



# NBN Wholesale Service Standards Inquiry

Draft Decision

October 2019

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## Abbreviations and acronyms

4G	4 <sup>th</sup> generation mobile communications technology
ACCAN	The Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ACMA	Australian Communications and Media Authority
API	Application programming interface
AVC	Access virtual circuit
B2B	Business to Business
CCA	Competition and Consumer Act 2010 (Cth)
CCC	Competitive Carriers' Coalition
CSG	Customer Service Guarantee
CVC	Connectivity virtual circuit
DoCA	Department of Communications and the Arts
FAD	Final Access Determination
FTTB	Fibre to the building
FTTC	Fibre to the curb
FTTN	Fibre to the node
FW	Fixed wireless
HFC	Hybrid fibre coaxial
IAD	Interim Access Determination
LTIE	Long-term interests of end-users
MTM	Multi Technology Mix
NBN	National Broadband Network
NBN Co	National Broadband Network Company Limited
NSNW	New service never worked
PA	Priority Assistance
PIR	Peak information rate
RSP	Retail Service Provider

SAU	Special access undertaking
SFAA	Standard form access agreement
SQ	Service qualification
VHA	Vodafone Hutchinson Australia
WBA	Wholesale Broadband Agreement
WBA2	Wholesale Broadband Agreement 2
WBA3	Wholesale Broadband Agreement 3
WBA4	Wholesale Broadband Agreement 4

## 1. Executive summary

The Australian Competition and Consumer Commission (ACCC) has reached its draft decision in the National Broadband Network (NBN) wholesale service standards inquiry that regulated terms are likely to be required to improve end-user experiences on the NBN.

Our draft decision has been informed by a range of factors. We consider that NBN Co's existing service standard arrangements are not sufficiently robust. The absence of strong service level commitments supported by effective incentives have led to poor service performance outcomes and corresponding consumer harm.

We consider that effective service standards should not only provide commitments on overall or aggregate performance, but should focus on and take into account the performance of each individual service. Service standards also need to incorporate strong incentives to promote good customer experience for end-users.

We consider that regulated terms, in the form of a final access determination (FAD), are likely to be needed to put in place a framework for NBN Co's wholesale service standards that would promote the long-term interest of end-users (LTIE).

Further, we consider that NBN Co, as a wholesale monopoly, has a central role to play to ensure that Retail Service Providers (RSPs) can meet their obligations to their customers. This is particularly important in the context of increased supply chain complexity in the move from vertically integrated legacy networks to the NBN industry structure. The inquiry has revealed that NBN Co's current service standards do not necessarily align with the obligations that are already in place at the retail level.

We also recognise that given that NBN Co is entering into the final stages of its rollout, its focus must necessarily shift from connecting services to delivering on its service commitments.

As part of the inquiry, we have consulted with stakeholders extensively. Following our first discussion paper, we accepted an enforceable undertaking from NBN Co in which it committed to improve its service level commitments by introducing a number of changes, primarily to the rebate arrangements. While the enforceable undertaking was a critical first step towards addressing some of the concerns raised in the inquiry, we were of the view that there were still matters raised by stakeholders that were not fully addressed by the undertaking.

We subsequently released our second discussion paper, which sought views from stakeholders on a number of longer term issues including, for example, the broader principles underpinning the long term service standard framework, information and treatment of service speed and performance issues, arrangements at the wholesale level for the support of retail consumer safeguards, measurement and reporting of operational outcomes, and current arrangements regarding liability.

Our draft decision to make a FAD has been informed by the submissions we received in response to both of our discussion papers, as well as our engagement with individual stakeholders during the inquiry.

The key proposals of our draft decision on which we are seeking views are:

- Applying rebates for delayed connections and fault rectifications on a daily basis rather than on a one off basis – this will provide strong incentives for NBN Co to make new connections and rectify faults in a timely manner, even after the service level has been missed. This is also likely to reduce the incidence of aged orders and

faults. As result of these changes, the financial consequences to NBN Co of service level misses are expected to increase, which will further strengthen incentives faced by NBN Co for improved performances.

