



NBN Wholesale Service Standards Inquiry

Position Paper

April 2020

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1. ACCC position on the NBN wholesale service standards inquiry

This position paper sets out the ACCC's current position in regard to key aspects of NBN Co's wholesale service standards and the NBN wholesale service standards inquiry more generally.

The ACCC published its draft decision in October 2019.¹ Having reviewed the submissions from industry members and other stakeholders, we have formed a position on those matters set out in the draft decision and draft final access determination (FAD). The ACCC's current position is that a FAD would be likely to be required to improve service outcomes for end-users of the NBN.

However, in line with the ACCC's statement on its response to the COVID-19 pandemic,² we have decided to defer making a final decision in the inquiry. We recognise the need for industry members to adapt to meet the changing traffic volumes and usage patterns over the NBN and other networks and the degree of uncertainty as to when business as usual arrangements will resume.

The ACCC will resume the inquiry and decide whether to proceed to make a FAD once the emergency health situation has stabilised and more is known about the impacts on the industry.

In the interim, we have decided to publish our current position on the key matters examined in the inquiry to assist NBN Co and RSPs in the context of the longer-term access arrangements that will be negotiated in the Wholesale Broadband Agreement 4 (WBA4). We consider this clear statement of the ACCC's views will provide more clarity to parties and assist in providing balance to negotiating positions on key matters.

This section of the position paper sets out further details on the ACCC's current position. The remaining section of the position paper sets out the ACCC's views on specific matters raised during the inquiry and our consideration of stakeholder submissions to the draft decision.

1.1. Background

In November 2017, the ACCC commenced the NBN wholesale service standards inquiry to determine whether wholesale service standards on the NBN are appropriate, and to consider whether regulation of NBN wholesale service standards is necessary to improve consumer experiences.

The ACCC had previously considered NBN wholesale service standards in its initial assessment of NBN Co's special access undertaking (SAU) in 2013. NBN Co had initially proposed to include its detailed service level framework in the SAU. However, the ACCC and other industry parties agreed it was too early in the NBN rollout to lock in the framework for an extended period. It was therefore decided that the service level framework would be removed from the SAU.³ Removing service levels from the SAU allowed service standards to be determined through negotiations in the first instance, with the ACCC able to specify service standards in a regulatory determination if required.

¹ ACCC, *NBN Wholesale service standards inquiry - Draft decision*, October 2019.

² ACCC media release, ACCC response to COVID-19 pandemic, 27 March 2020.

³ ACCC, *Variation to NBN Co special access undertaking - Draft decision*, March 2017.

The decision to launch the inquiry was made in the context of a high number of complaints from consumers around poor experiences on the NBN, particularly in relation to consumers connecting to NBN services and having faults repaired, as well as concerns raised by industry that the service standards are not adequate to ensure a positive consumer experience on the NBN. It was also recognised at the commencement of the inquiry that although the NBN rollout was ongoing, NBN Co had become a major network operator and focus on service delivery had become more important.

In September 2018, NBN Co gave an enforceable undertaking to the ACCC to offer a set of service level improvements to access seekers through amendments to the WBA. NBN Co provided the enforceable undertaking after the ACCC had proposed to make an interim access determination while longer-term measures were considered. The ACCC accepted the enforceable undertaking given by NBN Co. Some of the service level improvements to which NBN committed in the undertaking include: payment of rebates for every late connection or fault rectification (not just those below its 90 per cent performance objective threshold), a new rebate for missed appointments, simplification of processes and conditions for claiming rebates, and a range of additional reporting commitments (particularly in relation to fixed wireless services).

The ACCC undertook further consultation seeking stakeholder views on a number of key longer terms issues that had been raised in the course of the inquiry that were not addressed within the enforceable undertaking.

On 1 October 2019 the ACCC released its draft decision and draft FAD for consultation. This proposed NBN wholesale service terms, including: daily rebates for late connections and unresolved faults, increasing rebates for missed appointments from \$25 to \$75 and requiring that RSPs pass on this rebate to consumers, monthly rebates for fixed wireless services in congested cells or connected to congested backhaul links, and fixed line services that fail to meet certain minimum speed objectives, and enhanced reporting and automation requirements to promote better information flows, transparency and supply-chain coordination.

Developments in related processes

During the course of the inquiry, the ACMA and Department undertook consultation on related processes. The ACMA consulted on and introduced new rules focussed on migration to the NBN. These include rules relating to consumer information, minimum standards for complaint handling and reporting, line testing and provision of interim services for failed migrations.⁴ These were designed to address particular consumer harms and to improve the consumer experience.

In April 2018, the Government commenced a review of the telecommunications consumer safeguards framework for a post-2020 environment, when the NBN is expected to be fully rolled out. In December 2019, the Department published the final report for Part B of the consumer safeguards review.⁵ The final report recommended a range of measures, including, wholesale level regulation of connections, repairs, and appointment keeping, requirements for retail service providers to provide consumer information on service level commitments, further consideration of consumer safeguards for priority assistance, and addressing legacy safeguards that are declining in relevance. The final report also foreshadowed further coordination between the ACCC, ACMA and the Department on regulatory measures to apply across the NBN supply chain.

⁴ Telecommunications (NBN Continuity of Service) Industry Standard 2018; Telecommunications Service Provider (NBN Service Migration) Determination 2018.

⁵ The Department, Consumer Safeguards Review - Final Report Part B, December 2019.

1.2. Summary of current ACCC position

The current position that the ACCC has reached in the NBN wholesale service standards inquiry is that a final access determination would be likely to promote the long term interests of end-users (the LTIE).

In accordance with the position set out in the ACCC's draft decision, we consider a FAD would be likely to promote the LTIE if it specifies clear wholesale service level commitments for key aspects of NBN Co's service delivery and a clear set of consequences if these commitments are not met. This would in turn promote competition at the retail level by allowing RSPs to better manage consumer expectations and outcomes. It would also improve RSPs' capacity to provide recourse to end-users when these expectations and outcomes cannot be met in cases where NBN Co does not deliver on its service commitments.

Competitive markets have been shown to be effective in delivering goods and services to consumers at the standard and quality they want and at prices that reflect their willingness to pay. However, in industries where there is bottleneck infrastructure (for example, at the network level), the positive outcomes of competition on service quality can be undermined if the infrastructure operator does not have clear service level commitments, appropriate incentives, or appropriate allocations of risk. In these situations, regulated terms and conditions for services provided over bottleneck infrastructure can assist in providing the appropriate clarity, incentives and risk allocation to improve competition in other parts of the supply chain and improve long term outcomes for consumers.

In the course of this inquiry, the ACCC has found that NBN Co's wholesale arrangements on key aspects of service delivery, including connections, fault repairs, keeping appointments and network speed performance lack clear and strong service commitments and appropriate recourse when service levels are not met. We have found that NBN Co's service level commitments have either been expressed in terms of 'best efforts', have focussed on overall or average performance rather than individual service outcomes, or both. Although NBN Co has shown considerable improvements in meeting service level targets, and in other aspects of service delivery over the course of the inquiry, the focus on overall or average performance can mask instances of poor service outcomes for individual consumers.

We also found that current arrangements for rebates, which are paid by NBN Co to RSPs when service levels are not met, do not provide sufficient incentive to NBN Co to address individual issues and do not reflect the severity of service level misses. This can lead to poor consumer outcomes. Without appropriate incentives, there is a risk that more complex connections or fault repairs will not be prioritised and the level of individual instances of consumer harm will rise. RSPs rely on wholesale inputs and require certainty about the commitments to deliver those inputs. This allows RSPs to plan for and deliver strategies to mitigate consumer harm where poor consumer experiences occur. We also found instances where insufficient wholesale commitments were resulting in poor coordination across the supply chain and difficulties for RSPs to comply with their obligations.

1.3. Emergency health situation and next steps in inquiry

Although the ACCC has formed the view that a FAD would be likely to promote the LTIE, it is also mindful of the emergency health situation regarding the COVID-19 pandemic.

This situation is evolving rapidly and has already seen significant increases in traffic volumes over the NBN and changes in usage patterns.⁶ It is uncertain how this situation will develop

⁶ See NBN Co media releases from 16 March and 18 March 2020.

over the coming months and what the nature and extent of the disruption to the telecommunications industry will be.

In recognition of the growth in traffic volumes and the greater capacity needs of RPSs, NBN Co has already announced it will waive charges for additional Connectivity Virtual Circuit (CVC) of up to 40 percent to help support residential and business services.⁷ It is unclear at this stage how the situation will impact other aspects of NBN Co's service delivery. However, the ACCC considers that there is a risk that NBN Co's connection, fault rectification, remediation and reporting activities could be affected significantly as the situation evolves. This may include prioritisation of certain aspects of service delivery over others.

Taking into account this uncertainty, the ACCC is not proceeding to finalising the inquiry or make a FAD at this point. The ACCC considers that issuing a FAD that imposes the service level commitments being contemplated in this inquiry will not be appropriate at the current time and may inhibit NBN Co's ability to adapt and prioritise its service activities in response to the situation.

The NBN wholesale service standards inquiry will remain ongoing, but will be put on hold in the current situation. The ACCC will resume the inquiry and decide whether to proceed to make a FAD once the emergency health situation has stabilised and more is known about the impacts on the industry. However, we consider that it is important we publish our current views on these matters given the lengthy consultation throughout the inquiry and the engagement of industry members on the matters covered by the inquiry.

While the inquiry is on hold, we will continue to work with the ACMA as they consider whether, and if so, to what extent retail regulation is required to ensure that end-users receive the benefit of any rebate paid at the wholesale level.

We note that NBN Co and RSPs have been in discussions about WBA4, which is due to come into effect once WBA3 expires in November this year. It is unclear how WBA4 negotiations between NBN Co and RSPs will be impacted by the current situation. The ACCC will monitor this situation closely and will maintain regular discussions with NBN Co and other industry parties through this process.

As foreshadowed by the Consumer Safeguards Review Part B final report, the ACCC will work closely with the ACMA and the Department regarding the overall framework for consumer safeguards and standards while the inquiry is on hold.

1.4. ACCC views on specific matters

The ACCC has further considered its views on the specific matters contained in the draft FAD and discussed in the draft decision, taking into account the submissions provided by stakeholders. The ACCC's current views on these matters, including how consideration of stakeholder submissions, are discussed in the remaining sections of this position paper.

⁷ NBN Co media release, nbn waives additional wholesale capacity charges of up to 40 percent for three months, 18 March 2020.

