



Submission in response to the ACCC's Draft Decision
and proposed Final Access Determination in the nbn
Wholesale Service Standards Inquiry

Public Version

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1. Introduction

1.1 This submission follows our earlier submission provided in March 2018 as the Competitive Carriers Coalition. As you may be aware, the Competitive Carriers Coalition was relaunched as Commpete in April 2018. Our vision remains to secure a flourishing wholesale digital communications market that enables competition with open and timely access to consumers, in which challenger communications companies can enter and thrive.

1.2 Commpete's members greatly appreciate the ACCC's attention to these matters and remain committed to working with the ACCC and with nbn Co and intermediaries to ensure that:

1.2.1 nbn's wholesale service offerings can support the customer experience outcomes that Commpete's members aspire to deliver and need to deliver in order to attract and retain customers; and

1.2.2 that regulation is imposed where required to promote the long term interests of consumers where there is evidence that nbn Co is not otherwise incentivised to act consistently with those long term interests and where nbn Co's conduct will otherwise remain unconstrained because of nbn's status as a monopoly wholesale infrastructure provider.

1.3 We welcome the general approach reflected in the Draft Decision and support the regulatory principles articulated by the ACCC. The proposed Final Access Determination will be an important step towards driving improvements in nbn wholesale service delivery, however, it remains to be seen whether it will effectively constrain nbn's approach in the upcoming WBA4 negotiations. Commpete members would welcome the ACCC exploring further the role the ACCC could play in ensuring that challenger RSPs are better able to participate in that negotiation process. In relation to the proposed Final Access Determination (**FAD**), Commpete considers that:

1.3.1 The industry and end users could realise further benefits if the FAD set minimum service standards across a broader set of key wholesale Performance Objectives/Service Levels (articulated in the WBA) that significantly impact the standard of service RSPs can deliver to end users;

1.3.2 We remain concerned that the service level exclusions in clause 8 of the FAD are broad, and in particular clause 8.1(b) has the potential to be applied subjectively by nbn Co; and

1.3.3 Finally we note that establishing the IT systems under in clause 7 of the FAD Could require a significant investment by nbn co and by RSPs in systems for exchanging detailed and timely information in order to track individual wholesale service standard outcomes at a per connection level.

We set out below our further response to the questions posed by the ACCC and to the proposed FAD below.

2. Commpete supports nbn wholesale service standards regulation and the regulatory principles defined by the ACCC

- 2.1 Commpete supports the imposition of regulation to ensure that nbn's wholesale service terms are improved and can support the customer experience outcomes that are expected in the industry today. At the very minimum nbn's wholesale service terms and conditions should properly support retail service providers being able to meet minimum regulatory requirements under the Telecommunications Act, the Australian Consumer Law and the Telecommunications Consumer Protection and Service Standards Act. For reasons outlined in our previous submissions, nbn's current WBA3 does not meet this standard.
- 2.2 Commpete supports the principles described in the ACCC's Draft Decision and supports the ACCC using those principles to formulate nbn's wholesale service standards.

3. Specific submissions in relation to the draft Access Determination

- 3.1 The Access Determination will be an important step towards driving improvements in nbn wholesale service delivery, however, it remains to be seen whether it will be sufficient to drive improvements in nbn's wholesale service offering and adequately constrain nbn's approach in WBA negotiations. The FAD addresses only the service levels aspect of the WBA and because a Final Access Determination is the lowest in the hierarchy of regulatory tools available under Part XIC, for most RSPs, the existing WBA3 or any commercially agreed terms will take precedence over the terms of the FAD.
- 3.2 We also note that the FAD is significantly consistent with the WBA Variation Agreement addressing Service Level Improvements that was published by nbn Co on 26 October 2018, and note that for those RSPs who have entered into the WBA3 agreement and signed the variation (which took effect on 11 December 2018), the FAD does not appear to deliver any great step-change in nbn wholesale service improvements compared with those already offered by nbn Co.
- 3.3 In our earlier submissions we outlined our concern that the complexity of the WBA, the cumbersome negotiation approach and the level of legal and technical resources required to participate in that process continue to present real barriers to full participation in negotiation of the WBA, and Commpete believes that more is required to address that imbalance.
- 3.4 Commpete welcomes the following aspects of the proposed FAD:
- 3.4.1 clear formulae for calculating the rebates payable;
 - 3.4.2 removal of the 10% threshold for payment by nbn Co of any rebates in relation to end user connections or faults that exceed service level timeframes, and therefore removal of the potential for inequality of outcomes for RSPs with relatively small proportions of their customer base actually connected to the national broadband network;
 - 3.4.3 increased rebates payable by nbn Co for missed appointments and for connections not being completed within the service level period so that they better approximate the real impact on end users of poor service delivery by nbn Co, and in the case of delayed fault rectification, increased rebates over time therefore incentivising speedy fault resolution;