- Increasing the missed appointment rebate from \$25 to \$75 for each missed appointment – this will improve incentives on NBN Co to keep appointments and to take into account the considerable harm to end-users from NBN Co technicians failing to attend scheduled appointments.
- Requiring that NBN Co and RSPs work together to ensure that missed appointment rebates are passed through to consumers where these occur.
- Introducing rebates for underperforming service speeds – we propose rebates where fixed line services do not meet certain minimum speed requirements, where fixed line products are supplied over lines that cannot appropriately support those products, and for fixed wireless services that are experiencing congestion issues.
- Ensuring NBN Co does not confirm that a connection is complete, and begin charging for services, until it has conducted appropriate testing to ensure installation activities are successful.
- Enhanced service level reporting and availability of service information, including for fixed wireless services, and changes to measurement and exclusions.
- Regulatory recourse provisions to ensure future changes to consumer safeguards are appropriately reflected in wholesale terms.

We consider that a FAD incorporating these terms will promote the LTIE by promoting competition in the retail market for broadband services and encouraging economically efficient use of and investment in infrastructure. This is because these terms will set out clearer service level commitments, provide strong incentives on NBN Co to meet these commitments, and provide greater clarity about the redress available to RSPs where service levels are not met. We consider this is likely to have the effect of increasing certainty for RSPs and therefore promote competition in the retail broadband market. In addition, it will help improve the allocation of risk and responsibility in the supply chain between NBN Co and RSPs and thereby encourage NBN Co to invest in activities that reflect consumer preferences and make the best use of the NBN network.

We note that this draft decision comes at a time when NBN Co's Wholesale Broadband Agreement 3 (WBA3) is reaching the end of its term and NBN Co has commenced its negotiations with RSPs on WBA4. This transition provides opportunities for improvements to the NBN Co's wholesale terms that result in better outcomes for consumers.

We intend for this draft decision to contribute to industry discussions. However, we note that some of the draft FAD terms are stated at a high level and the draft FAD does not contain comprehensive non-price terms. NBN Co and RSPs will need to reach agreement on a number of commercial and technical matters. We expect industry to work together under the framework of the draft decision to ensure improved outcomes for consumers. While the WBA4 terms and conditions ultimately agreed to by the parties may differ from any regulatory terms made by the ACCC, these terms would operate as fall-back terms for WBA4, and will therefore set a baseline and framework for those negotiations.

The ACCC will work closely with the ACMA to monitor outcomes for consumers, noting its role in the regulation of retail markets. In particular, we expect RSPs to continue to take steps to ensure consumers' services benefit from the payment of wholesale rebates. We also acknowledge that there are likely to be circumstances where RSPs could take complementary action to improve consumer experience, where this reflects their responsibility in the supply chain, and that appropriate incentives should also be in place to

ensure these actions are taken. We will take this into account as we consider our final decision.

We seek stakeholder views on this draft decision, whether a FAD is required as well as the draft FAD terms, and will seek to reach a final decision and finalise the inquiry in December 2019.

## 2. Introduction

### 2.1. Background

#### 2.1.1. Commencement of the inquiry

In November 2017, the ACCC commenced the NBN Wholesale Service Standards Inquiry ('the inquiry') to determine whether wholesale service standards on the NBN are appropriate, and to consider whether regulation is necessary to improve consumer experiences.

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.

Prior to commencing the inquiry the ACCC's Communications Sector Market Study identified NBN service standards as a topic for further examination. RSPs had expressed dissatisfaction with the service standards that were in place and considered they did not set an appropriate baseline to ensure positive consumer experiences. The market study draft report published in October 2017 found:

*There are issues with current NBN service level standards, including risk allocation, ineffective coordination, poor risk management and limited compensation, which are likely to have flow on impacts for the consumer experience on the NBN if left unresolved.<sup>1</sup>*

NBN Co's Wholesale Broadband Agreement (WBA) sets out the full contractual terms on which NBN Co provides NBN services to its wholesale customers. For the purposes of this inquiry, we refer to 'NBN wholesale service standards' to mean NBN Co's service levels as set out in its WBA, including performance objectives and operational targets, as well as requirements for NBN Co to take corrective action and provide compensation or commercial rebates if service standards are not met. It also refers to other non-price aspects of NBN Co's wholesale arrangements that are likely to influence consumer experience.

