACCC requests it to. This could unnecessarily delay the replacement module process. Requesting this level of information once NBN Co has submitted its RMA will not be possible given the current timeframes set out in the SAU. Therefore, ACCAN recommends that the SAU require NBN Co put forward business cases for consultation to enable the assessment of the prudence and efficiency of major planned capital expenditures.

Requirements for the business case should include that they are published. Where there are commercial in confidence aspects of the business cases, they should be shared in confidence with consumer representatives to allow for consultation. NBN Co should be required to provide independent assessments and reviews of material business cases, as well as provide alternative business cases. This will allow the regulator to assess the costs and benefits of multiple approaches or projects and allow the regulator to direct NBN Co to do an alternative option if it deems it to be in the LTIE. Business cases should be provided for capital expenditure over a certain amount, however, there needs to be protections against NBN Co disaggregating capital expenditure into smaller categories in order to avoid providing business cases.

Recommendation 17: NBN should be required to provide independent assessments and reviews of material business cases.

## Government-directed Expenditures

The SAU variation would have the effect of deeming actual capital expenditure incurred and operational expenditure forecast to be incurred pursuant to a government policy project notice as 'prudent' to the extent those expenditures are incurred in a manner that implements the details of the project or program as specified in a notice. Whilst the expenditure incurred under a government policy project notice will still be assessed for efficiency. ACCAN supports this change of approach regarding government-directed expenditures compared to the previous SAU Variation. ACCAN welcomes the increased transparency of this process which requires the government policy project notice made by the Communications Minister to be published.

## Meaning of Regulatory Requirement

Forecasts of operational expenditure and capital expenditure input into NBN Co's ABBRR must reasonably reflect the prudent and efficient expenditure that an operator in NBN Co's position would incur in achieving certain objectives. The objectives include meeting expected demand for products and services, complying with all regulatory requirements, implementing projects and programs the subject of a government policy project notice and maintaining and improving the

quality, reliability, safety, security and integrity of supply of products and services. Within the SAU Variation, Regulatory Requirement means any legal or regulatory obligation or requirement to the extent that it materially affects, or is reasonably anticipated to materially affect, the supply of products or services by NBN Co.

ACCAN notes that the pass-through mechanism could allow for NBN Co to put forward significant amounts of expenditure to meet regulatory requirements. While we are supportive of NBN Co being able to recover its efficient costs, it is key that material additional expenditures where reasonably foreseeable are subject to full business case development requirements and appropriate consultation as part of the lodgement of an RMA.

For example, the imposition of additional cyber-security requirements is reasonably foreseeable over the near term and could be put forward as a contingent project. Accordingly, it is reasonable to expect NBN Co to consider the potential or likely imposition expenditure impacts of reform. This approach is consistent with best practice in other regulated sectors.

Putting forward reasonably foreseeable regulatory change event pass-throughs as contingent projects, rather than cost-pass through applications, would allow for the full consideration of prudent and efficient options for meeting the requirements of the pass-through event. Further, this approach would facilitate the efficient planning of project delivery by NBN Co.

## **Expenditure Objectives and Expenditure Factors**

In meeting the expenditure objectives, regard must be given to a range of expenditure factors, including actual and expected expenditure, historical trends in expenditure, expected end user willingness to pay for services, the extent to which relevant expenditure includes expenditure to address the concerns of Access Seekers and Consumer Advocacy Groups identified during NBN Co's engagement with them.

NBN Co has reduced both the expenditure objectives and factors compared to the March SAU Variation. However, we remain concerned regarding the scope of the expenditure objectives. For example, clause 2G.2.5(d)(iii) requires NBN Co to consider the extent to which relevant expenditure includes expenditure to address the concerns of Access Seekers and Consumer Advocacy Groups as identified by NBN Co in the course of its engagement with such persons.

Whilst it is important to take Access Seekers and Consumer Advocacy Groups views into consideration whilst proposing expenditure, ACCAN considers that it should be made clear that this clause is subordinate to the requirement that expenditure be prudent and efficient. Clarifying the clause would preclude the possibility that inefficient or imprudent expenditures are proposed by NBN Co on the basis that it was requested by Access Seekers or Consumer Advocacy groups.

ACCAN considers that clarification of this clause is appropriate to safeguard against the potential that Consumer Advocacy Groups or Access Seekers endorse or support excessive expenditures based on limited information or commercial interest. For example, this clause might allow for inefficiently high expenditure being proposed to improve service standards, which may align with the commercial strategies of Access Seekers to target high-speed and high-reliability customers, but impose excessively high costs to general consumers. While we consider that the risk of this occurring to be limited, we nonetheless see merit in clarifying the intended operation of this clause.