2. Connections, unresolved faults and missed appointments

2.1. Failed connections

A failed connection refers to a newly connected services that does not function as expected after being confirmed by NBN Co as being successfully completed. Where the service has no functionality after connection it is classified as a 'new service never worked' fault type and is prioritised by NBN Co. Where this occurs, RSPs must to lodge a service fault with NBN Co after performing tests and diagnostics.

Service continuity in the migration to the NBN has been the focus of ACMA requirements on RSPs to perform post-migration testing after the NBN service is connected, and not charge for services until they are operational. Service fault types within 30 days of a newly connected NBN service were also examined in an ANAO report published in November 2019.⁸ Approximately three per cent of new connections made within the audit timeframe (across all technology types) had a 'new service never worked' fault within the first 30 days, against a KPI of 2.7.⁹ The ANAO observed improvements to this metric in the five months to March 2019. However, it also noted that FTTN/B services made up the majority of 'new service never worked' faults.

Draft decision

In the draft decision we considered that, as a general principle, NBN Co should only confirm to the access seeker that a connection is complete, and begin charging for that service, after conducting appropriate testing to ensure installation activities are successful.¹⁰

We noted that 'new service never worked' faults represented a small but significant proportion of total connections. However, we also noted 'new service never worked' faults were more prevalent on some networks than others. This may be attributed to the technical characteristics of the network technology and the associated operational processes that apply before a connection is confirmed as successful.

We considered that a focus on connection processes was more likely to result in better consumer outcomes than if NBN Co were to implement a new rebate for failed connections. However, we considered that NBN Co should not be charging for wholesale services that are not successfully provisioned, and that NBN Co should also continue to monitor and report to RSPs on the number of failed connections.

The draft FAD terms proposed to extend the approach of only confirming a successful connection once NBN Co detects data-flow – used for installation testing of HFC and FTTC connections – to all network technologies.¹¹ Under these terms, NBN Co would only notify a wholesale customer that a connect order is completed, and begin charging for that service, after it has successfully completed installation testing on the Access Virtual Circuit (AVC).

⁸ Auditor-General Report No.15 2019–20, National Broadband Network Fixed Line Migration — Service Continuity and Complaints Management, pp 38-41.

⁹ Auditor-General Report No.15 2019–20, National Broadband Network Fixed Line Migration — Service Continuity and Complaints Management, Figure 3.3: March 2018 to March 2019, p.39.

¹⁰ ACCC, *NBN Wholesale Service Standards Inquiry - Draft Decision*, October 2019, sections 4.1.1.3 & 4.1.1.4, pp. 21-22.

¹¹ See clause 2, Schedule 2 of the draft FAD - NBN Wholesale Service Standards Inquiry.

Submissions

Apart from NBN Co, submissions expressed broad support for the principle expressed in the draft decision that installation testing should occur.¹² In respect of the draft FAD:

- NBN Co raised operational challenges associated with FTTN/B networks. In particular, NBN Co noted that it is unable to perform connection testing unless a modem within the premises (typically supplied by the RSP) is plugged in and turned on.¹³
- Optus submitted that the FAD should specifically state that NBN Co should not be able to charge until a line is activated and being used by the end-user (i.e. when NBN Co determines that data is successfully being transmitted over the connection).¹⁴

ACCC views

'New service never worked' faults result in poor experiences for consumers where they are advised that their connection is completed, only to find it does not actually work. We consider it important that NBN Co has strong commitments at the wholesale level for confirming new connections are working and the circumstances in which it can start charging for services supplied.

Although we consider that the general principle set out in our draft decision, that NBN Co would only commence charging after installation testing is complete is appropriate, we acknowledge that for some network technologies certain actions will be required from other parties before NBN Co can perform installation testing. We therefore consider some flexibility is required for the implementation of the general rule.

In respect of NBN Co's submission that it requires a modem to be present and activated for FTTN/B connection testing, we consider a reasonable approach is for NBN Co to apply a 'pending' status to the connect order while it is awaiting modem connection. We would propose that no wholesale charges would apply for this period and NBN Co's service level for measuring connections would effectively be paused while the 'pending' status applies to the connection order. Consistent with current operational practice, NBN Co may ultimately cancel or reject the order if the necessary action is not taken.¹⁵

Finally, we note that the WBA already states that if NBN Co accepts that an access seeker has paid charges that it should not have paid, then it will ensure charges for those service are credited to the access seeker on a pro rata daily basis.¹⁶ We consider this adjustment of charges would also apply, where NBN Co has commenced charging for a connection that experiences a 'new service never worked' fault.

¹² Vocus, *Submission to the draft decision*, p.1; Telstra, *Submission to the draft decision*, p.5; VHA, *Submission to the draft decision*, p.2; Optus, *Submission to the draft decision*, p.6; ACCAN, *Submission to the draft decision*, p. 5; Aussie Broadband, *Submission to the draft decision*, p.2.

¹³ NBN Co, *Submission to the draft decision*, pp. 33-34.

¹⁴ Optus, *Submission to the draft decision*, p.7.

¹⁵ See NBN Co, WBA3, Operations Manual 4.5 Orders.

¹⁶ NBN Co, WBA3, Head Terms, B1.4.

2.2. Delayed connections and unresolved faults

NBN Co's WBA includes service level commitments and timeframes to connect premises, depending on the service class¹⁷ of the relevant premises,¹⁸ and to rectify faults, depending on the location and network type of the premises.¹⁹

As part of its enforceable undertaking,²⁰ NBN Co committed to paying a rebate of \$25 to RSPs for each missed standard connection and fault rectification service level.²¹ This contrasts to the previous rebate arrangements in the WBA, where rebates were only payable for every missed service level below a 90 per cent performance threshold.

Draft decision

In the draft decision, we considered that connection and fault rebates should accrue on a daily basis if the relevant service level is not met.²² Our view was that daily rebates would provide more effective incentives for NBN Co to connect services promptly and rectify faults in a timely manner. We also considered that the connection rebate should apply to all standard connections.

We considered that these rebates must balance the need to strengthen the financial incentive on NBN Co by increasing its rebate liability, while not being disproportionately or unnecessarily onerous. We also noted that a daily rebate would support RSPs to provide services to a standard that meets end-users' expectations, particularly where consumers are without service for a period of time. This could include the provision of ongoing customer support and customer remedies such as compensation or 4G or mobile backup.

The proposed terms in the draft FAD²³ maintained NBN Co's existing service level timeframes for connections and fault rectification as specified in the WBA. Further, the draft FAD terms incorporated:

- a connection rebate of \$13.50 per business day for each missed connection service level, up to a cap of 20 business days,²⁴ and
- a fault rebate of \$20 per business day, escalating to \$30 per business day after 5 business days, up to a cap of 40 business days.²⁵

The draft FAD also included terms requiring NBN Co to pay rebates automatically, rather than requiring RSPs to submit claims.

¹⁷ The service class of a premises reflects the network type and status of the physical infrastructure applicable to the premises.

¹⁸ The WBA sets out service levels for Standard Connections, Accelerated Connections and Priority Assistance Connections. Accelerated Connections can be used for connections where the end-user does not have an existing telecommunications service that is being used to supply a standard telephone service. Priority Assistance Connections are used to connect end-users who suffer from a diagnosed life threatening medical condition and require access to a standard telephone service.

¹⁹ NBN Co, WBA Ethernet Product Module, Service Levels Schedule, section 1 and section 8.

²⁰ NBN Co, Section 87B Undertaking, 11 September 2018.

²¹ The connection rebate excludes standard connections where NBN Co can remotely provision services and the service level timeframe is one business day (service classes 3, 6, 9, 13, 24 and 34). The connection rebate also does not apply to missed Accelerated Connection and Priority Assistance Connection service levels. The fault rebate does not apply to Priority Assistance Fault Rectification service levels.

²² ACCC, *NBN Wholesale Service Standards Inquiry - Draft Decision*, October 2019, section 4.1.2.3-4.1.2.4, pp. 25-28 and sections 4.1.3.3-4.1.3.4, pp. 30-32.

²³ See clauses 3 & 4, Schedule 2 of the draft FAD - NBN Wholesale Service Standards Inquiry.

²⁴ This rebate would apply to all missed service levels for standard connections, including standard connections where the service level is one business day, accelerated connections and PA connections.

²⁵ This rebate would apply to all missed end-user and PA fault rectification service levels.

Submissions

ACCAN, Aussie Broadband, Commpete, Optus, Telstra, VHA and Vocus expressed support of the proposed daily rebates for delayed connections and unresolved faults to incentivise NBN Co to resolve delayed connections and rectify faults in a timely manner.²⁶ ACCAN submitted that connection rebates could be higher and escalate over time to reflect the actual costs incurred by end-users,²⁷ and VHA considered that connection rebates should be the same as fault rebates, except where an end-user has access to a legacy service.²⁸ Vocus submitted that connection and fault rebates should accrue per day, rather than per business day.²⁹

Telstra, Optus, Aussie Broadband, ACCAN and Vocus raised concerns that NBN Co may not face sufficient incentives to resolve delayed connections that extend beyond the rebate cap.³⁰ Telstra and Optus submitted that other measures, such as ongoing reporting and monitoring, should apply for connection delays beyond the rebate cap.³¹ ACCAN and Vocus submitted that there should not be a cap for either rebate.³² The TIO proposed aligning connection rebate caps with the timeframes in the ACMA's NBN Service Migration Determination.³³

NBN Co and the Department considered that regulatory intervention in relation to connection and fault rebates is unnecessary, given significant improvements in NBN Co's performance.³⁴ The Department considered that, if rebates are progressed, they should be in line with the impact on the affected party, paid by the responsible party, and flow through to the affected party; however, it acknowledged this system would be difficult and costly to deliver.³⁵

NBN Co submitted that the proposed rebates are excessively high and would divert resources from other initiatives that would have a greater impact on customer experience.³⁶ Further, it considered that the proposed rebate amounts are not evidence-based, particularly in regard to whether the amount reflects the costs incurred by access seekers in supplying alternative services or the amount lost by the end-user through service delays. NBN Co considered that an appropriate benchmark is the ACCC's 2008 Model Non-Price Terms and Conditions Determination, which points to much lower remedies.³⁷

ACCC views

We consider that rebates for missed connection and fault rectification service levels should apply on a daily basis to strengthen NBN Co's commitments to meet its service level timeframes and provide a more effective incentive for NBN Co to resolve connection or fault rectification delays. Having considered the views of stakeholders, we remain of the view that the rebate amounts and structures proposed in the draft FAD strike an appropriate balance

²⁶ ACCAN, *Submission to the draft decision*, p. 5; VHA, *Submission to the draft decision*, p.2; Telstra, *Submission to the draft decision*, pp.5-6; Optus, *Submission to the draft decision*, pp.8-12; Commpete, *Submission to the draft decision*, p.3; Vocus, *Submission to the draft decision*, pp.1-2; Aussie Broadband, *Submission to the draft decision*, p.2.