The inquiry is considering whether the ACCC should take regulatory measures to promote the LTIE in the form of making a FAD.

#### 2.1.2. First discussion paper and enforceable undertaking

The ACCC published the first discussion paper on NBN wholesale service standards in December 2017. The discussion paper outlined the key issues for the inquiry and sought input on whether the ACCC should make interim regulated terms. The ACCC received 12 written submissions to the first discussion paper. Public versions of these submissions are available on the ACCC website.<sup>2</sup>

Through the consultation process, we identified a number of changes to NBN Co's wholesale service level commitments that we considered should be implemented immediately to improve consumer experiences. The ACCC proposed to make an interim access determination (IAD) to implement regulatory measures on the NBN on an interim basis while the inquiry was ongoing and longer-term measures were considered. NBN Co

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<sup>1</sup> Australian Competition and Consumer Commission (ACCC), *Communications sector market study: Draft report*, October 2017, p. 79.

<sup>2</sup> ACCC, *NBN wholesale service standards inquiry: Discussion paper & submissions*, 18 December 2017.

subsequently offered to commit to voluntary measures in the form of an enforceable undertaking.

The ACCC accepted an enforceable undertaking from NBN Co in September 2018. Consistent with the enforceable undertaking NBN Co updated its WBA by offering a number of service level improvements to access seekers. The service level improvements included:

- the payment of rebates for every late connection or fault rectification (not just those below its 90 per cent performance objective threshold)
- a new \$25 rebate for missed NBN Co appointments
- simplification of the process and conditions for claiming rebates, including that NBN Co will pay rebates automatically, rather than requiring RSPs to submit rebate claims, and
- a requirement that RSPs pass on a fair value benefit from rebates to end-users.

The undertaking also included a range of reporting and information commitments, particularly in relation to fixed wireless services.<sup>3</sup>

Most RSPs have signed up to the service level improvements as per the changes set out in the enforceable undertaking.

### **2.1.3. Second discussion paper and information request**

The ACCC published a second discussion paper in December 2018 seeking stakeholder views on a number of key longer term issues raised in the course of the inquiry that were not addressed within the enforceable undertaking, including:

- aspects of the rebate framework
- information regarding speed and performance issues
- wholesale support for retail consumer safeguards and regulatory obligations targeted at the retail level
- information and reporting of operational outcomes
- matters relating to liability and third party claims against NBN Co.<sup>4</sup>

The ACCC received 9 written submissions to the second discussion paper. Public versions of these submissions are also available on the ACCC website.<sup>5</sup>

We have met with key stakeholders to the inquiry to discuss their submissions. We also received confidential data from NBN Co about its performance against key WBA service levels for the period April 2018 to June 2019.

### **2.1.4. WBA4 negotiations**

NBN Co is required under its Special Access Undertaking (SAU) to maintain a standard form of access agreement (SFAA) (i.e. the WBA published on its website). The SAU also states that the expiry date for the SFAA must be no later than two years after it commences, although the expiry date may be extended by agreement of the parties.<sup>6</sup>

The current version of NBN Co's WBA (WBA3) was finalised by NBN Co in November 2017 soon after the wholesale service standards inquiry was announced. NBN Co recently

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<sup>3</sup> ACCC, *NBN wholesale service standards inquiry: NBN enforceable undertaking*, 11 September 2018.

<sup>4</sup> ACCC, *NBN wholesale service standards inquiry enters next phase*, 7 December 2018.

<sup>5</sup> ACCC, *NBN wholesale service standards inquiry: Second discussion paper & submissions*, 7 December 2018.

<sup>6</sup> NBN Co, *NBN Co Special Access Undertaking (SAU)*, varied on 18 November 2013, p. 57; SAU, cl 6, 1B.2.

extended the term of WBA3 to the end of November 2020 to allow for WBA4 negotiations to take place.

