



NBN Wholesale Service Standards Inquiry 2019 Draft Decision Consultation

Submission by the Australian Communications Consumer Action
Network

November 2019

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 availability, accessibility and affordability of communications services for all Australians.

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 and Recommendations

ACCAN welcomes the opportunity to comment on the ACCC's Draft Final Access Determination (FAD) as part of the NBN Wholesale Services Inquiry. The creation of robust and tangible wholesale service standards will underpin significant improvements in the reliability of services and alleviate many of the pain points faced by consumers when accessing NBN services.

The draft decision is largely in keeping with ACCAN's pre-existing positions concerning the creation of wholesale service standards. Accordingly, the focus of this submission is to outline those elements of the FAD that may be enhanced or improved through modification. ACCAN believes that the FAD can be improved through:

- the automatic of pass through for all rebates;
- the elimination of rebate caps; and
- an increase in the rebates payable for missed appointments to ensure that they are in keeping with the losses faced by consumers.

The submission sets out ACCAN's views on the appropriate principles for regulating wholesale standards, before turning to the terms of the Draft FAD and the validity of the FAD under the *Competition and Consumer Act 2010* (Cth). Finally, the ACCAN outlines our view that the FAD should be implemented prior to the conclusion of Wholesale Broadband Agreement 4 (WBA4) in order to frame these negotiations.

Recommendations

Recommendation 1

That the FAD be revised to require the pass through of all wholesale rebate payments to consumers.

Recommendation 2

That the FAD be revised to remove the proposed caps on the maximum rebate payable for non-compliance with service levels.

Recommendation 3

That the missed appointments rebate be increased to a minimum of \$100.

Recommendation 4

That clause 9 of the FAD is revised to require public release of service level reporting.

Recommendation 5

That the FAD be implemented prior to the commencement of WBA4 negotiations.

Principles for regulating wholesale standards

ACCAN is supportive of the principles set out within the draft decision and consider that they provide a sound basis for the regulation of NBN Wholesale Service Standards. The principles set out in the FAD reflect existing principles concerning the sale of goods and services commonly accepted in the market.

Principles described in the draft decision

NBN Co. should only confirm to the access seeker that a connection is completed and begin charging for that service, after conducting appropriate testing to ensure installation activities are successful.

ACCAN strongly supports the principle that NBN Co. should undertake testing prior to confirming a service is working. Identification and rectification of service issues in the first instance allows for the efficient resolution of connection issues and minimises harm to consumers that arise as a result of delayed connection.

Consumers and retailers should not be required to pay for services that are not delivered. ACCAN notes that ordinarily the failure to provide a service for which a party has agreed to pay represents a breach of contract. In the absence of strong incentives on the part of retailers to pursue NBN Co. for contractual breach (in the context of their broader financial interests) the creation of FAD protections is essential.

Connection rebates should apply to all standard connections and should accrue on a daily basis if the relevant service level is not met.

ACCAN supports the extension of rebates and service standards to all standard connections. The implementation of service standards should be uniform and rebates should accrue on a daily basis in order to provide incentives to ensure that connections are made in the first instance or that where this not possible that any connection issues are rapidly rectified.

Fault rebates should accrue on a daily basis if the relevant service level is not met.

As noted above ACCAN supports the accrual of fault rebates on a daily basis in order to ensure that NBN Co. has appropriate incentives to rectify faults as soon as possible and ultimately in order to compensate end users fairly for daily losses incurred due to loss of service.

Missed appointment rebates should take into account the cost and inconvenience to the end-user when an appointment is missed, while at the same time provide a stronger incentive to reduce the rate of missed appointments.

ACCAN considers that the cost to the end-user should be the primary consideration when setting missed appointment rebates. In setting the rebate reference should be had to existing

approaches for valuing the losses attributable to consumers for wasted time. ACCAN's views concerning this issue are detailed in the following sections.

NBN Co. should be responsible for the speed and performance of its wholesale product and not charge for services it does not provide.

ACCAN strongly supports the principle that retailers and consumers should not be charged for services that are not provided. The losses attributed to consumers as a result of underperforming services are material. The provision of a service that performs below the advertised speed results in consumers paying the full cost of a service that is worth a fraction of the price that they are paying.