²⁷ ACCAN, *Submission to the draft decision*, p.9.

²⁸ VHA, *Submission to the draft decision*, p.2.

²⁹ Vocus, *Submission to the draft decision*, p.1-2.

³⁰ Vocus, *Submission to the draft decision*, p.1-2; Telstra, *Submission to the draft decision*, p.5; Optus, *Submission to the draft decision*, p.9.

³¹ Telstra, *Submission to the draft decision*, p.6; Optus, *Submission to the draft decision*, p.9.

³² ACCAN, *Submission to the draft decision*, pp.4, 9; Vocus, *Submission to the draft decision*, pp.1-2.

³³ TIO, *Submission to the draft decision*, p. 3.

³⁴ The Department, *Submission to the draft decision*, pp.3-5; NBN Co, *Submission to the draft decision*, pp.5-6.

³⁵ The Department, *Submission to the draft decision*, pp. 1-2.

³⁶ NBN Co, *Submission to the draft decision*, pp. 7, 22, 34, 37.

³⁷ NBN Co, *Submission to the draft decision*, pp.34-35, 37.

between providing a meaningful incentive on NBN Co and supporting RSPs to provide a service that meets end-user expectations, and the potential cost and business impact on NBN Co. Further, we consider that rebates should apply to all missed connection and fault service levels, including for accelerated connections, Priority Assistance (PA) connections and PA fault rectification. NBN Co should pay rebates to RSPs automatically where a service level is missed.

In the context of wholesale terms of access, daily rebates represent a tangible consequence for each missed connection and fault service level, increasing with the length of delay but capped after a specified period, and which can be minimised by performing well against the service levels. Further, NBN wholesale products are a key input to downstream markets. When there are wholesale service issues, we consider that it is appropriate for NBN Co to pay rebates that will assist RSPs to ameliorate poor end-user experience within the supply chain.

The downstream impacts of delayed connections and unresolved faults are significant. Where NBN Co fails to connect consumers or fix faults within its timeframes, consumers may experience harm caused by lost access to essential services and applications, reduced or lost productivity, and costs incurred due to the need to make alternative arrangements. End-users may experience significant frustration and inconvenience, particularly where delays or issues are compounded by poor communication and lack of information. NBN Co should face incentives to minimise these issues and assist RSPs to mitigate impacts on end-users, including offering alternative services and providing customer support, updates and information.

We note submissions from some RSPs and ACCAN that NBN Co's rebate liability could be higher than that proposed in the draft FAD. We have also considered NBN Co's argument that the rebates set out in the draft FAD are excessively high. On balance, we consider that the terms that were set out in the draft FAD strike an appropriate balance between the different factors that we have taken into account. In particular, the potential rebate amounts of 6 and 12 months of revenue for a typical service, for connections and faults respectively, is significant enough to offer a meaningful incentive and level of compensation in the context of the supply chain, given the associated consumer harm, while balancing the potential cost and business impact on NBN Co.

We have considered submissions which argue that increased rebates will detract from NBN Co's ability to invest in other customer experience initiatives that may have more impact on end-users. We support initiatives to improve service quality for end-users across the supply chain. However, these should not detract from incentives for the quick resolution of specific connection and fault issues impacting on individual end-users. We note that the completion of the NBN rollout and forecast slowing rate of activations is likely to significantly reduce NBN Co's connection rebate liability.

2.3. Missed appointments

Under WBA3, a missed appointment refers to a situation where an NBN Co technician does not attend an end-user's premises at the agreed appointment time, within the agreed appointment window or within a specified time thereafter. NBN Co's performance objective is to meet its appointment service levels 90 per cent or more of the time.³⁸

The initial version of WBA3 did not provide for any rebate mechanisms in the event that NBN Co missed appointments. However, NBN Co's enforceable undertaking introduced a new

³⁸ See NBN Co, WBA Ethernet Product Module, Service Levels Schedule, sections 2 and 10. This relates to those appointments that are not rescheduled appointments. The performance objective for rescheduled appointments is 95 per cent.

\$25 rebate for each missed appointment in relation to 'end-user service connection'³⁹ and 'end-user fault rectification'.⁴⁰ The enforceable undertaking also included a requirement that RSPs must take reasonable steps to ensure their customers receive a fair value benefit from the rebate, which may be in a monetary or other form.⁴¹

Draft decision

In the draft decision, we acknowledged stakeholders' view that missed appointments can be particularly frustrating to end-users, and can cause consumer detriment due to costs associated with time lost or missed work.⁴² We considered that NBN Co should provide a rebate for missed appointments. As a general principle, we considered that the quantum of missed appointment rebates should reflect the cost and inconvenience to the end-user when an appointment is missed, while at the same time, be capable of providing a strong incentive for NBN Co to reduce the rate of missed appointments.

The draft FAD terms proposed to require NBN Co to pay RSPs a \$75 rebate for each missed appointment.⁴³ We considered that the rebate would compensate for poor customer experience and incentivise NBN Co to improve its services without placing an undue or disproportionate financial burden on NBN Co.

We also considered that RSPs should pass through missed appointment rebates to affected end-users. This departed from our general approach to rebates because unlike other service misses, end-users are the main party that bear the costs of missed appointments and there is little scope for RSPs to mitigate this harm through other means. We considered that NBN Co and RSPs should work together to implement systems to ensure the timely pass through of rebates.

Submissions

Stakeholder submissions on our draft decision are broadly supportive of the introduction of missed appointment rebates,⁴⁴ although there were alternative views on what the rebate value should be. Some stakeholders considered that rebate value could be set at a higher value than \$75 to reflect harms and inconvenience to end-users.⁴⁵

In particular, ACCAN submitted that the cost to the end-user should be the primary consideration when setting missed appointment rebates and a rebate amount of \$100 should be the minimum appropriate valuation.⁴⁶

NBN Co however submitted the proposed rebate for missed appointments in the draft FAD are excessive when compared to the current rebate (\$25) and CSG compensation amounts, and will drive increased costs that will detract from investments in other initiatives that would have a greater impact in improving the experience of end-users.⁴⁷

³⁹ The service level and rebates also apply to Professional Splitter Installation Appointments and Professional Wiring Isolation Appointments

⁴⁰ NBN Co, *Section 87B Undertaking*, 11 September 2018. *WBA Ethernet Product Module*, Service Levels Schedule (Revised), sections 2.4 and 10.4.

⁴¹ *ibid.* sections 2.4(e) and 10.4(e).

⁴² ACCC, *NBN Wholesale Service Standards Inquiry - Draft Decision*, October 2019, sections 4.1.4.3 & 4.1.4.4, pp. 34-36.

⁴³ See clause 1, Schedule 2 of the Draft FAD in NBN Wholesale Services Standards Inquiry Draft FAD.

⁴⁴ Vocus, *Submission to the draft decision*, p.2; Telstra, *Submission to the draft decision*, p.6; VHA, *Submission to the draft decision*, p. 6; Optus *Submission to the draft decision*, p.12; TIO, *Submission to the draft decision*, p. 4; ACCAN, *Submission to the draft decision*, p. 5, Aussie Broadband, *Submission to the draft decision*, p.2.

⁴⁵ Aussie broadband submission, *Submission to the draft decision*, p. 2; ACCAN, *Submission to the draft decision*, p. 10.

⁴⁶ ACCAN, *Submission to the draft decision*, pp. 5 & 10.

⁴⁷ NBN Co, *Submission to the draft decision*, pp. 32-33.

NBN Co also noted that it would be contrary to the LTIE to increase the rebate, without evidence that the existing missed appointment rebates (of \$25) are not effective at achieving their intended outcomes.⁴⁸ It considered that the 12-month period that has elapsed since NBN Co first offered the \$25 missed appointment rebates is not enough time to properly assess their impact.

ACCC views

We maintain our view in the draft decision that NBN Co should be incentivised to meet its appointment service levels on a per-service basis by paying a rebate of \$75 to RSPs and that this rebate should in turn, be paid to end-users. In reaching this view, we have taken into consideration stakeholders' (in particular ACCAN's) view that the impact on the end-user should be the primary consideration in setting an appropriate value, as well as NBN Co's legitimate business interests.

We have considered the views of some submitters that the rebate value should be higher. On balance however we consider that a \$75 rebate is high enough to adequately compensate consumer harms while also providing a strong incentive for NBN Co to improve its performance for keeping appointments.

We note NBN Co's view that a \$75 rebate would be excessive when compared to the current rebate level (\$25) and the CSG standards (\$14.52). In contrast, as noted above, many stakeholders are of the view that the current \$25 rebate is too low to reflect consumer harms.

NBN Co submitted that the rebate would detract from investment and would be contrary to the LTIE. We do not agree with this view. We consider that the rebate would adequately compensate consumer harms as a result of NBN Co's service level misses. Further it would provide incentives to NBN Co to invest in areas where customer experience needs to be improved the most. In our view, the rebates are fully consistent with the LTIE. In relation to NBN Co's argument that more evidence that the current rebate of \$25 has not been effective would be needed to warrant an increase in rebate amount, we note that stakeholders are generally of the view that the current rebate value is too low to reflect consumer harm arising from a missed appointment.

We have given regard to the potential cost impact of the rebate on NBN Co. We note that the \$75 rebate should incentivise NBN Co to reduce the total number of missed appointments which in turn will lead to a reduction in the impact over time. We also note that as we move towards the completion of the NBN rollout, appointment volume is likely to decline, which will further reduce NBN Co's rebate liability.

Finally, consistent with the draft decision, we are of the view that it is appropriate for the missed appointment rebates to be passed through to end-users. This is because the impact of missed appointments is primarily felt by them and there is limited scope for RSPs to take measures to ameliorate the impact. While this approach differs from our general approach to pass through, it is consistent with the principle that the impact on end-users should be paramount in our consideration in the context of missed appointments (pass through is discussed in detail in section 4).

⁴⁸ NBN Co, *Submission to the draft decision*, p.33.

3. Underperforming service speeds

NBN Co's wholesale products for the FTTN/B/C technologies are defined by the following downstream peak information rates (PIRs) and PIR ranges: 12Mbps, 25Mbps, 25-50Mbps, and 25-100Mbps. NBN Co's minimum commitment on the maximum attainable speed for products that are defined in terms of a PIR range is 25 Mbps (the PIR Objective). The exception is for FTTN services that are subject to co-existence, in which case the commitment is 12 Mbps.