## Ex-post Review of Capex

As part of the placement module process, the ACCC must review NBN Co's actual capex for prudence and efficiency prior to the end of a regulatory cycle. Only prudently and efficiently expenditure incurred in achieving the expenditure objectives and with having regard to the expenditure factors will be added to NBN Co's RAB.

ACCAN considers that imprudent or inefficient capex should be publicly identified by the ACCC. Further, any trends or drivers for inefficient forecasting or project delivery outcomes should be made clear in order to drive improvements to NBN's forecast process going forward. This should work to minimise instances of material overestimates which may or may not be offset by subsequent pricing reductions in the following period.

## Cost Pass-through

The SAU variation provides that NBN Co can seek to pass-through costs to its regulated revenue and subsequent prices during a regulatory cycle. This will occur where NBN Co has incurred or is expected to incur materially higher or lower costs as a result of a variety of specified changes or events. Cost pass-throughs can be incurred due to tax changes, changes in regulatory requirements, changes relating to a government policy project notice, a defined natural disaster or terrorism event and changes in benchmark service standards. ACCAN supports the inclusion of a cost pass-through mechanism as NBN Co needs sufficient certainty of its ability to respond to exogenous events.

ACCAN supports the proposal in regard to cost pass-throughs triggered by a Government Policy Project Notice Event. In this instance, a notice must state that the Communications Minister has determined that NBN Co undertaking a particular project or program is reasonably required to achieve commonwealth government policy, taking into account the public interest served by the project or program. This process increases the level of transparency of how government directed projects interact with consumer costs mid-cycle.

NBN Co will have 90 business days to submit a cost pass-through application, and the ACCC would have 40 business days to make a subsequent determination, with the ability to extend up to two months. ACCAN supports the proposal for the ACCC to have the ability to extend their assessment of the cost pass-through application by 2 months however we consider NBN Co should be incentivised to respond to information requests in a timely manner and for the risk of regulatory gaps to be minimised. For example, if the ACCC deems that NBN Co has not provided sufficient information to prove that a cost-pass through application is required, then the ACCC can reject the application. Alternatively, if NBN Co miss timeframes set for providing information, this could result in a reduction of the ICRA.

**Recommendation 18:** The SAU variation should include appropriate incentives for NBN Co to adhere to timeframes for information requests regarding cost pass-through applications.

We are also concerned regarding the proposed process of cost pass-throughs relevant to a Negative Change Event.<sup>12</sup> The proposal requires NBN to submit a cost pass-through application within 90 days of becoming aware of a Negative Change Event occurring. Clause 2D.5.3 specifies that the ACCC may notify NBN Co of the Negative Change Event occurring if NBN has not provided a cost pass-through application. If the ACCC provides NBN a notification of a Negative Change Event occurring, NBN Co is not required to make a cost pass-through application. The ACCC then has 40 days to issue a determination regarding the Negative Change Event.

NBN Co should be required to provide a cost pass-through application on becoming aware of a Negative Change Event regardless of whether the ACCC informed NBN Co that the event has occurred. On receiving a notification from the ACCC that a Negative Change Event has occurred, NBN Co should be required to provide a cost pass-through application within 90 business days of being given the notification.

Recommendation 19: Clause 2D.5.3, which provides the ACCC the power to notify NBN Co of the occurrence of a Negative Change Event if NBN Co has not provided a cost pass-through application relating to that Negative Change Event, should be amended such that it does not prevent NBN Co from making a cost pass-through application in respect of that Negative Change Event.

## Telstra Arrangements and Optus Arrangements

NBN Co has proposed that payments forecast to be made under the Telstra Arrangements and the Optus Arrangements for a given regulatory cycle could be included in the relevant forecast expenditure allowances without any prudence and efficiency assessment. We consider that all forecast expenditure should be required to be assessed for prudence and efficiency with the exception of the expenditure directed by a government policy project notice.

Recommendation 20: The ACCC should consider the prudence and efficiency of the expenditure allowances made under the Telstra Arrangements and the Optus Arrangements for a given regulatory cycle.

## Cost Allocation and Accounting Separation

NBN Co has proposed to separate cost bases for 'core' and 'non-core services' to account for NBN Co's operation in both competitive and non-competitive markets. Services and their associated costs which NBN Co supplies in competitive markets would be categorised as non-core, while all other services and costs are categorised as core.