The losses to consumers vary considerably depending upon the underperformance of their individual service. Contacts from consumers and ACCC reporting indicate that for a significant proportion of consumers underperformance of services remains a common experience,¹ with consumers indicating that they feel that underperforming services should be priced on a pro-rata basis to reflect the true value of the service. This implies that consumers attaining speeds below the headline rate (e.g. 20% - 50% below) consider the fundamental underlying value of the service is proportionately lower and that therefore the loss they are experiencing is equivalent in monetary terms.

To ensure a robust service level framework, NBN Co should only extend service level timeframes under limited specified circumstances, for example if NBN Co is waiting for a customer or RSP action before completing a connection or remediating a fault, or NBN Co.'s operations are affected by a force majeure event.

NBN Co. should not have the ability to use exemptions to avoid having to pay rebates or promptly rectify service level issues except in clearly defined circumstances. Clarification of the specified circumstances when NBN Co. may seek to extend service level timeframes is essential in order to incentivise rapid rectification of service issues.

NBN Co. should record service specific information about the progress of appointments, connections and faults and make this available to access seekers in a way that is accurate, timely and accessible. This should include whether a relevant service level has been missed and is able to be used by RSPs to inform end-users when appropriate.

ACCAN strongly supports the implementation of record-keeping and reporting requirements for NBN service levels. At present the lack of specific records is a barrier to the identification of systemic service issues and the attribution of responsibility for failures in meeting service levels. A sufficiently detailed system of reporting will allow for the clarification of the drivers of non-compliance with service levels and facilitate identification of systemic issues and the development of solutions.

¹. <https://www.accc.gov.au/system/files/Measuring%20Broadband%20Australia%20-%20Report%207%20-%20November%202019.PDF>

ACCAN believes that the publication of the monthly service level performance information required under clause 9 of the draft FAD is essential to ensure confidence in the performance of NBN Co.

NBN Co should provide regular reports to access seekers about the overall level of performance of its network. This should include its performance meeting service levels by location, service class and network.

ACCAN agrees with the ACCC that NBN Co. wholesale service standards should support the delivery of NBN services consistently with existing priority assistance arrangements. However, ACCAN considers that there is considerable scope for the revision and improvement of these safeguards, as set out in our submission to Part B of the Consumer Safeguards Review,² NBN Co.'s performance standards may require revision in the future to comply with any enhanced standards.

NBN Co should support the delivery of NBN services in line with existing consumer safeguards, where they apply. PA connections and faults should be prioritised over standard connections and faults. NBN Co should commit to updating the WBA service standards to support any changes to the consumer safeguards framework that affect NBN services.

Priority assistance is an essential service for many vulnerable Australians. ACCAN believes NBN service standards should be set to ensure compliance with existing consumer safeguards that provide shorter timeframes for connection and fault repair of priority assistance services. The continuation of these arrangements is fundamental to ensuring that Australians who are at elevated risk of harm are able to access the services that they require, with minimal disruption to continuity of service.

ACCAN also believes that it is appropriate to have wholesale service requirements in place that underpin existing retail obligations, including those imposed on Telstra.

Pass through of rebates

As part of ACCAN's consultation for this submission, we have been advised by numerous retail service providers of their capacity and willingness to fully pass through rebates paid to them for non-compliance with wholesale service standards. ACCAN believes that all rebates for non-compliance with service standards should be automatically passed through to consumers.

Consumers are fundamentally the primary party affected by poor service standards. The provision of a poor or non-functional service has not eroded the profitability or operations of retailers, but merely resulted in consumer loss. As a principle, compensation is intended to put the affected party back in the position that they would have been in if no loss occurred – it is not to provide a payment to retailers – as they have not suffered loss.

² <http://accan.org.au/our-work/submissions/1529-consumer-safeguards-review>.

ACCAN believes that that there should be automatic pass through of rebates in the form of compensation payments for non-compliance with the obligations set out in the FAD. We note that if certain service providers can commit to the pass through of all rebates to consumers, there is little basis for concluding that such an arrangement cannot and should not be made by other service providers. ACCAN believes that ongoing ACCC scrutiny of pass through arrangements is required in order to avoid a windfall gain to retailers at the expense of consumers.

Recommendation 1

That the FAD be revised to require the pass through of all wholesale rebate payments to consumers.