In terms of services on the fixed wireless network, NBN Co has adopted a design standard which is to provide services to an average throughput of at least 6 Mbps during the busy hours⁴⁹ (and less than 0.25 per cent packet loss on backhaul links⁵⁰). Where the fixed wireless network is impacted by network congestion during the busy hours, services may not meet end-user expectations. While congestion is not formally defined, NBN Co has adopted the aforementioned design standard for fixed wireless services.

NBN Co provides service speed information to RSPs to support their sales and marketing activities. However there are limited remedies available under the WBA where wholesale service speeds do not perform consistently, both for fixed line and fixed wireless services. In contrast, RSPs have obligations to provide remedies where lines are not capable of providing the speeds promised to the end-user. These include not charging for services, downgrading to lower priced plans, and providing the ability to exit contracts.

RSPs require accurate and timely service speed information to advertise and sell fixed wireless services, and to enable customers to make more informed purchasing decisions. The weekly fixed wireless congestion reporting that NBN Co provides to RSPs pursuant to the enforceable undertaking has enabled them to inform their customers as to whether they are on a congested cell and when the cell will be upgraded. While the ongoing provision of prospective fixed wireless reporting is essential, NBN Co should also provide maximum attainable speed data for fixed wireless services to RSPs post-connection.

ACCC draft decision

In the draft decision we indicated that NBN Co should be responsible for the maximum attainable speed and performance of its wholesale products and not charge for services that it does not provide.⁵¹ In relation to fixed wireless services, we proposed that NBN Co should be held to its design standard and that it should provide rebates or compensation for each fixed wireless service that is impacted by network congestion.

We considered that stronger wholesale commitments from NBN Co with respect to service speed and performance are required.

Service speed information

For fixed line services, we noted the importance of NBN Co providing timely and reliable service speed information to RSPs to enable them to advise customers on service speed expectations and suitable retail products given capabilities of their line. However, the draft FAD did not include specific terms of this nature for fixed line services and we sought further information on initiatives undertaken by NBN Co.

⁴⁹ NBN Co, Media release: NBN Co unveils new plans for its Fixed Wireless network, 18 December 2018.

⁵⁰ NBN Co, *Monthly progress report (customer experience)*, January 2020.

⁵¹ ACCC, *NBN Wholesale Service Standards Inquiry - Draft Decision*, October 2019, sections 4.1.5.3 & 4.1.5.4, pp. 41-46.

For services on the fixed wireless network, the draft FAD terms⁵² required NBN Co to provide RSPs with information on whether a new customer is likely to be connected to a congested cell or congested backhaul link and to provide RSPs with maximum attainable speed information based on the signal levels recorded at the time of installation for each fixed wireless service within two days of installation.

Rebates

The draft FAD proposed rebates to provide incentives for NBN Co to only sell wholesale services that can be delivered having regard to any technical limitations of the line, and remediate services that perform below established minimum speeds.⁵³ For fixed wireless services, the draft FAD proposed rebates to provide an incentive for NBN Co to meet its design standard and to provide compensation for each fixed wireless service that is impacted by network congestion.

In relation to FTTN/B/C services, the draft FAD proposed a rebate of \$20 for each month that the downstream PIR that a service is capable of achieving is less than the PIR Objective (downlink). As noted above, the PIR Objective (downlink) is 12Mbps for the most basic speed tier and, 25Mbps for all other speed tiers (25Mbps; 25-50Mbps; 25-100Mbps) except for FTTN services during coexistence when it is 12 Mbps.

In addition, the draft FAD proposed a rebate for each month that the downstream PIR that a FTTN/B/C service is capable of achieving is below the upper range of the lower service tier. That is, where it is less than:

- 50 Mbps for an AVC with a PIR of up to 100 Mbps,
- 25 Mbps for an AVC with a PIR of up to 50 Mbps, and
- 12 Mbps for an AVC with a PIR of up to 25 Mbps.

For fixed wireless services, the draft FAD proposed the introduction of a fixed wireless rebate, requiring NBN Co to pay a \$20 payment to RSPs for each end-user service within a fixed wireless cell where the 30 day average busy hour speed falls below the 6 Mbps design metric or where the cell is served by any backhaul link(s) with greater than 0.25 per cent packet loss.⁵⁴

Submissions

Stakeholders supported the principle that NBN Co should not charge for services it is not providing on fixed and fixed wireless networks, although differing views were raised on the nature of speed commitments and remedies that should be implemented.⁵⁵

Service speed information

In relation to fixed wireless services, submissions expressed broad support for the principle that NBN Co should provide accurate and timely information about the performance of the network. Telstra submitted that the provision of maximum attainable speed information will enable RSPs to have more informed conversations with end-users at the point of sale and Vocus submitted that this information will help manage consumer expectations.⁵⁶

⁵² See clauses 10.2 and 11, Schedule 2 of the Draft FAD in NBN Wholesale Services Standards Inquiry.

⁵³ See clause 4, Schedule 2 of the Draft FAD in NBN Wholesale Services Standards Inquiry.

⁵⁴ See clause 5, Schedule 2 of the Draft FAD in NBN Wholesale Services Standards Inquiry.

⁵⁵ NBN Co, *Submission to the draft decision*, p.37. Telstra, *Submission to the draft decision*, pp. 3 & 7. Vocus, *Submission to the draft decision*, p.3. Optus, *Submission to the draft decision*, pp.15-17, ACCAN, *Submission to the draft decision*, p.6. Aussie Broadband, *Submission to the draft decision*, p.2. Commpete, *Submission to the draft decision*, p.2. VHA *Submission to the draft decision*, p.6.

⁵⁶ Telstra, *Submission to the draft decision*, p. 7. Vocus, *Submission to the draft decision*, p. 3.

NBN Co disagreed with the inclusion of maximum attainable speed information in a FAD and submitted that the benefits of providing this information are likely to be outweighed by the inherent limitations. It noted that some of this information is based on signal strength measurements taken at the time of installation, which are point-in-time measurements.⁵⁷

Rebates – fixed line services

RSPs and ACCAN generally supported our approach in the draft FAD. They considered it important that NBN Co remediate lines, address interference or repair lines that are not capable of meeting the baseline PIR Objective.⁵⁸ RSPs also considered that the obligation to address speed performance issues should continue even when a consumer elects to downgrade their speed tier.⁵⁹ In addition, they suggested strengthening the PIR Objective rebate to include higher speed tiers and to report on the progress of remediation.⁶⁰

NBN Co supported the objective of ensuring that customers are receiving value for money for services purchased over the NBN. However it considered that the PIR Objective rebate would potentially reduce choice for access seekers by creating financial incentives for NBN Co to restrict the availability of service options to access seekers. It also argued it would be penalised in circumstances where it does not currently have the contractual right to downgrade the ordered service.⁶¹

NBN Co expressed concern that it could be required to pay a rebate in circumstances where the cause is located at the end user premise. It submitted that such a scenario could create a perverse incentive for access seekers to not cooperate with NBN Co to fix issues.⁶²

Stakeholders had different views on the rebate for services that have maximum attainable speeds of less than 50 per cent of the AVC PIR. RSPs and consumer groups generally supported the draft FAD approach although there were differing views on specific aspects.⁶³ For example, VHA submitted that the minimum speed requirement should be 80 per cent of the speed a service is capable of achieving.⁶⁴

NBN Co and the Department strongly opposed the speed assurance rebate. Both argued that underperformance speed issues should be resolved through other means (WBA4 commercial negotiations⁶⁵ or the broader framework described in the Consumer Safeguards Review Part B report⁶⁶). The Department submitted that speed related rebates would unduly shift risk and cost to NBN Co, when this is better managed by the retailer.⁶⁷

NBN Co submitted that, while it agreed with the outcome being sought by the ACCC, regulatory intervention would create a risk of access seeker gaming.⁶⁸ It explained that in order to receive a rebate, an access seeker may choose not to raise a trouble ticket, or it

⁵⁷ NBN Co, *Submission to the draft decision*, p.45.

⁵⁸ Telstra, *Submission to the draft decision*, p.7. Optus, *Submission to the draft decision*, p.16. Vocus, *Submission to the draft Decision*, p.3. ACCAN, *Submission to the Draft Decision*, pp.6 & 12. Aussie Broadband, *Submission to the draft decision*, p.2. VHA, *Submission to the draft decision*, p.8.

⁵⁹ Vocus, *Submission to the draft decision*, p.3. Optus, *Submission to the draft decision*, p.16.

⁶⁰ Telstra, *2nd submission to the draft decision*, pp.2-3.

⁶¹ NBN Co, *Submission to the draft decision*, p.38.

⁶² NBN Co, *Submission to the draft decision*, pp.26, 38-39.

⁶³ ACCAN, *Submission to the draft decision*, pp. 6 & 12. Optus, *Submission to the draft decision*, p.16. Vocus, *Submission to the draft decision*, p.3. Telstra, *Submission to the draft decision*, p.7. VHA, *Submission to the draft decision*, p.8.

⁶⁴ VHA, *Submission to the draft decision*, p.3.

⁶⁵ NBN Co, *Submission to the draft decision*, pp.39-40.

⁶⁶ The Department, *Submission to the draft decision*, pp.1 & 8.

⁶⁷ The Department, *Submission to the draft decision*, p. 9.

⁶⁸ NBN Co, *Submission to the draft decision*, p.39.

could sell a retail service at one speed and order a higher speed from NBN Co only in order to obtain the rebate.⁶⁹

To mitigate this risk, NBN Co indicated that a unilateral right to downgrade a service to a lower speed tier would be required, that RSPs should be required to raise a trouble ticket and provide assistance to NBN Co where required, and that RSPs should determine that the cause of underperformance is NBN Co's responsibility for either rebate to apply. In addition, NBN Co submitted that it may be required to pay a rebate where the connection underperformed periodically throughout the month and that there was a risk that more than one rebate would be payable in respect of a single service.⁷⁰

In terms of the rebate amount, Telstra supported \$20 for the PIR Objective rebate (in line with the draft FAD)⁷¹ while ACCAN proposed a rebate of \$30/month for services not reaching 12Mbps to place more emphasis on the minimum speed requirement.⁷²

In relation to the rebate for services that have maximum attainable speeds of less than 50 per cent of the AVC PIR, stakeholders proposed a range of different rebate structures and amounts.