ACCAN supports the proposal which will see only core services subject to SAU requirements to provide assurance that there is no cross subsidy between competitive and non-competitive services.

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<sup>12</sup> A Negative Change Event is a cost pass-through event that results, or is likely to result, in NBN Co incurring materially lower costs of supplying WAPC Charge Components than it would have incurred but for that event.



NBN may re-categorise a service as core or non-core as part of the replacement module process. ACCAN supports the ACCC having the power to also re-categorise a product or service as a core or non-core service through a replacement module determination. The SAU variation sets out cost allocation principles for NBN Co to separate costs associated to core and non-core services. ACCAN considers the cost allocation principles to be appropriate.

## Initial Cost Recovery Account

We note that NBN Co has proposed for the full ICRA balance to be allocated to core services. Given the ICRA represents unrecovered costs, ACCAN considers that it is appropriate for the ACCC to closely consider what proportion of the unrecovered costs have been incurred due to the services NBN Co sells in competitive markets. Without allocating the ICRA between core and non-core services, we cannot be certain that a cross subsidy between the competitive and non-competitive services has not occurred. Indeed, if there exist unrecovered costs incurred due to competitive services, allowing NBN Co to recover these costs through residential services will embed the cross subsidy.

Recommendation 21: The balance of the ICRA should be allocated between core and non-core services.

## Cost Allocation Manual

The SAU requires that NBN Co must submit to the ACCC a proposed cost allocation manual (**CAM**) which describes the methodology for NBN Co to allocate costs according to the cost allocation principles. The ACCC should then approve the CAM submitted by NBN Co or a form which incorporates reasonable changes made by the ACCC to the proposed CAM. ACCAN recommends that the SAU Variation require that the CAM be used to allocate the ICRA between core and non-core services.

The ACCC will have 3 months to make a decision regarding the proposed CAM, after which time NBN Co's proposed CAM will be the applicable CAM. We consider this to be sufficient time for the ACCC to review NBN Co's proposed CAM. Furthermore, the ACCC has the opportunity to extend the period to review the proposed CAM. Additionally, we support the ACCC having the power to issue a notice to direct NBN Co to submit a proposed CAM.

### *Initial Cost Allocation Manual*

NBN has submitted an initial Cost Allocation Manual (**CAM**) to describe the methodology to determine costs between core and non-core services. The competitive (non-core) services comprise of NBN Co Enterprise Ethernet, NBN Co Business Satellite Service and NBN Co Satellite Mobility for Large Commercial Passenger Aircrafts.

Shared costs that are not specific to one cost category or cannot be directly assigned to a specific cost category are allocated to services through the application of an allocator. Shared capital costs are allocated proportionally as either shared, shared among fixed line networks or overhead based on either the number of premises passed, the number of premises connected or the amount of provisioned bandwidth depending on the allocation percentages for that year in the model.

The calculation of premises passed refers to the actual or forecast total number of premises that are able to connect to nbn Core Regulated Service or Competitive Service, to represent the share of available footprint. For competitive services NBN Co is treating the number of premises connected as equal to the number of premises passed.

It is not clear to ACCAN whether it is appropriate to assume that for competitive services, the number of premises connected is equal to the number of premises passed. ACCAN would like to understand how costs associated with premises which were once connected to NBN Co Enterprise Ethernet but have since been disconnected will be allocated. There is no justification given for why the number of premises passed cannot be treated the same for core or non-core services.

Operational expenditure is allocated based on Revenue proportions. It remains unclear to ACCAN whether this is the most appropriate allocator. NBN Co states that revenue is considered the most accurate allocator available for this allocation because it best reflects the higher average value of competitive service (as premium business services). However, by definition we would expect the non-core services to gain lower revenues due to facing competition compared to the services where NBN Co operates as a monopoly. This will become more prominent where NBN Co no longer faces a revenue cap in its core-services.

ACCAN urges the ACCC to carefully consider NBN's proposed CAM to ensure that attempts to cross-subsidise commercial operations by allocating costs to residential consumers is prevented. There is likely merit to further consultation and inquiry regarding how NBN Co allocates costs between core and non-core services.

## Weighted Average Cost of Capital

A key component of the building block model is the return on capital, which is estimated by applying a WACC to the RAB. The WACC should appropriately reflect the opportunity cost of debt and the opportunity cost of equity.