Draft FAD terms

As with any principles based framework, the efficacy of the principles is a function of how they are applied and implemented. ACCAN considers that the current drafting of the Final Access Determination is broadly appropriate but considers that improvements can be made through further refinement of specific terms.

Delayed connections rebates

ACCAN supports the implementation of a time based daily rebate. However, the escalation of rebates as time progresses would provide stronger incentives to resolve connection issues for those consumers facing ongoing delays in connecting. ACCAN considers that there remains scope for higher rates of rebates to be paid for delayed connections and that this is an appropriate step given the considerable costs faced by consumers as a consequence of undue delays.

ACCAN does not support the introduction of a rebate cap, noting that a cap provides weakened incentives to rectify complex connections where it may be cheaper for NBN Co to ignore these connections and pay the maximum rebate fee. There are considerable losses faced by consumers due to prolonged delays in connecting, so the terms should be drafted to alleviate any incentive to ignore complex cases where the harm faced is of the greatest magnitude.

Unresolved faults

ACCAN supports the implementation of the fault rebate as currently structured and believes that it will provide strong incentives for rectification of connection faults. The proposed rebate of \$20 per full or partial business day (for the first 5 days) and subsequently \$30 for each full or partial business day is a significant step forward.

ACCAN remains concerned that for some complex connections that the cost of rectification may be higher than the cost of paying the rebate which is capped at a maximum of \$1150. Accordingly consumers with complex faults may be de-prioritised over alternative simpler rectification processes.

Recommendation 2

That the FAD be revised to remove the proposed caps on the maximum rebate payable for non-compliance with service levels.

Missed appointments rebate

ACCAN is supportive of the proposed increase in the missed appointments rebate to \$75 but considers that a stronger incentive is appropriate given the significant losses to consumers attributable to missed appointments. ACCAN believes that the value proposed by Aussie Broadband of \$150 is consistent with the costs faced by consumers and considers that a rebate amount of \$100 is the minimum appropriate valuation.³

The cost to consumers associated with waiting prolonged periods of time can be estimated in a number of ways. The ACCC could apply existing principles provided by the Office of Best Practice Regulation (OBPR) concerning the value of leisure time.⁴ This is applicable because in the vast majority of instances, consumers have to take time off work for appointments, and therefore they are in fact using their leisure time for this purpose. .

An application of OBPR figures would result in an estimated loss to consumers in the order \$128 for a four-hour waiting period.⁵ Noting that a missed appointment inherently implies a subsequent appointment, the economic cost to the consumer for an 8-hour wait is at a minimum \$256.⁶ However, accepting that consumers may be able to engage in alternative activities during this period, it may be reasonable to apply a more conservative estimation.

ACCAN considers that a conservative basis for estimating the costs associated with missed appointments can be taken, that yield higher rebate figures than those proposed in the FAD. In 2019 ACCAN commissioned Synergy Economics to provide guidance on the appropriate valuation techniques for customer wait times.

The research report provided by Synergies recommended the application of a valuation of \$19.14 per hour of customer time spent waiting,⁷ with this value increasing as a function of the level of aggravation or difficulty faced by a customer. This approach is a conservative one, with the OBPR figures and alternatives in the form of wage rates (with many consumers foregoing employment opportunities) to wait for connections to occur.

The cost to a consumer for a 4-hour wait is \$76.56.⁸ As noted, a missed appointment inherently implies a subsequent appointment, so the economic cost to the consumer for an 8-hour wait is at a minimum \$153.12.⁹ In circumstances where a consumer is required to set

³ <https://www.itnews.com.au/news/aussie-broadband-suggests-nbn-co-pay-150-for-missed-appointments-531706>

⁴ Office of Best Practice Regulation, *Regulatory Burden Measurement Framework* (2016).

⁵ [\$32 x 4 = 128].

⁶ [\$32 x 8 = \$256].

⁷ Synergies Economics, *Please Hold: Costing Telco Customer Wait Times* (2019) 43.

⁸ [\$19.14 x 4 = \$76.56].