- 3.4.4 the inclusion of service speed assurance rebates; and
 - 3.4.5 the inclusion (in clause 12 of the FAD) of a requirement for nbn Co to give wholesale effect to regulation dealing with consumer safeguards by seeking to amend the access agreement to give effect to that regulation or legislation within 90 days after its making or enactment.
- 3.5 Commpete believes that the industry and end users could stand to realise further wholesale service standard improvements if the FAD was enhanced in the following ways:
- 3.5.1 The FAD should also include a minimum rebate/service credit framework for each of the nbn performance objectives set out in the WBA3 so as to set minimum standards of service across all of nbn's wholesale service standard indicators addressed in the WBA, which we believe would drive broader benefits for the industry and for end users (for example, nbn's Performance Objectives around Remediation Cases for achieving the PIR Objective as either Standard or Customer Remediation Solutions is a minimum of 2 years, with no requirement for rebates to be provided to RSPs during that period);
 - 3.5.2 There is no express requirement for nbn Co to remove the strict process and eligibility requirements it currently places on RSPs under the WBA, specifically, the requirement to lodge monthly connection forecasts to nbn Co;
 - 3.5.3 The service level exclusions in clause 8 of the FAD are broad and in particular clause 8.1(b) has the potential to be applied quite subjectively by nbn Co, we consider that the language in this clause could be tightened;
 - 3.5.4 There is no express requirement that nbn Co's overall cap on liability under the WBA is set at a level that does not prevent nbn Co from meeting its obligations under the Access Determination;
 - 3.5.5 Commpete members remain concerned that the lack of effective information flows between nbn Co and RSPs has a direct impact on the extent to which any rebates can be passed on to end users. While we welcome the inclusion of a requirement for nbn to establish an IT system that would identify and track the status of nbn's order handling and any rebates payable on a per connection basis, this would need to be ideally available in real time. In practice we anticipate that this will require RSPs to be exchanging significantly detailed and timely information about customer interactions in relation to faults, and could require a significant investment by nbn co and by RSPs in systems and processes for exchange of this information. To support the development of the IT interfaces, industry forums may be required to develop appropriate guidelines for these information flows, in a variety of common fault scenarios;
 - 3.5.6 In determining an appropriate rebate amount for the purposes of the FTTN/B/C service speed assurance rebate (in clause 4.3 of the draft FAD) we submit that because the FAD provides for rebates to be payable by nbn Co in any month in which the downstream PIR that a service is capable of achieving is less than 50% of the maximum downstream PIR for the relevant nbn speed tier purchased, a rebate of 50% of the monthly Recurring Charge (for the AVC TC-4 and UNI bundle) paid by the RSP to nbn in respect of the impacted service would be appropriate;
 - 3.5.7 As currently drafted, the anti-overlap provision (in section 6 of the draft FAD) is triggered if nbn is liable to pay CSG Compensation or under s118A of the

Telecommunications (Consumer Protection and Service Standards) Act “in connection with any rebate”. In our view the more appropriate trigger for a provision of this kind would be that nbn has actually paid the CSG compensation or has already satisfied its liability under 118A before it can withhold further credits or require repayment of credits by an RSP. We also consider that the FAD should specify that a reduction in the future rebates payable to an access seeker, or requirement to repay any amounts would need to be directly referable to the amount of overlap between amounts owing under this instrument and amounts paid by nbn Co as CSG Compensation or pursuant to s118A in respect of the very same customer events or service failure by nbn Co; and

- 3.5.8 Finally, we note that the FAD relies heavily on definitions and provisions in the WBA, (including for example the service level for End User Connections). This appears to be potentially circular in that nbn Co may be able to revise the WBA unilaterally which could have the effect of modifying the minimum standard set out in the FAD.

4. Commencement and expiry of the Final Access Determination

- 4.1 We would welcome commencement of the FAD as soon as possible, and ideally from May 2020, which would allow nbn Co a reasonable implementation period, while also flowing through benefits as soon as possible to any RSPs who have not reached agreement with nbn Co on the terms of supply.
- 4.2 Similarly, in order for the FAD to have the maximum possible impact for the benefit of RSPs in the WBA4 negotiations, the FAD should remain in force until the *later of* 31 December 2022 and nbn’s publication of WBA5 (as opposed to commencement of WBA5, as the commencement date may not be a uniform date across all RSPs).

5. ACCC should play a role in ensuring that the smaller retail service providers have a voice in the WBA4 and future WBA negotiations

- 5.1 Commpete would strongly support the ACCC hosting an industry forum on service standards and exploring further ways that the ACCC can play a role in addressing some of the structural barriers that exist and hinder challenger RSPs’ full participation in the WBA negotiation process. Particularly to ensure that there is room for addressing (through WBA4 negotiations) issues that have the potential to have a disproportionately adverse impact on smaller RSPs.