NBN Co has proposed that the rate of return will be determined by estimating a nominal vanilla WACC for that financial year which is commensurate with the efficient financing costs of a benchmark efficient entity with a similar degree of risk that applies to NBN. NBN Co has proposed that this will be done with having regard to:

- the objective of producing reliable estimates of the market cost of capital in a wide range of plausible market conditions; and
- the objective of promoting stability in the rate of return over time.

The first objectives, to produce reliable estimates of the market cost of capital in a wide range of plausible market conditions works towards ensuring that the WACC appropriately reflects the opportunity cost of debt and the opportunity cost of equity. The second objective, promoting stability in the rate of return over time, does not necessarily work towards achieving an efficient WACC, yet we see merit in reducing volatility within the BBM to prevent price shocks for consumers. Therefore, ACCAN supports NBN Co's proposed WACC objectives.

ACCAN welcomes the proposal for the ACCC to have the power to determine the WACC methodology as part of an RMD.

## Incorporating Other Access Technologies

ACCAN supports the inclusion of the additional multi-technology mix (**MTM**) access technologies into the SAU which ensures these services will be subject to NBN Co's regulatory commitments.

However, it remains unclear to ACCAN whether the proposed network boundaries for each of the new MTM networks are appropriate. It appears that for 'Non-Multi Dwelling units' the FTTC boundary point puts the network connection device outside of NBN's network boundary as there could be cabling between a power socket and the network connection device within the end-user's premise.

ACCAN considers that all aspects of NBN's network should be included in the network boundary, and as such, NBN Co needs to develop a clearer framework which appropriately excludes customer cabling but accounts for all NBN equipment. That said, NBN Co should still be empowered or have the ability to restore connectivity if an issue lies with the customer's cabling and restoring connectivity promotes public safety.

## Service Quality

### Service Standards Framework

ACCAN welcomes NBN Co's proposal to incorporate a framework for setting benchmark service standards for each regulatory cycle. This will allow for assessment of NBN Co's proposed price changes and how this will materially impact consumers regarding the quality of service they receive. Furthermore, we consider the ACCC's ability to provide a RMD to determine benchmark service standards appropriate and in the LTIE. The proposed regulatory oversight will promote the adoption of benchmark service standards that reflect more closely end-user service requirements and willingness to pay.

During module 2, the ACCC and NBN Co have the power to initiate a mid-regulatory cycle review of benchmark service standards. The ACCC may initiate a review if a systemic service standard event occurs or if a retail service standard regulation is made or varied. A systemic service standard event means an event or circumstance arising during a regulatory cycle that results in a recurring material adverse impact on Access Seekers' access to a service standards product due to a matter for which NBN Co is responsible. In this instance, the ACCC would consider, acting reasonably, that the NBN Co did not take reasonable steps to address the recurring material adverse impact on Access Seekers. It appears that by this definition the ACCC may only initiate a review when there are significant issues regarding access to the network, rather than issues which may impact the quality of the service.

During the regulatory cycle, NBN Co may propose changes to benchmark service standards at its discretion, where it is required to consult with Access Seekers prior to submitting the proposal and associated cost pass through application to the ACCC. The ACCC has the power to accept or reject the proposal. ACCAN considers that the process regarding mid-regulatory cycle review ensures that there is sufficient flexibility during a regulatory cycle to respond to unforeseen events.

However, during Module 3, it is unclear whether the ACCC will have similar powers in regard to initiating a mid-regulatory cycle review of benchmark service standards. The SAU should be clear on

the roles and powers assigned to the ACCC. ACCAN considers the SAU should be amended to ensure that this power is clearly provided to the ACCC.

Recommendation 22: For the SAU to be amended such that it is clear that the ACCC has the power to initiate a mid-regulatory cycle review of benchmark service standards post-2032.

### *Incentive schemes*

The proposed SAU variation currently states that the consequence of NBN Co failing to achieve any service standard is limited to the payment of any applicable rebate or taking of any applicable corrective action.<sup>13</sup> Whilst paying rebates to end users who have been affected by missed service standards and taking corrective action is an important part of the regulatory regime, consumers would benefit from greater incentives within the SAU for NBN Co to meet service standards and benchmarks.

ACCAN recommends that the SAU provide an opportunity to develop an incentive scheme framework in the future. The purpose would be to disincentivise NBN Co from falling short of its service standard benchmarks by imposing additional costs where benchmarks are not met, for example through sacrificing cost recovery through the ICRA.

Recommendation 23: For the SAU to provide an opportunity for the ACCC to introduce a service standard incentive scheme.