On other issues relating to underperformance, Optus argued for the inclusion of services on the HFC access network on the basis that they are also subject to congestion.⁷³ NBN Co submitted that the speed assurance provisions not apply to an AVC TC-4 service that is used to support an AVC TC-2 (symmetric) bandwidth profile in respect of the same premises.⁷⁴

Rebate - fixed wireless services

Telstra submitted that the fixed wireless rebate will 'incentivise NBN Co to remediate cells/services and enable RSPs to provide further support to their customers'.⁷⁵ While Telstra supported the fixed wireless rebate as proposed, it questioned whether NBN Co's 6 Mbps design metric would remain appropriate in the future, given that throughput is likely to continue to grow and NBN Co will need to invest to upgrade cells and backhaul links.⁷⁶

NBN Co opposed the introduction of fixed wireless rebates and submitted that they would not provide any meaningful additional incentive to improve performance of the fixed wireless network and would divert resources away from other, more meaningful customer experience initiatives.⁷⁷ NBN Co noted that it had spent, or committed to spend, over \$800 million on upgrading the fixed wireless network in the absence of any rebate requirement or other regulatory intervention, and that it faced logistical difficulties in expanding the existing program of works.⁷⁸

The Department noted that NBN Co expects to reduce congestion on both cells and backhaul links to less than one per cent, and submitted that rebates for underperforming services on the fixed wireless network could impede ongoing investment, without providing any additional incentive for future investment. It also considered that regional investment

⁶⁹ NBN Co, *Submission to the draft decision*, pp.26-27.

⁷⁰ NBN Co, *Submission to the draft decision*, pp.63-65.

⁷¹ Telstra, *Submission to the draft decision*, p.7 and Telstra 2nd *Submission to the draft decision*, p.1.

⁷² ACCAN, *Submission to the draft decision*, p.12.

⁷³ Optus, *Submission to the draft decision*, pp.15 & 17, 18.

⁷⁴ NBN Co, *Submission to the draft decision*, p.63.

⁷⁵ Telstra, *Submission to the draft decision*, p.7.

⁷⁶ Telstra, *Submission to the draft decision*, p.7.

⁷⁷ NBN Co, *Submission to the draft decision*, pp. 40-41.

⁷⁸ NBN Co, *Submission to the draft decision*, pp. 40-41.

could be distorted in an economically inefficient manner, such as being directed at reducing peak congestion rather than lifting the overall capacity of the network.⁷⁹

ACCC views

The ACCC's general view is that stronger wholesale service commitments on speed assurance would ensure the timely provision of speed information for fixed wireless services. Additionally, they would provide incentives for NBN Co to only sell wholesale services that are appropriate to any technical limitations of the line, and remediate services that perform below established minimum speeds and design standards. However, after considering submissions, we have reconsidered several aspects of the proposals outlined in the draft decision, as discussed below.

Service speed information

For fixed line services, we consider that NBN Co should provide timely and reliable service speed information to RSPs.

In terms of fixed wireless services, the ACCC also considers that NBN Co should continue providing RSPs with prospective fixed wireless performance information and that it should also provide maximum attainable speed data, post-connection.

The ongoing provision of prospective fixed wireless performance information is essential so RSPs can advise their customers appropriately prior to orders being placed. We consider that this measure could be delivered in parallel with NBN Co's plan to provide additional or enhanced reporting under its commercial agreements.

We consider that requiring NBN Co to provide RSPs with maximum attainable speed data for fixed wireless services (as it does for FTTN/B/C services) will enable RSPs to provide better and more accurate information about these services to individual customers. It will also promote better selling practices in accordance with the ACCC's broadband speed claims industry guidance.⁸⁰ In response to NBN Co's submission that the maximum attainable speed measurement is inherently limited, we note that NBN Co could provide appropriate qualifications on the measurement methods used.

Clarification of speed assurance terms

The ACCC considers that measurement of the speed objective and commitment for fixed line services should be with respect to monthly average downstream PIR rather than simply downstream PIR. We agree with the submission made by NBN Co that the rebate should not capture services that underperform periodically throughout the month.

We no longer propose a speed commitment of 12 Mbps (downlink) for an AVC-T4 with a maximum achievable PIR (downstream) of up to 25 Mbps as this speed tier is already covered by the PIR Objective.

In relation to fixed wireless services, we consider that NBN Co should be able to propose alternative metrics that it considers to be more reflective of the end-user customer experience on its fixed wireless network to trigger the fixed wireless rebates. These would replace the current cell congestion and backhaul congestion metrics, following consultation with access seekers. For example, NBN Co has identified there is potential in some circumstances for its backhaul congestion metric to identify additional backhaul links beyond those actually congested.

⁷⁹ The Department, *Submission to the draft decision*, pp. 9-10.

⁸⁰ ACCC, *Broadband speed claims industry guidance*, May 2019.

Additionally, the ACCC accepts NBN Co's drafting suggestion that would mean the fixed wireless rebate calculations align with NBN Co's reporting cycles and can be operationalised.

Rebate amount

The ACCC's view on rebate amounts is that a \$20 rebate amount is likely to be appropriate for all instances of service speed underperformance.

For fixed line services, a rebate of \$20 per month balances a number of factors, including the potential financial impact on NBN Co, fixed line bundled product prices,⁸¹ implementation costs and efficiencies. A flat rebate amount avoids complexity in the rebate structure.

We considered the proposal to base rebates on the difference between a higher and lower wholesale service speed tier or bundle charges. We have concerns that a higher rebate for higher speed tiers may incentivise NBN Co to prioritise higher speed services over others and as such, may not be in the LTIE of all end-users. Additionally it may raise the level of complexity and result in a rebate that is difficult and inefficient to implement.

We agree with ACCAN that there should be more emphasis on the minimum speed requirement but consider that in some respects this is already the case. For example, we note that the 12/1Mbps service product is required under the WBA to be remediated and, because it cannot be downgraded to a lower service speed, would continue to attract a speed assurance rebate during remediation.

In accordance with the draft FAD, our view is that there should be no obligation on an RSP to first lodge a Trouble Ticket for NBN Co to investigate and resolve an underperformance issue on its network. This is because the LTIE is best served by the quick resolution of underperforming issues by the party best placed to resolve them. As NBN Co has access to all relevant information concerning the performance of its network, it is best placed to monitor, investigate and resolve speed issues.

For fixed wireless services, our view is that the \$20 rebate amount in the draft FAD is appropriate.

We consider that a rebate of \$20 takes into account NBN Co's legitimate business interests. We acknowledge that NBN Co is upgrading the fixed wireless network to enhance capacity and the wholesale speeds available in the future.⁸² However, we consider that a \$20 rebate would incentivise NBN Co to meet its design standard on an ongoing basis, while also compensating RSPs that are currently providing redress to end-users who are affected by fixed wireless congestion.

As with other rebates, we maintain the view that NBN Co should be required to pay the rebate directly to RSPs without the need for them to submit a claim.

Scope of fixed line speed assurance provisions

The ACCC's view is that the speed assurance provisions should not apply to AVC TC-4 services required to support an AVC TC-2 bandwidth profile supplied in respect of the same premises. We note that TC-2 services are used for business services, and not the residential services which are the focus of the current inquiry.

In accordance with the draft FAD, our view is that services on the HFC network should be excluded from the scope of the speed assurance provisions. Although we accept Optus'

⁸¹ NBN Co also provides unbundled products to a minority of customers.

⁸² NBN Co, Half-Year Report FY20, 11 February 2020.

submission that there are issues of congestion on the HFC network, speed issues on this network do not appear to be at the same level as the other networks.

Circumstances where the fixed line speed assurance rebates do not apply

For fixed line services our view is that the speed assurance rebate should not apply in circumstances where:

- an access seeker or end-user fails to cooperate with NBN Co in relation to remediation activities, or
- an access seeker does not allow NBN Co to downgrade an underperforming fixed line service to avoid paying a rebate in the subsequent month.

We accept NBN Co's arguments in relation to its obligation to pay a rebate in circumstances where it is unable to properly test a line or determine the causal location of the speed issue because of a lack of access to the end-user premise.

We consider it reasonable that NBN Co not be required to pay a rebate in circumstances where it is not allowed (by the RSP) to downgrade an underperforming service or where it is unable to remediate the service because of the actions of the end-user.'

4. Pass through of rebates

The question of how RSPs should treat or respond to these rebates paid by NBN Co to RSPs for failing to meet service levels, and the extent these should be passed through to end-users, has been a key issue throughout this inquiry.

As part of the enforceable undertaking accepted by the ACCC, NBN Co introduced a requirement that RSPs take reasonable steps to ensure that affected end-users receive a fair value benefit (in a monetary or other form) of those rebates paid to RSPs (the 'pass through' requirement).⁸³

RSPs raised concerns in response to the pass through provision in the enforceable undertaking. They argued that the pass through obligation was difficult to implement and did not allow for flexibility in providing tailored remedies to affected end-users.⁸⁴ In contrast, NBN Co considered that rebates should ultimately result in RSPs providing a benefit to end-users rather than a transfer of value from NBN Co to RSPs. It also submitted that the ACCC should consider specific mechanisms for pass through of any rebate imposed under a FAD.⁸⁵

ACCC draft decision

We did not include a general pass through requirement for rebates within the draft FAD instrument. We considered that regulated pass through requirements would have the following drawbacks:

- pass through requirements may introduce unintended effects on the retail market, including limiting the ability of RSPs to offer differentiated remedies to customers in cases of poor experience
- pass through requirements increase the contractual and operational complexity between NBN Co and RSPs and may increase the cost of providing services without sufficient benefit
- enforcement of pass through requirements would fall solely to NBN Co as a contractual term, which may be difficult to achieve in the context of NBN Co's broader relationships with its wholesale customers
- if rebates are withheld by NBN Co because an RSP did not comply with the pass through requirement, NBN Co's incentives to meet service levels may be diluted, and
- cases of consumer detriment are unlikely to perfectly align with the payment of service level rebates, and the resulting inconsistent or variable application of the pass through of rebates would be unlikely to meet consumer expectations.

However, we considered it was appropriate to include a pass through requirement for missed appointments in the draft decision. Missed appointments directly affect consumers and RSPs have limited capacity to offer remedies where the missed appointment is caused by NBN Co. In these circumstances, we considered that it would be appropriate for RSPs to take reasonable steps to pass through missed appointment rebates, to ensure that the customer receives the full benefit of this rebate payment.⁸⁶

⁸³ NBN Co, *Section 87B Undertaking*, 11 September 2018. *WBA Ethernet Product Module, Service Levels Schedule (Revised)*, sections 1.4(f), 2.4(e), 8.5(f) and 10.4(e).

