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Submission in response to ACCC Discussion Paper 'ACCC Inquiry into NBN Wholesale Service Standards' dated December 2017

1. Introduction

- 1.1 This submission is provided by the Competitive Carriers' Coalition (**CCC**) in response to the ACCC's Discussion Paper 'ACCC inquiry into NBN wholesale service standards' released in December 2017 (the **Discussion Paper**).
- 1.2 The CCC welcomes the ACCC's inquiry into NBN wholesale service standards (**Inquiry**) and is grateful to the ACCC for committing the time and resources required to conduct this important review.
- 1.3 The CCC members are committed to working with NBN Co and intermediaries to ensure that the NBN services that end-users receive meet the needs of consumers and are consistent with the long-term interests of end users (**LTIE**). The CCC believes that appropriate service standards in version 3 of the Wholesale Broadband Agreement (**WBA 3**) is an important element of meeting this objective.

2. Summary of Submission

- 2.1 The CCC believes that the NBN wholesale service standards set out in the WBA 3 are not adequate. They do not operate to ensure that NBN Co delivers an acceptable standard of service to end users and the service level regime in WBA 3 does not provide adequate incentives for NBN Co to meet the performance objectives set out therein. As a result, the NBN wholesale service standards do not promote the LTIE.
- 2.2 The CCC considers that the implementation of WBA 3 by NBN Co has highlighted the need for greater regulatory oversight by the ACCC to ensure that service standards offered by NBN Co promote the LTIE.
- 2.3 The reasons that the CCC holds this view include the following:
 - 2.3.1 WBA 3 does not set out comprehensive service standards in relation to all of the key aspects of the performance of NBN Co's service obligations. The CCC considers that the WBA 3 should set out clear and unequivocal service standards in relation to ordering and provisioning, service availability and fault rectification. The service standards that do exist in the WBA are limited and difficult to apply;
 - 2.3.2 in addition, clear service standards should be backed by service level commitments which provide adequate incentives for NBN Co to perform its service obligations in line with its commitments. Under such a regime, service credits should be available which are clear, easy to apply, and enable RSPs to make appropriate commitments to their own wholesale or retail customers and pass on the benefits of these service levels to end users as appropriate; and
 - 2.3.3 the service levels that do exist in the WBA are extremely limited and do not provide an adequate incentives for NBN Co to meet the service standards to which they relate. In addition, the mechanism for the implementation of these service levels is too complex, and does not enable RSPs to provide any real flow on benefits to end users.



- 2.3.4 the WBA 3 does not include wholesale service standards that create the appropriate incentives for NBN Co to share information effectively with RSPs and intermediaries, and develop resolutions to systemic problems efficiently.
- 2.4 The structure of the WBA 3 is much too complex and it is difficult to interpret and apply. This is inconsistent with the position of NBN Co as a wholesale-only open access provider of local access services. NBN Co's agreements should be simple and transparent. Instead, WBA 3 is extremely lengthy, dense and complex and is out of step with other wholesale agreements generally used within the telecommunications industry.
- 2.5 As a monopoly provider of local access services, NBN Co faces little or no competition for the provision of its services. Accordingly, RSPs have extremely limited bargaining power in negotiations with NBN Co. The complexity of the WBA 3 combined with the lack of real bargaining power makes it difficult for smaller RSPs, including CCC members, to engage with NBN Co in a meaningful way in relation to the WBA 3. The length and complexity of the WBA 3 means that, to engage fully with NBN Co in relation to the agreement requires a very substantial commitment of legal and technical resources. Where the RSP ultimately has limited ability to effectively negotiate, it is difficult to justify the commitment of these resources.
- 2.6 The members of the CCC believe that there is an opportunity for NBN Co and RSPs to work together to ensure that the NBN wholesale service standards offered by NBN Co and passed on by RSPs to end-users are in the LTIE. The CCC believes that it is essential that this take place in order to restore consumer confidence in NBN based services and to meet the LTIE.
- 2.7 The CCC considers that ongoing supervision by the ACCC of NBN Co's wholesale service standards is required. In addition, more immediate action is required by the ACCC to address the insufficiencies of the wholesale service standards in the WBA 3 for those RSPs who are now locked in to the terms of the WBA 3 until its expiry. For these RSPs, a BROC or an access determination by the ACCC will be of no immediate benefit as the WBA 3 takes precedence according to the hierarchy set out in Part XIC of the CCA. Accordingly, unless NBN Co voluntarily accepts a service standard recommendation from the ACCC and agrees to amend WBA 3, the ACCC may need to consider recommending to the Government that appropriate service standards be implemented by legislative instrument along the lines of the Customer Service Guarantee.
- 2.8 Each of these points is considered in further detail below.
- 3. Commercial Negotiations with NBN Co**
- 3.1 The CCC appreciates that the structure of the regime under Part XIC of the CCA is such that primacy is given to commercially negotiated agreements. The CCC also appreciates that the roll-out of the NBN is a significant undertaking, and NBN Co has natural incentives to limit its own risk and exposure to its customers.
- 3.2 However, as a monopoly service provider, NBN Co does not face the same level of (or any) genuine competition in the marketplace experienced by other service providers. It is therefore only natural that NBN Co would seek, to the greatest extent possible, to limit its exposure to additional risks (i.e. the payment of service rebates or credits) if service standards are not met.
- 3.3 In the Discussion Paper, the ACCC makes the observation that NBN Co consulted with RSPs about WBA 3 and provided the opportunity for certain concerns to be raised and examined.¹
- 3.4 While there were opportunities for members of the CCC to engage with NBN Co at certain stages of the development of WBA 3, NBN Co's position as a monopoly service provider