⁹ [\$19.14 x 8 = \$153.12]

aside 8 hours of their time to wait for the connection appointment, they are likely to be aggravated, so to allow for this factor the effective cost would be in the order of \$180.48.¹⁰

ACCAN notes that these costs are well in excess of the current and proposed rebates and believes that the draft rebate should be increased in order to ensure that they are consistent with the underlying costs to consumers associated with missed appointments.

The costs associated with the rollout of the NBN are significant for all parties involved. For consumers, the costs associated with the rollout of NBN services to their premise if undertaken correctly in the first instance is \$76.56. The rollout will entail the switch-over of approximately 8 million premises, which implies a minimum economy-wide cost of \$612.48 million (using the above conservative valuation of time). An application of OBPR guidelines would imply a cost of \$1.024 billion if all services were connected correctly and activated in the first instance.

The costs for missed appointments are commensurately large. On average the number of missed appointments (excluding those where a service is connected the same day but outside the agreed window) is 320 per day;¹¹ which implies the average daily cost is in the order of \$24,563 or approximately \$9 million per annum when using the conservative valuation.¹² An application of OBPR figures would result in a cost of \$40,960 per day or approximately \$15 million per annum.¹³

The above figures represent a pure loss to the consumer. Accordingly the total cost to the consumer in terms of their time is higher (as noted earlier in this section). ACCAN considers that in light of the material loss faced by consumers that there are substantial grounds for increasing the rebate in order to provide stronger incentives for compliance and to adequately compensate consumers for the loss that they face due to missed appointments.

Recommendation 3

That the missed appointments rebate be increased to a minimum of \$100.

¹⁰ Ibid 44. The wait time penalty for aggravation increases the per hour figure to \$22.56, the figure of \$180.48 = \$22.56 x 8 hours.

¹¹ <https://www.itnews.com.au/news/nbn-co-technicians-now-missing-469-appointments-a-day-523214>

¹² [\$76.56*320 premises = \$24,563 per day]. Per annum = \$8.965 million.

¹³ [\$128*320 premises = \$40,960 per day]. Per annum = \$14.95 million.

Underperforming service speeds

ACCAN is supportive of the introduction of rebates on underperforming services, but questions the merit in rebates being paid to retail service providers in the absence of conditions requiring their pass through. Consumers are ultimately the party that suffers loss in the event that their service is underperforming and should accordingly be the party that is compensated.

In setting the rebates for underperforming service speeds ACCAN considers that an emphasis should be placed on ensuring that services meet a minimum speed requirement. Accordingly there is a case for the implementation of higher service rebates for services that do not meet the statement of expectations requirements (of peak information rate of 25Mbps). For example this would see the implementation of a rebate of say \$30 per month for services not reaching 12Mbps.

ACCAN is supportive of the proposed drafting of the FAD which would limit the ability of NBN Co. to sell services at speed tiers that cannot be attained over a given connection.

Service level measurement and exclusions

ACCAN strongly supports the measures set out in the FAD and believes that further clarity is required around the operation of service standards and in what circumstances NBN Co. may be exempt from compliance. The reporting of service level outcomes is essential for all stakeholders and is a critical component when assessing opportunities to improve service outcomes.

Public reporting on the use of exceptions and service level exclusions is essential in order to provide greater clarity concerning the reasons for non-compliance with service levels. ACCAN considers that wholesale reporting requirements that outline the reason for non-compliance (e.g. due to inaction on the part of retailers or from consumers) will allow for the rapid identification of points of failure within the broader system, attribution of delays and facilitate improvements in systems into the future.

At present the lack clarity concerning which elements of the supply-chain are the source of delays and faults remains a significant source of frustration for consumers. Greater specification of the grounds for exclusion from service levels and greater reporting concerning these exclusions has the potential to be a significant driver in improved outcomes for consumers.

Recommendation 4

That clause 9 of the FAD be revised to require public release of service level reporting.

Consistency with regulatory criteria

ACCAN considers that the Final Access Determination as drafted meets the criteria set out under s. 152BCA (1) of the *Competition and Consumer Act 2010* (Cth). The statutory framework requires the consideration of a variety of factors when making an access determination. These factors are considered in detail below.

Whether the access determination will promote the LTIE

The draft decision is consistent with the long term interests of end users and will encourage the efficient allocation of resources to reduce the cost of transitioning to the NBN.