⁸⁴ Optus, *Submission to the second discussion paper*, p. 12; Telstra, *Submission to the second discussion paper*, pp. 11–12; VHA, *Submission to the second discussion paper*, p. 12.

⁸⁵ NBN Co, *Submission to the second discussion paper*, p. 16.

⁸⁶ ACCC, *NBN Wholesale Service Standards Inquiry - Draft Decision*, October 2019, section 3.4, pp.16-18.

Submissions

RSPs' submissions were broadly supportive of our approach of not including a general pass through requirement.

The complexities of implementing pass through and its associated costs was a major concern of RSPs.⁸⁷ Vocus, VHA and Optus, for example, noted the need for automated, detailed and real-time notification from NBN Co about service level misses and the payment of rebates.⁸⁸ Optus submits that pass through currently requires a high degree of manual processing due to how the information is provided by NBN Co.⁸⁹

RSPs also submitted that there are other ways to mitigate consumer harm and mandating pass through could potentially stifle service differentiation and competition at the retail level. Telstra and VHA both identified initiatives proactively introduced by RSPs to address consumer harm resulting from NBN service level misses (e.g. 4G back-up modems).⁹⁰

They also argued that rebates should recognise the costs they incur due to service level misses by NBN Co. Optus and Telstra both noted the costs associated with rescheduling missed appointments, which Optus submitted is a significant driver of call volumes.⁹¹

In contrast, NBN Co, ACCAN the Department and the TIO submitted that all service level rebates should be passed through to consumers. ACCAN and the TIO considered that rebates should compensate consumers directly as they are the primary party affected, and as consumers experience significant detriment when their services are not working.⁹² The Department's submission noted that if rebates are intended to compensate consumers, then they should be fully passed through to consumers, aside from legitimate costs incurred by intermediaries or RSPs.⁹³ However, the Department acknowledged that options for pass through of rebates are not straightforward and are difficult where the FAD only applies to NBN Co.

NBN Co noted that, without pass through, there is no guarantee that rebates will directly benefit end-users. As such, NBN Co submitted that the lack of general pass through requirement means that RSPs who do not voluntarily pass through rebates will make significant windfall gains.⁹⁴ The TIO noted the risk that rebates might benefit RSPs without compensating consumers,⁹⁵ while ACCAN considered that ongoing ACCC scrutiny of pass through is necessary to avoid such windfall gains.⁹⁶ NBN Co submitted that RSPs' windfall gains are likely to lead to misaligned incentives between NBN Co and RSPs, and incentivise RSPs to maximise their rebate payments instead of resolving consumer issues promptly.⁹⁷ Further, NBN Co considered that RSPs may become dependent on wholesale rebates as a form of revenue stream as part of their business model.⁹⁸

⁸⁷ Telstra, *Submission to the draft decision*, p.3; VHA, *Submission to the draft decision*, p.3.

⁸⁸ Vocus, *Submission to the draft decision*, p. 2; VHA, *Submission to the draft decision*, p. 6; Optus, *Submission to the draft decision*, p. 13

⁸⁹ Optus, *Submission to the draft decision*, p. 14.

⁹⁰ Telstra, *Submission to the draft decision*, p. 3; VHA, *Submission to the draft decision*, p. 3.

⁹¹ Optus, *Submission to the draft decision*, p. 13.

⁹² ACCAN, *Submission to the draft decision*, p.7; TIO, *Submission to the draft decision*, p. 4-5.

⁹³ The Department, *Submission to the draft decision*, p. 8

⁹⁴ NBN Co, *Submission to the draft decision*, p. 7.

⁹⁵ TIO, *Submission to the draft decision*, p.5.

⁹⁶ ACCAN, *Submission to the draft decision*, p.8.

⁹⁷ NBN Co, *Submission to the draft decision*, p.7.

⁹⁸ NBN Co, *Submission to the draft decision*, p. 24.

More broadly, the TIO submitted that there is a need for an integrated approach to consumer compensation and remedies such as interim services, to be developed by the ACCC and the ACMA.⁹⁹ It also proposed that the ACCC consider preventing providers from requiring or requesting that consumers waive their entitlements to rebates.¹⁰⁰

ACCC views

Our general position is that imposing a requirement on RSPs to pass through all rebates is complex and difficult to enforce. It may also create inefficiencies across the supply chain. As such, our view is that there should not be a general pass through requirement for rebates imposed at the wholesale level, except in the case of missed appointments.

However, consumers should receive the benefit from rebates paid to RSPs. There is a clear consumer benefit to allowing RSPs to offer differentiated, tailored and innovative remedies to consumers in cases of consumer detriment. These should be supported by wholesale rebates where service issues are caused by NBN Co missing its service levels. In many cases, this benefit may arise instead of, or in addition to, direct financial compensation.

In particular, we note remedies that focus on providing continuous voice and internet services to consumers, such as providing 4G backup modems, mobile broadband devices, or credit for additional mobile data, are likely to be preferable to many consumers. While some RSPs will offer direct compensation to affected consumers, it may be better and more efficient to allow them the flexibility to determine remedies based on the customers' particular experiences, and where practical, offering consumers a choice between financial compensation and other remedies.

We consider that formal pass through requirements for all rebates would be likely to limit the ability and the scope for RSPs to offer differentiated remedies to customers in cases of poor experience, and to tailor compensation in specific cases. We note that RSPs may already be offering remedies to consumers under their existing retail obligations, including the 2018 ACMA rules¹⁰¹ and the Australian Consumer Law.

Missed appointment rebate

As discussed in section 2.3, we continue to hold the view that missed appointment rebates should be passed through to end-users. Unlike delayed connections and unresolved faults resulting in loss of service, RSPs are not able to offer different or tailored remedies that mitigate the harm caused by missed appointments. In this case, we consider that direct consumer compensation is the best, if not the only, remedy available for consumers where a missed appointment has occurred due to NBN Co.

While we recognise there are costs associated with implementing pass through of missed appointment rebates, we consider that these circumstances are more specific and can be more readily implemented than for connection or fault rebates.

More broadly, we will work with the ACMA as they consider whether, and if so, to what extent pass through requirements should be imposed at the retail level to ensure that end-users receive the benefit of any rebate paid at the wholesale level. We propose to work closely with the ACMA and the Department to ensure that RSPs develop and deliver on retail commitments as recommended in the final report of Consumer Safeguards Review

⁹⁹ TIO, *Submission to the draft decision*, pp. 10-11.

¹⁰⁰ TIO, *Submission to the draft decision*, p. 10.

¹⁰¹ Among other things, these rules require RSPs not to charge consumers unless their NBN service is operational, and to provide consumers with an interim service if the NBN service cannot be provided to them within three working days, unless an NBN backup service is supplied or another arrangement is reached.

Part B. This will include considering issues relating to rebates and coordination in the context of the supply chain.

5. Service level measurement and exclusions

Service level measurement and exclusions refer to the starting point from which NBN Co begins measuring its performance against a service level timeframe, and the circumstances in which it is able to pause or ‘stop the clock’ on the measurement of its performance, until the relevant service level activity is complete.

Generally, these provisions allow NBN Co to exclude any time where it has been adversely affected by circumstances outside of its reasonable control in determining its service level performance (a ‘held’ ticket status), or where it is awaiting action from an RSP (a ‘pending’ ticket status).¹⁰² These general exclusions apply in addition to defined exclusions such as force majeure events and acts of RSPs or end-users.¹⁰³

Several terms within the WBA also describe the point from which measurement of each service level begins. Measurement will generally begin once the instruction has been lodged with NBN Co (e.g. a connect or modify order is placed by the RSP). However, timeframes for rectifying most end-user faults begin only after NBN Co has evaluated and accepted a ‘trouble ticket’ lodged by an RSP.¹⁰⁴

ACCC draft decision

In the draft decision we considered that, as a general principle, NBN Co should only extend service level timeframes under limited specified circumstances.¹⁰⁵ For example, if NBN Co is waiting for either the customer or RSP action before completing a connection or remediating a fault, or NBN Co is affected by a force majeure event.

We considered it reasonable and appropriate for NBN Co to ‘stop the clock’ on the measurement of a service level in circumstances that are caused by the RSP, a downstream provider or the end-user. We also considered it reasonable for exclusions to apply where the cause is of an exceptional nature, provided the cause for the delay is communicated to the RSP.

However, we did not consider exclusions should be available to NBN Co where it may reasonably develop strategies to mitigate poor end-user outcomes. This includes, for example, localised events, such as minor weather events or traffic incidents, which may be beyond NBN Co’s control but will occur from time to time.

The draft FAD terms stated that NBN Co may only ‘stop the clock’ in its measurement of connection and fault rectification service levels to the extent that these are affected by:

- an end-user’s request to change the date of an appointment
- a ‘pending’ status on a ticket awaiting action from the RSP or end-user
- acts of the RSP, downstream providers, or end-users that are not in accordance with the WBA terms or that are unlawful – including refusing NBN Co access to premises
- multi-dwelling unit equipment or in-building wiring issues
- issues caused by the network, systems, equipment or facilities of the RPS, downstream provider, or end-user, or
- a force majeure event.¹⁰⁶

¹⁰² NBN Co, *Supplementary submission to the first discussion paper*, pp. 8–9.

¹⁰³ See NBN Co, *WBA Ethernet Product Module*, Service Levels Schedule, section 21.

¹⁰⁴ NBN Co, *WBA Ethernet Product Module*, Service Levels Schedule, section 8.1. NB: for PA Faults and Enhanced Faults timeframes begin once the trouble ticket is acknowledged.

¹⁰⁵ ACCC, *NBN Wholesale Service Standards Inquiry - Draft Decision*, October 2019, sections 4.2.3.-4.2.4, pp. 49-50.

¹⁰⁶ See clause 8, Schedule 2 of the Draft FAD - NBN Wholesale Service Standards Inquiry.

Additionally, the draft FAD terms stated that NBN Co must also clearly log when any of these exclusions are relied upon.

In respect of the measurement of end-user faults, the draft FAD terms specified that service levels for fault rectification begins from the time of trouble ticket acknowledgement (as opposed to trouble ticket acceptance).¹⁰⁷ The draft decision set out our view that timely validation of trouble tickets should be undertaken as part of NBN Co's ordinary operational processes and should therefore be included within the calculation of time.