¹ Section 5.2.1, ACCC, *Discussion Paper*, p. 31



places natural limitations on the benefit of these discussions given the relative inequality in bargaining power of the parties involved. We consider that this dynamic is clearly reflected in the ultimate outcome of WBA 3.

- 3.5 As the ACCC is aware, reviewing a document like the WBA and negotiating it with NBN Co is a significant undertaking that requires the investment of significant time and legal and technical resources. This is exacerbated somewhat by the length, density (the Ethernet Product Module alone is approximately 200 pages) and complexity of the terms of the WBA 3 as compared to the kinds of wholesale agreements generally used by the telecommunications industry.
- 3.6 The benefit of dedicating the time and resources required to engage with NBN Co must be weighed against the likely benefit of any such engagement given the inequality in bargaining power between NBN Co and access seekers and the lack of genuine incentive for NBN Co to accept a more balanced allocation of risk. The practical reality for smaller RSPs is that they simply do not have the resources required for such an undertaking in the circumstances.
- 3.7 The complexity of this process means that only the largest RSPs (for example, Telstra) are able to commit the resources required to effectively engage with NBN Co which means that any concessions made by NBN Co are likely to be specific to the circumstances of these larger RSPs rather than the industry as a whole.
- 3.8 This experience is not limited to the WBA 3. It has also been the experience of members of the CCC that the volume and complexity of materials made available by NBN Co to RSPs through the product development forum makes it similarly difficult for the members of the CCC to engage in such consultation in a meaningful way.
- 3.9 The practical limitations of commercial negotiations with NBN Co as outlined above and as evidenced by the WBA 3 should be considered by the ACCC when considering an appropriate approach to its involvement in negotiations between NBN Co and the industry going forward.
- 3.10 The CCC also considers that the ACCC should review whether it is appropriate for NBN Co to insist on bi-lateral negotiations being treated as confidential given NBN Co's non-discrimination obligations. The CCC does not believe that it is appropriate or necessary for NBN Co to insist on RSPs treating their negotiations with NBN Co as confidential, and that the ability for RSPs to consult with each other in relation to such negotiations may help limit, if not resolve, the problems of inequality of bargaining position.

4. NBN Wholesale Service Standards

- 4.1 The CCC agrees with the ACCC's statement in the Discussion Paper that '*for a monopoly service provider, service standards that include meaningful and measurable commitments that are enforceable and include remedies or penalties, will enable its customers (both wholesale and retail service providers) to deliver quality retail services in downstream markets*'.²
- 4.2 The CCC considers, however, that the NBN wholesale service standards set out in the WBA 3 do not include meaningful and measurable commitments that are enforceable, and do not include remedies or penalties that are sufficient to allow members of the CCC to pass these remedies through to their downstream customers.
- 4.3 The CCC views the service standards (including the applicable Service Levels) currently set out in the WBA 3 as largely unbalanced, and far removed from what would be acceptable if NBN Co faced genuine competition in relation to the provision of the services. Rather, the

² Section 4.1, ACCC, '*ACCC inquiry into NBN wholesale service standards – Discussion paper*', December 2017, p. 19.