The quality of services is an important factor in consumer decisions about whether to purchase a service, and consumer expectations or perceptions of the quality of a service drive their valuation of it. However, the current market for broadband services suffers from information asymmetries and as a consequence consumers perceive NBN services to be of poorer average quality than what can be delivered over the network¹⁴ As a consequence of these information asymmetries, the willingness to pay of consumers has declined and existing infrastructure is being underutilised.

The creation of wholesale service standards will assist in underpinning the value of NBN services. This in turn will support greater uptake, higher NBN Co. revenues and the long-term financial viability of NBN Co. and ongoing investment in network infrastructure. In the event that the value of NBN services remains weak or uncertain for consumers, take-up may remain subdued and undermine the long term viability of the network, an outcome not in keeping with the long term interests of end users.

The legitimate business interests of NBN Co., and NBN Co.'s investment in facilities used to supply the declared service

ACCAN considers that the terms of the FAD are consistent with the business interests of NBN Co. Although the implementation of the FAD may result in some costs, in the long term the provision of high quality and high reliability broadband services will improve confidence in NBN services and as a consequence improve take-up, retention and increased willingness to pay.

¹⁴ George A Akerlof, 'The Market for" Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84(3) *The Quarterly Journal of Economics* 488.

ACCAN believes that the current lack of assurance for service speeds is a critical factor in the reduced willingness to pay of consumers. Put simply, if the information asymmetry that exists with respect to poor speeds is maintained, consumers will be increasingly unwilling to pay for higher speed services.¹⁵

The interest of access seekers who have a right to use the declared service

ACCAN agrees with the view of the ACCC that the terms of the FAD adequately provide for the interests of access seekers who have a right to use the declared service. The FAD terms as drafted will facilitate the provision of NBN services to access seekers on terms that are consistent with their interests in having a reliable service to retail.

The direct costs of providing access to the declared service

ACCAN considers that the direct costs associated with providing access to the declared service are unlikely to be substantial, noting that under existing obligations set out in the statement of expectations NBN Co. is required to provide access to services nationally. Accordingly, the declaration of the services set out within the FAD are unlikely to entail any additional costs through the extension of access.

The economically efficient operation of a carriage service, a telecommunications network or a facility

ACCAN considers that the introduction of wholesale service standards will result in a significant improvement in the efficient use of the network. At present the lack of quality assurance and consumer concerns about the service provided over the network is undermining its efficient use.

The FAD will support greater consumer confidence in the quality and reliability of NBN services and thus underpin its value. This will be a determinative factor in alleviating the exceptionally low rates of take-up observed in some parts of Australia.

¹⁵ Ibid.

WBA4 Negotiations

ACCAN is supportive of the consideration of the content of the WBA4 negotiations in assessing the time frame for handing down the FAD. However, we note that the WBA4 negotiations are primarily concerned with matters of commercial concern for NBN Co. and retailers. As a consequence the consumer and public interest in minimum service standards is unlikely to be the focus of negotiations.

The use of negotiation to develop the terms on which a service is provided offers the opportunity of a win-win trade-off, and therefore is often viewed as a superior option to direct regulation.¹⁶ However, in actuality whether a negotiated settlement or a regulated standard is more efficient fundamentally is a question of how much benefit is generated through either approach and the relative cost. A negotiated agreement arrived at through a costly negotiation process,¹⁷ characterised by a multitude of legal teams and significant delay is unlikely to be as beneficial as a regulated standard, where these costs are avoided.

Accordingly, ACCAN does not consider that the ACCC is bound to wait until a negotiated agreement is formed between NBN Co. and retailers. Through the setting of wholesale service standards in the immediate future, the ACCC can set the parameters of future negotiations and fill in existing gaps within the WBA3. In doing so considerable cost to retailers and NBN Co. can be avoided through the elimination of fruitless negotiations on elements of service standards that should have already been resolved, and through the creation of incentives to improve service levels in the immediate future.

Recommendation 5

That the FAD be implemented prior to the commencement of WBA4 negotiations.

¹⁶. In technical parlance a pareto efficiency improvement. Buchanan, J.M., 2001. Game theory, mathematics, and economics. J. Econ. Methodol. 8, 27–32, p. 29.

¹⁷. Coase, R.H., 1937. The nature of the firm. *economica* 4, 386–405.