## Benchmark Service Standards for the First Regulatory Cycle

NBN Co has largely proposed to retain the Wholesale Broadband Agreement (**WBA**) 4 service levels and associated performance objectives and rebates as the benchmark service standards for the first regulatory cycle. With the exception being:

- Higher performance objectives for completion advice for connections delivered within 30 minutes and service transfers completed in either 15 minutes or 1 hour.
- Reduced activity timeframes for delivery of completion advice for connections and service transfers, access component modifications that do not require the attendance at the premise and CVC modifications.
- Lower service fault dropout thresholds for services on the FTTN and HFC Networks from greater than nine to greater than seven in 24 hours.

ACCAN's view is that the proposed benchmark service standards for the first regulatory period do not address current issues with poor service quality on the network. Noting that NBN Co is investing significantly to improve the network, we would anticipate the benefits of these investments to be

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<sup>13</sup> NBN Co, 2022, *Variation to NBN Co Special Access Undertaking Variation*, clause 2.1.2.1.

seen within the first regulatory cycle. The service standards and associated rebates for the first regulatory cycle should be more ambitious than those currently set out in the WBA 4.

Service quality benchmarks determined via the WBA have to date fallen short of consumer expectations. The SAU Variation should be amended such that benchmarks that apply to connection, fault rectification and appointment keeping standards should be set to 95% at a minimum.

Recommendation 24: Benchmarks relating to connection, fault rectification and appointment keeping standards should be amended to a minimum 95%.

In setting robust standards, ACCAN believes that it is appropriate for NBN Co to have efficient incentives to drive compliance. Accordingly, we consider that where NBN fails to meet service standards that the SAU Variation should impose penalties in the form of a write-down of recoverable ICRA for the regulatory period.

### *New connections timeframes and rebates*

The timeframes established under the Customer Service Guarantee (CSG) for new connections and fault repairs provide a good basis for consumer expectations when it comes to telecommunications reliability, yet currently only covers telephone services. ACCAN recommends NBN Co establish timeframes for end user connections which will allow retailers to meet the CSG Standard. Additionally, compensation amounts for missed connection timeframes should also be set in line with the current CSG.<sup>14</sup>

Recommendation 25: NBN Co should amend timeframes for new connections to allow retailers to meet the timeframes set out in the Customer Service Guarantee (CSG). Compensation amounts for missed connection timeframes should also be set in line with the current CSG.

### *Performance incident threshold*

The point at which remedial action is taken to address performance issues should be more ambitious. ACCAN recommends that the Performance Incident threshold should be amended such that if 1 or 2 dropouts occur in a 24 hour period and the RSP raises a trouble ticket with NBN Co, that NBN will investigate and seek to improve the performance of the service. Where a consumer experiences 3 or more dropouts within a 24 hour period, then this should constitute a fault and NBN should undertake assurance activities.

ACCAN's engagement to date indicates that poor service outcomes are a driver of lower expenditure on NBN services, with consumers reluctant to spend on higher-speed tiers due to underperformance. Poor service outcomes may be contributing to lower rates of take-up of high-speed services and under utilisation of available network capacity. Service standards which are not

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<sup>14</sup> Under the CSG, consumers can expect \$14.52 of compensation per working day where connection timeframes are missed. Under the SAU Variation, consumers can expect a rebate of \$7.50.

meeting consumer expectations contribute to inefficient use of the infrastructure and should be addressed.

### *Wireless network cell congestion*

The SAU Variation defines a wireless network cell as being persistently congested if the average downlink throughput of the wireless network cell is reported by NBN Co as being less than 6 Mbps for the last downlink throughput reporting period ending in that month. 6 Mbps is far too low before end users on the congested cell are entitled to a wireless speed performance rebate. The definition for a wireless network cell being persistently congested should be set in close consultation with consumers. NBN Co should be required to explain the trade-off between improving this measure and the direct cost implications so that consumer preference is appropriately accounted for.

### *Utilisation threshold*

NBN Co has also proposed a utilisation measurement threshold of 90%, at a measurement timeframe of 30 continuous minutes on three separate days within a rolling 30-day period. There needs to be further consultation with consumers regarding the trade-off between provisioning enough capacity to ensure high quality service yet not over-investing in the network, resulting in higher prices. The appropriate utilisation management threshold should be set in close consultation with consumers, including examination of the cost implications of alternative measures. Following this, NBN Co should provide detailed explanation of how the utilisation measurement threshold meets consumer expectations.