CCC considers that the service standards are designed to minimise NBN Co's obligations while imposing all of the risk of the arrangement onto RSPs.

- 4.4 The CCC considers that;
- 4.4.1 service standards and performance objectives employed under the WBA 3 are not broad or material enough, and are therefore not appropriate to ensure a good customer experience;
 - 4.4.2 the recourse and compensation payable when these service standards and performance objectives are not met is not sufficient to incentivise NBN Co to supply services that meet specified service levels; and
 - 4.4.3 as a result, it is not practicable for the members of the CCC to pass through appropriate remedies or service credits for poor performance of the NBN services to their end-users without bearing full financial risk and responsibility.
- 4.5 In addition, the wholesale service standards in the WBA 3 do not adequately reflect the separation of responsibility between NBN Co, RSPs and intermediaries, including the absence of clear requirements regarding the flow of information from NBN Co to RSPs which can be passed on to end-users.
- 4.6 In the Discussion Paper, the ACCC queries whether the reason RSPs are not passing the service standards in the WBA 3 through to end users may be due to insufficient competition at the retail level to incentivise RSPs to differentiate NBN broadband services through service standards relating to connections, fault handling and appointments.³
- 4.7 The CCC considers that this is not the case and that the reasons RSPs do not pass-through the service standards in the WBA 3 to end users is:
- 4.7.1 firstly, the service standards and associated service levels that are included in the WBA 3 are so complex, and the service rebates available so uncertain, that it is not practicable to pass these through to end-users; and
 - 4.7.2 secondly, the service levels in the WBA 3 are not well adapted to being passed through to individual end users. If the RSP did pass through the service standards and associated service levels to end-users, the exposure to the RSP would be unmanageable. For example, where a service credit is payable only where a target is not achieved for 90% of customers, how can such a rebate be allocated among end users?
- 4.8 At a minimum, all RSPs involved in the supply of NBN services to end-users should be striving to provide a service that meets the fundamental levels of service for such services expected by the community, even where the service is a 'best efforts' service. To the extent that NBN Co sits at the top of the hierarchy in terms of the supply of NBN services, it is incumbent on NBN Co to ensure that it is working with RSPs to promote and facilitate this.

Commercial Rebates

- 4.9 The only recourse available to RSPs under the WBA 3 for NBN Co's inability to meet the performance objectives are the Commercial Rebates. Commercial Rebates offered by NBN Co under the WBA 3 are only available where NBN Co fails to achieve its performance objective for:
- 4.9.1 End User Connections; and
 - 4.9.2 End User Faults.

³ Section 6.3, ACCC, *Discussion Paper*, p. 45



- 4.10 For all other performance objectives, the WBA 3 does not include any specific remedy for affected RSPs in circumstances where NBN Co fails to meet these performance objectives. It is unclear to the CCC why rebates have been included where NBN Co fails to achieve some performance objectives in the WBA 3, but not others.
- 4.11 The CCC's detailed comments regarding the Commercial Rebates are set out Schedule 1 to this Submission.
- 4.12 The inadequacy of the rebate regime in the WBA 3 is further exacerbated by the fact that NBN Co's sole and exclusive liability to its customers in respect of any Loss arising by reason of a failure of NBN Co to achieve a Service Level or any delay in supplying, failure to supply or an error or defect in the supply of an Ordered Product will be the applicable Commercial Rebate or CSG Compensation (if any).⁴
- 4.13 This ultimately means that in circumstances where NBN Co fails to meet its performance objectives, or otherwise fails to supply an Ordered Product, its customers (and in turn, the end-users of its customers) are often likely to be without any remedy under the WBA 3.
- 4.14 As a result, there is little incentive for NBN Co to meet the performance objectives set out in WBA 3 as there will often be little or no consequences to NBN Co for such non-performance.