Submissions

Stakeholders provided broad support for the draft FAD measures.¹⁰⁸ Telstra considered that the main principles relating to service level exclusions have been captured in the draft FAD.¹⁰⁹ Telstra also provided support for the inclusion of the terms that specify that service levels begin from the time of order acknowledgement rather than acceptance, and for notification of when NBN Co 'stops the clock'.¹¹⁰

Optus also supported the ACCC's intention to clarify the current ambiguities in relation to the provision of service level information, as well as measurement and exclusion terms. It submitted that these affect the reporting of service level timeframes and the determination of NBN Co's liability where a service level has not been met.¹¹¹ This said, Optus raised concerns over the level of transparency in relation to 'stop the clock' reporting. It noted that it is often unclear when NBN Co 'stops the clock' and what conditions and criteria it applies when doing so.¹¹²

NBN Co submitted that the exclusions set out in the draft FAD are excessively narrow in scope and that there were many more circumstances where exclusions should apply. It considered that these provisions should be addressed through detailed operational discussions and commercial agreement and that regulated terms should be limited to circumstances where there is evidence that the service level exclusions are being applied inappropriately.¹¹³ Alternatively, it proposed a number of scenarios not covered in the draft FAD that should be excluded in the measurement of both end-user connection and fault service levels.¹¹⁴

ACCC views

We maintain the view that there should be an exhaustive list of exclusions that NBN Co may rely on to 'stop the clock' on its measurement of service levels for connections and faults. This is important to promote clarity over which party is responsible for carrying forward operational processes relating to connections and faults. Building IT capability so RSPs are aware of when an exclusion is relied on should also be pursued at an appropriate time.

We accept NBN Co's submission that there are additional exclusions should also be included so that this term better aligns with the roles and responsibilities of NBN Co and RSPs that current apply under the WBA.

We further maintain the view that service levels for faults should begin from the time of trouble ticket acknowledgement (as opposed to trouble ticket acceptance).

¹⁰⁷ See clause 3, Schedule 2 of the Draft FAD - NBN Wholesale Service Standards Inquiry.

¹⁰⁸ Telstra, *Submission to the draft decision*, p.8; Optus, *Submission to the draft decision*, pp.19-20, Vocus, *Submission to the draft decision*, p.3, VHA, *Submission to the draft decision*, pp.6-8, ACCAN, *Submission to the draft decision*, p.6; Aussie Broadband, *Submission to the draft decision*, p.2.

¹⁰⁹ Telstra, *Submission to the draft decision*, p.15.

¹¹⁰ Telstra, *Submission to the draft decision*, pp.7-8.

¹¹¹ Optus, *Submission to the draft decision*, p.20.

¹¹² Optus, *Submission to the draft decision*, p.21.

¹¹³ NBN Co, *Submission to the draft decision*, p.42.

¹¹⁴ NBN Co, *Submission to the draft decision*, p.68.

6. Service information and reporting

6.1. Availability of operational service information

NBN Co provides a range of information to RSPs about the wholesale services it provides via its business-to-business (B2B) access and service portal. This also allows RSPs to perform key business transactions including activations, appointments, assurance, billing, and tests and diagnostics. We are aware that NBN Co has also provided service information to RSPs via regular reporting (e.g. FTTN and FTTB AVC maximum attainable speeds and the busy hour performance of fixed wireless cells) or on an ad hoc basis.

RSPs rely on this information when marketing, activating and providing ongoing assurance activities to their customers. Consequently, impediments to timely and efficient access to this information can raise supply costs, such as by introducing additional customer touch points, dampen retail competition, and jeopardise consumer outcomes arising from incomplete or incorrect information

ACCC draft decision

In the draft decision we considered that, as a general principle, 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.¹¹⁵ This should include whether a relevant service level has been missed and be able to be used by RSPs to inform end-users where appropriate.

The ACCC draft FAD terms required NBN Co to have IT systems in place to automate the transfer of all regular and ongoing operational information provided to RSPs.¹¹⁶ Where relevant operational information is not yet automated, NBN Co would maintain an IT roadmap setting out timeframes for the consultation and development of IT systems with this capability. Specifically, the draft FAD stated that automated IT systems should be in place for information about the progress of appointments, individual order status, modify orders, fault tickets, whether an exclusion has been relied on, the extent to which a service level is missed and a rebate payable, and the provision of enhanced wireless network reporting.

In coming to this draft view we acknowledged that changes to operational IT systems could present significant costs to NBN Co and RSPs. However, we noted that information that is not provided effectively can increase the transactional costs associated with RSPs accessing the information, and may limit its utilisation.

Submissions

Several stakeholders expressed support for the draft FAD terms requiring IT automation and noted specific items where they considered the information provided by NBN Co could be improved.¹¹⁷ In addition to the matters set out in the draft FAD, submissions highlighted inefficiency and complexity of service information contained in numerous sources and the lack of real-time information.¹¹⁸

Telstra expressed strong support for NBN Co maintaining an IT roadmap setting out the timeframe and process for systems changes, separate to NBN Co's Integrated Product Roadmap, which it considers does not always contain sufficient detail relating to IT

¹¹⁵ ACCC, *NBN Wholesale Service Standards Inquiry - Draft Decision*, October 2019, sections 4.3.1.3 & 4.313.4, pp.50-53.

¹¹⁶ See clause 7, Schedule 2 of the Draft FAD - NBN Wholesale Service Standards Inquiry.

¹¹⁷ Vocus, *Submission to the draft decision*, p.4; Telstra, *Submission to the draft decision*, p.8; Optus, *Submission to the draft decision*, p.21; Aussie Broadband, *Submission to the draft decision*, p.2.

¹¹⁸ Vocus, *Submission to draft decision*, p.4.

systems/interface changes.¹¹⁹ Commpete's submission recognised that the investments required by NBN Co and RSPs to implement IT systems changes can be significant.¹²⁰

NBN Co on the other hand submitted that it has made significant progress in relation to the quality and timeliness of information that it provides to access seekers and that the draft FAD terms would not provide any substantive benefit to access seekers or end-users.¹²¹

Further, it considered that the any FAD requirements should be exhaustive to ensure certainty about the scope of the obligation and to allow an assessment of the potential impacts of the obligation before any FAD is made. In particular, it noted that an obligation to make all regular and ongoing service specific information available via automated IT systems is unclear.¹²²

ACCC views

We consider that the provision of operational information via automated IT systems is important for good consumer outcomes and should continue to be a focus for improvement. This is essential for RSPs to be able to manage end-user services, keep end-users informed of the status of their services, and improve on their own systems and processes.

Our draft decision identified a number of information types that we considered should be incorporated into automated IT systems. We consider these should be pursued at an appropriate time once NBN Co resumes business as usual operations. There should also be a general presumption that where information about wholesale services is provided on a regular basis, that this be integrated within NBN Co's B2B access and service portal or other B2B systems so it can be made use of by RSPs.

There is significant support for NBN Co maintaining a separate roadmap for IT systems changes. We consider this approach would be useful for RSPs to be able to provide input on the priorities within NBN Co's broader IT strategy and to plan for corresponding IT changes within their systems.

6.2. Reporting of service level metrics

NBN Co provides monthly reports to RSPs detailing its performance against its service levels for that month. RSPs use this information to understand how NBN Co is tracking against its service level commitments. Where NBN Co's aggregate performance against the service levels falls below set thresholds, the WBA requires NBN Co to specify what action it will take to address non-achievement of the performance objective.

Commitments within NBN Co's enforceable undertaking improved on the timeliness of this monthly reporting. It also introduced weekly reports to RSPs detailing the busy hour performance of fixed wireless cells, the services on cells experiencing congestion, and NBN Co's forecasts of when congested fixed wireless cells will be upgraded.¹²³

¹¹⁹ Telstra, *Submission to draft decision*, p.8.

¹²⁰ Commpete, *Submission to draft decision*, p.1.

¹²¹ NBN Co, *Submission to draft decision*, p.41.

¹²² NBN Co, *Submission to draft decision*, p. 42.

¹²³ NBN Co, *Section 87B Undertaking*, 11 September 2018. *WBA3 Ethernet Product Module*, Service Levels Schedule (Revised), section 15.5.

ACCC draft decision

In the draft decision, as a general principle, we considered that NBN Co should provide regular reports to access seekers about the overall performance of its network and that this should include its performance meeting service levels by location, service class and network.¹²⁴

The draft FAD terms included that NBN Co would provide monthly reporting to RSPs within 10 business days of the relevant month.¹²⁵ The terms specified that NBN Co would report its performance for each service level activity completed for the RSP, as well as NBN Co's performance across all RSPs, broken down by location, service class and network (where applicable).

In respect of fixed wireless services, the draft FAD terms required NBN Co to provide weekly performance reporting by 2 business days after the end of each week that includes fixed wireless congestion metrics and NBN Co's plans to remediate congested fixed wireless cells and congested backhaul links. The draft FAD terms also required NBN Co to provide prospective fixed wireless performance information to RSPs to enable them to identify whether prospective fixed wireless end-users are likely to be located within a congested cell.

Submissions

Submissions supported the reporting requirements as described in the draft FAD. Some RSPs noted that NBN Co is now providing more detail in its reporting, including reporting related to fixed wireless services.¹²⁶

While NBN Co submitted that it does not have an issue with the type of reporting described in the draft FAD, it considers the clause is unwarranted because it is already providing this information (or similar information) on a voluntary basis.¹²⁷ NBN Co's broader concern is that including performance requirements in a FAD would constrain its ability to improve on this reporting over time.¹²⁸

NBN Co raised an additional concern that providing aggregate service level reporting to all access seekers would potentially provide a competitive advantage to Telstra, which due to its scale may be able to better understand performance relative to their competitors.¹²⁹ NBN Co submitted that, as Telstra is the only access seeker that uses NBN services to supply downstream priority assistance customers, providing aggregated data to all access seekers would disclose confidential market information.¹³⁰

ACCAN and the TIO submitted that the publication of this reporting could enhance transparency and accountability, and ensure confidence in the performance of NBN Co.¹³¹

ACCC views

We consider NBN Co should clearly commit to reporting on its performance in respect of each service level activity, as well as a requirement for NBN Co to provide weekly fixed

¹²⁴ ACCC, *NBN Wholesale Service Standards Inquiry - Draft Decision*, October 2019, sections 4.3.2.3 & 4.3.2.4, pp.54-55.

¹²⁵ See clauses 9 and 10, Schedule 2 of the Draft FAD - NBN Wholesale Service Standards Inquiry.

¹²⁶ Vocus, *Submission to draft decision*, p.4; Telstra, *Submission to draft decision*, p.9; VHA, *Submission to draft decision*, p.9; Optus, *Submission to draft decision*, p.21; ACCAN, *Submission to draft decision*, p.6; Aussie Broadband, *Submission to draft decision*, p.3.

¹²⁷ NBN Co, *Submission to the draft decision*, pp.43-44.