### *Additional comments*

The ACCC notes that some of the definitions of capitalised terms have the meaning given to them in the standard form of access agreement as of 22 November 2022. The SAU should work as a stand-alone document, and therefore there would be benefit in having the benchmark service standards determined in a standalone document.

## Reporting

NBN Co has proposed to introduce performance reports (to include NBN Co's activity and network availability), utilisation threshold reports and operational reporting, including supplementary service level reporting, wireless network performance reporting and line rate and information rate reporting for ordered products for FTTB/N/C networks. We note that performance reports and any measurement and monitoring information produced by NBN Co are confidential information of NBN Co and will only be provided to RSPs.<sup>15</sup> ACCAN recommends that NBN Co publish this information.

ACCAN's preference is that reporting relating to service performance is done through a record keeping rule rather than be included in the SAU. This will allow for greater flexibility so that the reporting can adapt as benchmark service standards develop over the lifetime of the SAU. We

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<sup>15</sup> NBN Co, 2022, *Variation to NBN Co Special Access Undertaking Variation*, Attachment I, Part B 16.2.

encourage the ACCC to publish all information collected through the record keeping rule to allow for greater accountability and public scrutiny.

For more information regarding ACCAN's position on NBN's service performance reporting, see our submission to ACCC's record keeping rule - NBN Service Performance consultation.<sup>16</sup>

## ACCC Functions and Powers

ACCAN supports the proposed increase in the array of functions and powers which the SAU variation provides the ACCC. We welcome the ACCC's power to:

- assess RMAs and ability to determine RMDs
- review cost pass-through applications
- categorise core and non-core services
- determine the CAM and associated accounting measures
- set minimum benchmark service standards.

ACCAN considers that the ACCC's proposed approach to assessing the sufficiency and effectiveness of the proposed functions and powers is appropriate. We agree that the matters specified by the ACCC are relevant considerations, including the ability for functions and powers to deal with unanticipated situations, the need for powers to review effectiveness of controls, the need for any additional functions and powers to promote LTIE as well as the reasonableness and clarity of the powers and functions.<sup>17</sup>

ACCAN recommends the SAU be redrafted to clarify and strengthen the powers of the ACCC. In particular we support the revision of the aspects of the SAU that limit the powers of the ACCC, including:

- Clauses 3A.1.2(b), 3B.3(c) and 2G.4.2(b)(i)(A), which requires the ACCC, in setting NBN Co's ABBRR, to provide NBN Co with the reasonable opportunity to achieve and maintain a stand-alone investment grade credit rating, should be removed from the SAU.
- Clause A3.1.2, which outlines the process for the ACCC to provide NBN Co with a Statement of Approach, should be amended so that the ACCC is required to provide the Statement of Approach within a minimum of 180 days prior to NBN Co lodging their replacement module application.
- Clause 11.5.4, which specifies the process regarding product withdrawal required by law or directed by Shareholder Ministers should be amended to remove any reference to Shareholder Ministers.
- The ACCC should consider the prudence and efficiency of the expenditure allowances made under the Telstra Arrangements and the Optus Arrangements for a given regulatory cycle.
- For the SAU to be amended such that it is clear that the ACCC has the power to initiate a mid-regulatory cycle review of benchmark service standards post-2032.

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<sup>16</sup> ACCAN, 2023, *Submission to Record Keeping Rule -NBN Service Performance Consultation Paper*, <https://accan.org.au/accans-work/submissions/2059-record-keeping-rule-nbn-service-performance-consultation-paper>.

<sup>17</sup> ACCC, 2023, *Proposed variation to the NBN Co Special Access Undertaking*. P.67.

- For the SAU to provide an opportunity for the ACCC to develop an incentive scheme framework in the future.

ACCAN considers that clause 6.4(b) should be revised to clarify that the ACCC has the right to disclose to a third party any information or document of NBN Co where reasonable notice is provided. While NBN Co has legitimate matters over which it is appropriate for it to claim confidentiality, we consider that public interest considerations in many instances will favour disclosure. Further, we note that claims of confidentiality may provide a mechanism through which NBN Co may otherwise have the ability to constrain legitimate scrutiny of its operations.

Recommendation 26: For Clause 6.4(b), which provides NBN Co the opportunity to protect the confidentiality of any information or document that the ACCC has requested to disclose to a third party, to be revised to clarify that the ACCC has the right to disclose information to a third party of NBN where reasonable notice is provided, and it is in the public interest to do so.