Material Service Failures

- 4.15 While the inclusion of the concept of Material Service Failures in WBA 3 is an improvement in the commitments previously offered by NBN Co under WBA 2, it still falls short of what the CCC would expect or what would be negotiated if NBN Co faced genuine competition in the provision of its services.
- 4.16 For example, for a Material Service Failure to occur under the WBA 3, 90% of end users at a single point of interconnect must be affected by an Outage and the Outage must persist for, in the case of a general failure, up to 20 days, before an event can be classified as a material service level failure. For network outages that do not meet the 90% coverage criteria but are nonetheless significant and widespread, then such a fault will not be a Material Service Failure.⁵
- 4.17 In addition, even if a failure is a Material Service Failure, there is no clear mechanism for compensation in the WBA 3 (i.e. there are no service rebates). Affected RSPs are therefore required to bring a claim for breach of contract and seek compensation in damages. In addition, NBN Co's maximum liability to the RSP in the circumstances is limited to the Eligible Charges paid by that RSP.⁶
- 4.18 In the view of the CCC, these mechanisms provide little or no incentive for NBN Co to meet the Service Levels set out in WBA 3.
- 4.19 As noted by the ACCC in the Discussion Paper, the number of complaints received by the TIO regarding NBN services in 2016/17 had increased by 159.3% from the previous year.⁷ The reputational damage to both NBN Co and the relevant RSPs that coincides with this increase in TIO complaints is an issue that requires greater collaboration between NBN Co and RSPs regarding the standard of service that needs to be provided to end-users. The issue currently being faced by RSPs as a result of the NBN wholesale service standards in the WBA 3 is that, even where NBN Co has contributed to the circumstances giving rise to the TIO complaint, the RSP is solely responsible to the end-user and has no recourse against NBN Co. However, the general reputational harm affects NBN Co, intermediaries and the RSP. Therefore, the allocation of risk between NBN Co and RSPs does not align

⁴ Clause E1.2 of the Head Terms, Wholesale Broadband Agreement

⁵ Section 17, Product Terms, nbn Ethernet Product Module, Wholesale Broadband Agreement

⁶ Clause E1.3(a), Head Terms, Wholesale Broadband Agreement

⁷ Section 2.3.3, ACCC, *Discussion Paper*, p. 44



with the structure of the TIO complaints regime which operates on the assumption that service providers will have back-to-back arrangements with their upstream service providers.

- 4.20 The CCC considers that any determination by the ACCC regarding the suitability of the Service Levels and any Commercial Rebates should take into consideration the liability regime as a whole, and the allocation of risk between the RSP, intermediaries and NBN Co under the WBA 3.

Supply Chain Management

- 4.21 The CCC agrees with the observation made by the ACCC in the Discussion Paper that *'as with all supply chains, the effective provision of retail NBN broadband services needs to be supported by underlying wholesale NBN service standards and coordinated operational arrangements and information flows between NBN Co, RSPs and the consumer'*.⁸
- 4.22 The CCC considers that the service standards in the WBA 3 should be reflective of the NBN supply chain and should adequately capture the clear separation of responsibility between NBN Co, wholesale service providers providing NBN aggregation services and RSPs providing NBN broadband services to consumers. The absence of meaningful service standards in the WBA 3 has resulted in a general absence in meaningful service standards throughout the supply chain.
- 4.23 The CCC also considers that information flows between NBN Co and RSPs is another issue which negatively impacts the LTIE and should therefore be considered by the ACCC in its Inquiry.
- 4.24 The lack of requirements in the WBA 3 regarding the provision of timely information by NBN Co to its customers and their downstream customers regarding issues or delays in the provisioning of end-user services means that downstream RSPs are often unable to provide any certainty to their end-users. This has a direct impact on service experience of end-users. This is evidenced by the increase in TIO complaints received about services delivered over the NBN as noted in the Discussion Paper . The lack of information from NBN Co regarding delays in service installations is one example which has a critical impact on the consumer experience which could be mitigated by more stringent requirements around information flows.
- 4.25 Therefore, in addition to the inclusion of more stringent service standards around the provision of NBN services, the WBA 3 should include clear requirements for what information should be passed on to downstream RSPs and their end-users, and when.
- 4.26 The CCC understands that, as a result of the Telecommunications (NBN Consumer Experience Industry Standard) Direction 2017 given by the Minister for Communications in December last year, the ACMA must make standards which impose (among other things) minimum requirements for information and advice to be provided to consumers about services supplied using the NBN.
- 4.27 However, the CCC considers that, given the lack of effective information flows between NBN Co and RSPs has a direct impact on the extent to which service standards can be effectively passed on to end-users, clearer requirements around information flows from NBN Co to RSPs should be incorporated into the broader NBN wholesale service standards regime.
- 4.28 The CCC therefore considers that the Inquiry should also consider requirements regarding information flows between NBN Co and RSPs and the impact such information flows have on the experience of end-users.
- 4.29 In addition, the CCC notes that there is significant reputational harm to both NBN Co and RSPs involved in the re-supply of NBN services currently being caused by the combination