¹²⁸ NBN Co, *Submission to the draft decision*, p.44.

¹²⁹ NBN Co, *Submission to the draft decision*, p.43.

¹³⁰ NBN Co, *Submission to the draft decision*, p.69.

¹³¹ ACCAN, *Submission to draft decision*, p.7; TIO, *Submission to draft decision*, p.12.

wireless performance reporting by 2 business days after the end of each week that includes fixed wireless congestion metrics and NBN Co's plans to remediate congested fixed wireless cells and congested backhaul links.

We note NBN Co's submission that it may disclose Telstra's confidential market information if it reports overall priority assistance service levels to all access seekers. This concern could be addressed by including a condition that NBN Co is not required to provide reporting to the extent that it would disclose information that is confidential to an access seeker. This would align with NBN Co's confidentiality obligations under the WBA.

While we consider public reporting of service level outcomes to be outside of the scope of this inquiry, we note that record keeping and transparency rules for network providers is planned to be developed as part of the Consumer Safeguards Review Part B final report recommendations.¹³²

¹³² Consumer Safeguards Review – Part B (reliability of services) – Final report, recommendation 11.

7. Support for safeguards

The primary safeguards relevant to this inquiry are the Customer Service Guarantee (CSG) and Priority Assistance (PA).¹³³ We have considered how the commercial rebates for connections interact with wholesale arrangements in place to support the CSG and whether wholesale arrangements could provide further support for PA providers.

We have also considered how NBN Co's commercial agreements could be updated if changes are made to the safeguards framework.¹³⁴

ACCC draft decision

As a general principle, we proposed that NBN Co should support the delivery of NBN services in line with existing consumer safeguards, in particular CSG and PA.¹³⁵ We supported the principle that PA connections and faults should be prioritised over standard connections and faults. We also considered that NBN Co should commit to updating its wholesale arrangements to support any changes to the consumer safeguards framework that affect NBN services.

We considered that NBN Co's wholesale terms for CSG compensation could be strengthened to ensure they are effective in determining the extent to which their CSG liabilities are due to factors arising from wholesale services. Commitments designed to service PA customers could also be reviewed to ensure that the eligibility requirements for the PA wholesale provisions are appropriate and processes for claiming compensation for interim services are workable. However, we did not propose new consumer safeguard terms which were being reviewed by the Department, and instead considered that in order to best support access seekers meeting future safeguards, NBN Co should be required to discuss the additional support it could provide in its wholesale arrangements.

We considered that in order to provide access seekers with the certainty that these discussions would take place, that a regulatory recourse clause was required as set out in clause 12 of our draft FAD. This 'consumer safeguards event' clause would require NBN Co to negotiate with access seekers in good faith and in a reasonable timeframe (of no more than 90 days) to amend the WBA if changes are made to the consumer safeguards framework as part of the Department's safeguards review. We considered this requirement would allow RSPs to discuss the additional support they would require from the wholesale arrangements to be able to meet their own retail obligations.

The draft FAD also maintained the framework as set out in WBA3, whereby NBN Co could offset (or deduct) the amount of a commercial rebate by the amount of CSG compensation it is liable to pay for the same issue. We considered this would eliminate any unintended consequence of an RSP receiving both CSG compensation in addition to a commercial rebate.¹³⁶

¹³³ ACCC, *NBN Wholesale Service Standards Inquiry - Draft Decision*, October 2019, pp. 55 & 56.

¹³⁴ The Department is currently reviewing the consumer safeguards framework that applies in Australia as part of its Consumer safeguards review – see section 1.3 of this document for a more detailed summary.

¹³⁵ ACCC, *NBN Wholesale Service Standards Inquiry - Draft Decision*, October 2019, sections 4.4.3 – 4.4.4, pp. 58-59.

¹³⁶ NBN Co has termed this as 'double-dipping'. NBN Co, *Submission to the draft decision*, p. 41.

Submissions

Customer Service Guarantee

Telstra submitted that the CSG framework was in need of a review and that it has never successfully claimed CSG compensation from NBN Co.¹³⁷ The TIO also noted that the CSG can be complex to apply¹³⁸ and Optus submitted although there is some difficulty with the CSG's application, limited alternatives exist to compensate for lengthy connection delays.¹³⁹

Telstra submitted that CSG and commercial rebates serve different purposes and under this approach, RSPs would not be adequately compensated for costs incurred when NBN Co fails to meet its service standards.¹⁴⁰ Optus submitted that any amount to be recovered from NBN Co should be set equal to the difference of any approved CSG amount less the Connection rebate received for any delayed End User Connection¹⁴¹ and less than the Fault Rectification rebate received for any delayed End User Fault.¹⁴² Commpete submitted that NBN Co should only be able to offset its CSG payment amount if it has correctly satisfied its liability obligations under CSG framework.¹⁴³

NBN Co considered that the CSG is a retail-level remedy and that the RSP is the party with primary responsibility for the experience of the end-user and best placed to manage the overall experience.¹⁴⁴ NBN Co provided support for our draft FAD clause that would allow it to offset any liability to pay commercial rebates against any payments made under CSG compensation.¹⁴⁵ NBN Co further submitted some minor drafting changes to the wording of this clause to ensure consistency with its obligations in the WBA.

Priority assistance

Deaf Australia emphasised the importance of appropriate safeguards for vulnerable consumers that rely on continuous access to telecommunications services.¹⁴⁶ The TIO submitted PA timeframes should be mandated across all service types and closer alignment should exist between wholesale and retail PA obligations.¹⁴⁷ ACCAN agreed that NBN Co should support the delivery of its services in line with existing PA requirements and that 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.¹⁴⁸

NBN Co submitted the following points in regards to PA: that clause 3.1 of the draft FAD needed to be clarified to ensure that fixed wireless services are not permitted to be used to supply downstream PA services¹⁴⁹ and that clause 9 of the draft FAD should not require NBN Co to provide a report relating to PA service levels as this would identify Telstra's

¹³⁷ Telstra, *Submission to the draft decision*, pp. 6 & 9.

¹³⁸ TIO, *Submission to the draft decision*, p. 9.

¹³⁹ Optus, *Submission to the draft decision*, p. 9.

¹⁴⁰ Telstra, *Submission to the draft decision*, p. 10.

¹⁴¹ Optus, *Submission to the draft decision*, p. 9.

¹⁴² Optus, *Submission to the draft decision*, p. 12.

¹⁴³ Commpete, *Submission to the draft decision*, p. 5.

¹⁴⁴ NBN Co, *Submission to the draft decision*, p. 36.

¹⁴⁵ NBN Co, *Submission to the draft decision*, p. 41.

¹⁴⁶ Deaf Australia, *Submission to the draft decision*, p. 3.

¹⁴⁷ TIO, *Submission to the draft decision*, pp. 7-9.

¹⁴⁸ ACCAN, *Submission to the draft decision*, p. 7.

¹⁴⁹ NBN Co, *Submission to the draft decision*, p. 63.

performance as it is the only PA provider and could therefore present confidentiality issues.¹⁵⁰

Future Consumer Safeguards Event

Telstra supported the proposed regulatory recourse clause but argued it could go further and cover any alterations to the FAD or the implementation of a BROCC.¹⁵¹

NBN Co submitted the following points: it is uncertain what exactly the consumer safeguards events clause will capture as these terms have not been developed and therefore no market failure exists,¹⁵² no issues have been identified in the experience of end-user customers on the NBN network,¹⁵³ and this provision reverses the legislative hierarchy by making the terms of a regulatory instrument take precedence over the terms of an access agreement. Finally, NBN Co submitted that the clause only requires it to negotiate with access seekers but does not guarantee that an agreement can be reached.¹⁵⁴

ACCC views

We consider that the consumer safeguards framework that applies in the Australian telecommunications sector is broader than the subject of this inquiry, which is focused on NBN Co's wholesale service standards. We also note that future changes are likely to occur to the safeguards framework which have been foreshadowed in the Department's Consumer Safeguards Review Part B final report.¹⁵⁵

As discussed in our draft decision, the provision of telecommunications services to the end-user requires close coordination between both the wholesale and retail level of the supply chain. Close coordination and support is also required to ensure that an RSP can meet its retail safeguard obligations, especially when it relies on the wholesale input it would use to in turn provide a service to an end-user.

Following the publication of the final report in the Consumer Safeguards Review, Part B, we consider it appropriate that fresh discussions should occur between NBN Co and access seekers to ensure that wholesale arrangements can support future retail obligations.

We consider that NBN Co should make a clear commitment to access seekers that if changes are made to the consumer safeguards framework during the term of an access agreement, further discussions will take place to assess the need for wholesale terms to be updated to provide additional support required for RSPs to meet their safeguard obligations. If negotiations proceed, they should occur within a reasonable timeframe and in good faith.

We also consider that NBN Co should be able to offset, or reduce the amount of rebates payable up to the amount of CSG compensation. This would reduce any risk of an RSP claiming both CSG compensation and a commercial rebate. However, we consider this obligation should apply to CSG compensation actually paid by NBN Co (as opposed to a mere liability arising) to ensure the presence of the two mechanisms does not delay the payment of rebates for missed appointments, late connections or unresolved faults.

¹⁵⁰ NBN Co, *Submission to the draft decision*, p. 69.

¹⁵¹ Telstra, *Submission to the draft decision*, p. 4.

¹⁵² NBN Co, *Submission to the draft decision*, p. 45.

¹⁵³ NBN Co, *Submission to the draft decision*, p. 19.

¹⁵⁴ NBN Co, *Submission to the draft decision*, p. 46.

¹⁵⁵ See section 1.3 of this report for more detail on the Department's Consumer safeguards review.

8. Next steps

The NBN wholesale service standards inquiry will remain ongoing, but will be put on hold. The ACCC will resume the inquiry and decide whether to proceed to make a FAD once the emergency health situation has stabilised and more is known about the impacts on the industry.

The ACCC is not seeking further submissions to the inquiry at this stage but will continue to monitor developments closely. We will also provide regular updates to stakeholders and provide sufficient notice when considering resumption of the inquiry.

We note that NBN Co and RSPs have been in discussions about WBA4, which is due to come into effect once WBA3 expires in November this year. It is unclear how WBA4 negotiations between NBN Co and RSPs will be impacted by the current situation. The ACCC will monitor this situation closely and will maintain regular discussions with NBN Co and other industry parties through this process.

As foreshadowed by the Consumer Safeguards Review Part B final report, the ACCC will work closely with the ACMA and the Department regarding the overall framework for consumer safeguards and standards while the inquiry is on hold.