⁸ Section 6.3, ACCC, *Discussion Paper*, p. 45



of ineffective service standards in the WBA 3 and inadequate information flows between NBN Co and RSPs. It is therefore in the interests of RSPs and NBN Co generally to ensure that, at a minimum, the NBN services provided to end-users are consistent with community expectations regarding such services.

5. ACCC regulation of NBN wholesale service standards

5.1 The roll-out of WBA 3 by NBN Co has highlighted the need for greater regulatory intervention by the ACCC to ensure that service standards in the WBA promote the LTIE.

5.2 We note that the ACCC has proposed the following possible approaches that may be put in place by an access determination or BROCC for NBN service standards:

5.2.1 developing overarching principles to guide commercial negotiations, rather than detailed terms and conditions about service standards;

5.2.2 specifying service standards that would promote the LTIE but are unlikely to be agreed through commercial negotiation; or

5.2.3 specifying all-encompassing service standards.⁹

5.3 As discussed above in section 3, given the relative inequality in bargaining power between NBN Co and RSPs, while the development of overarching principles to guide commercial negotiations between NBN Co and RSPs going forward may be beneficial, it is not likely to address the underlying problem of the lack of incentive for NBN Co to commit to effective, binding service standards which are in the LTIE.

5.4 The CCC acknowledges that the timeframes for NBN Co's roll-out initiatives as set out in the Discussion Paper will have implications for the nature and scope of any regulatory intervention in respect of service standards and that this should be taken into account by the ACCC in determining its approach to long-term regulatory intervention.¹⁰

5.5 However, the CCC considers that there is a need for more immediate regulatory intervention from the ACCC which should not be impacted by these timeframes.

5.6 The CCC is concerned to ensure that the appropriate service standards are introduced into the WBA 3, together with appropriate incentives for NBN Co to meet these service standards through revised compensation arrangements that are easy to calculate and which are ultimately referable to the affected end-user service. In addition, the CCC considers that the allocation of risk as between NBN Co and RSPs should be properly balanced and information flows enhanced in order to promote the LTIE.

5.7 The CCC therefore considers that immediate intervention by the ACCC is required to assist the industry to identify those issues which are most important and which require immediate action, and to assist the industry to reach an agreeable position with NBN Co.

5.8 While the CCC supports the ACCC making an access determination or BROCC in relation to the NBN wholesale service standards under the WBA 3, the issue for many RSPs is that now that they have signed the WBA 3, they are bound to these terms until the expiry of the WBA 3 and therefore any such access determination or BROCC will be potentially ineffective (particularly given the limited duration of any BROCC).

5.9 The ACCC should also consider what options are available to those RSPs who were given no option but to sign the WBA 3 and are now bound by these terms given the hierarchy of instruments under Part XIC of the CCA.

⁹ Section 4.2.1, ACCC, *Discussion Paper*, p. 20

¹⁰ Section 4.2.2, ACCC, *Discussion Paper*, p. 22



5.10 As noted above, CCC believes that the Inquiry has presented a valuable opportunity for RSPs and NBN Co to work together to ensure that the NBN wholesale service standards are sufficient to ensure that the quality of the NBN services provided to end-users is in the LTIE.

5.11 However, given that NBN Co has natural incentives to limit its exposure to RSPs, intermediaries and end-users as discussed above, NBN Co may be unwilling to implement service standards in accordance with the ACCC's recommendations in response to the Inquiry. Therefore, it may be necessary for the ACCC to recommend to the Government that wholesale service standards along the lines of the CSG Standards be introduced into the legislative framework to protect the LTIE.

6. Conclusion

6.1 For the reasons outlined above, the CCC considers that greater regulatory intervention in relation to NBN wholesale service standards, and the approach taken by NBN Co generally, is required by the ACCC in order to:

6.1.1 fill the gaps in the WBA 3 regarding the service standards regime, and in particular the incentives on NBN Co to meet these service standards;

6.1.2 provide certainty for RSPs by simplifying the rebates available under the WBA 3 such that RSPs can pass these incentives through to end users; and

6.1.3 enable NBN CO, RSPs and intermediaries to deliver NBN based services which are fit for purpose and in the LTIE for end users.



Schedule 1

1. Commercial Rebates

- 1.1 Where the actual performance by NBN Co fails to achieve the relevant Service Level for End User Connections, a Connection Rebate may be available. This Connection Rebate is calculated according to the following formula:

$$\text{Connection Rebate} = (90\% - \text{Actual Performance}) \times \text{Total Connections} \times \$25$$

Where

Actual Performance means the percentage of Total Connections performed in accordance with the relevant Service Levels for relevant Standard Connections in the relevant month.¹¹

- 1.2 In circumstances where the actual performance of NBN Co fails to achieve the relevant Service Level for End User Fault rectification, a Service Fault Rebate may be available. Service Fault Rebates (if any) are calculated in accordance with the following formula:

$$\text{Service Fault Rebate} = \text{Credit Instances} \times \$25$$

Where

$$\text{Credit Instances} = (90\% - \text{Actual Performance}) \times \text{Customer End User Faults}$$

Actual Performance means the percentage of Total End User Faults rectified by nbn in accordance with the relevant Service Levels in the relevant month.

Customer End User Faults means the number of Total End User Faults that nbn has rectified for Customer in the relevant month.

Total End User Faults means the total number of end user faults rectified by nbn for all customers in the relevant month (subject to exclusions).¹²

- 1.3 The CCC makes the following observations about the Connection Rebate and the Service Fault Rebate:

1.3.1 the formulas used by NBN Co to calculate each Commercial Rebate are so complex that they are difficult not only to interpret but to apply in any meaningful way. It is therefore not practicable for RSPs to pass-through these Commercial Rebates to end-users without ultimately taking full financial risk and responsibility, even where NBN Co is ultimately responsible. This is inconsistent with market practice within the telecommunications industry for wholesale agreements;

1.3.2 NBN Co's performance is ultimately calculated based on NBN Co's ability to meet performance objectives across all NBN services, and is not referable to the end-user services of a single RSP or even an individual end-user service. In addition, NBN Co is not required to pay any rebate for the first 10 per cent of end user connections or faults that exceed the service level timeframes. This means that, where an RSP has a smaller percentage of overall customers who are connected to the NBN, but 100% of these customers experience an End User Fault or delayed End User Connections, the RSP could receive little or no Commercial Rebate from NBN Co which it could then pass on to the affected end user;

1.3.3 the Commercial Rebates are capped at \$25 for each failure by NBN Co to meet the relevant performance objective. In order for service rebates to be meaningful, they

¹¹ Section 1.4, Service Levels Schedule – nbn Ethernet Product Module, Wholesale Broadband Agreement

¹² Section 8.5, Service Levels Schedule – nbn Ethernet Product Module, Wholesale Broadband Agreement



should be referable to the extent of the fault (i.e. the amount of any rebate should increase according to the period of time the performance objective is not met). The extent to which these time frames are not met is not currently considered in the WBA 3. This means that, once it has been established that NBN Co has missed its performance objective, there is no incentive for NBN Co to remedy this in a timely manner as the extent of its liability is capped;

- 1.3.4 the CCC considers that Commercial Rebates which are meaningful should be introduced for all performance objectives included in the WBA 3, and should not be limited to End User Connections and Service Level for End User Fault rectification; and
- 1.3.5 RSPs are required to submit monthly connection forecasts to NBN Co to be eligible for the Connection Rebate and the Connection Rebate is contingent on certain forecast accuracy conditions. This further hurdle adds additional uncertainty to the calculation of the Connection Rebate which makes it impossible for this rebate to be meaningful in the context of end user services.