Under the telecommunications access regime in Part XIC of the *Competition and Consumer Act 2010* (CCA), NBN Co must supply NBN services consistent with ACCC regulated terms and conditions to the extent that they are not agreed through commercial negotiation.<sup>7</sup> Regulated terms and conditions of access determined by the ACCC will therefore operate as a fall-back position for NBN Co and RSP discussions for WBA4.

### **2.1.5. ACMA instruments and Consumer safeguards review**

#### *ACMA instruments on consumer information and service continuity*

In December 2017, the Minister for Communications directed the Australian Communications and Media Authority (ACMA) to make instruments in order to improve consumer experiences with services supplied using the NBN.

The ACMA undertook a consultation in the first half of 2018, and subsequently made a number of new rules to improve the consumer experience when migrating to the NBN that:

- specify the minimum information that RSPs must provide to consumers about their services before they sign up for a service
- specify minimum standards for RSPs' complaints-handling processes and a requirement for RSPs to report their complaint numbers to the ACMA so that trends can be monitored
- require RSPs to 'line test' new services on the NBN to ensure lines are working and faults are identified early
- enable consumers to be reconnected to legacy network services, or be provided with an interim service, if that fall-back is needed.<sup>8</sup>

These rules are set out in three ACMA instruments that became fully operative in October 2018 (referred to in this paper as the ACMA rules).<sup>9</sup> The ACMA rules primarily target RSP conduct, but also require upstream entities (including NBN Co where relevant) to provide reasonable assistance to RSPs carrying out their obligations under the ACMA rules.<sup>10</sup> Compliance with rules helping consumers moving to the NBN is a key area of focus in the ACMA's Compliance Priorities for 2019-20.<sup>11</sup>

#### *Consumer Safeguards Review*

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. The Department of Communications and the Arts (DoCA) is conducting the Review in three parts: Part A consumer redress and complaints handling, Part B reliability of telecommunications services, and Part C choice and fairness in the retail relationship between the customer and their provider.

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<sup>7</sup> ACCC, *ACCC inquiry into NBN wholesale service standards: Discussion paper*, December 2017, pp. 15–18 ('First Discussion Paper').

<sup>8</sup> ACMA, *Submission to the second discussion paper*, p. 2.

<sup>9</sup> Telecommunications (NBN Consumer Information) Industry Standard 2018, the Telecommunications (NBN Continuity of Service) Industry Standard 2018 and the Telecommunications Service Provider (NBN Service Migration) Determination 2018.

<sup>10</sup> ACMA, *Submission to the second discussion paper*, pp. 2–3.

<sup>11</sup> ACMA, *ACMA Compliance Priorities 2019–20*, 9 April 2019.

Part B is relevant to the ACCC's inquiry, given its focus on improvements to existing reliability measures and outcomes for consumers, including safeguards for:

- mandatory rules with maximum timeframes for connections and fault repairs
- requiring RSPs to offer alternative services if the maximum timeframes are not met, and
- publication of reliability metrics by network operators.<sup>12</sup>

## 2.2. Legislative framework

Part XIC of the CCA sets out the means by which a service can be declared and when declared, the means by which the terms and conditions of access to a declared service can be specified.

Relevant to this inquiry, the NBN access service was declared when the current SAU was accepted by the ACCC and came into operation in December 2013.<sup>13</sup> Additionally, NBN Co has published a SFAA (its Wholesale Broadband Agreement, WBA) which has the effect of declaring the services to which it relates.<sup>14</sup>

The ACCC may make an access determination under Part XIC with respect to declared NBN services.

An access determination may, among other things:

- specify terms and conditions of access to the NBN declared service
- impose other requirements on NBN Co and specify the terms and conditions on which it must comply with those requirements, and
- deal with any other matter relating to access to the NBN declared service.<sup>15</sup>

The ACCC can only make an access determination if it has held a public inquiry about a proposal to make an access determination under Part 25 of the *Telecommunications Act 1997*, and has prepared a report on the inquiry.<sup>16</sup> The ACCC announced it had commenced this public inquiry into NBN wholesale service standards on 2 November 2017.<sup>17</sup>

In making an access determination, the ACCC is required to take into account a number of matters set out in sub-section 152BCA(1) of the CCA. These are:

- whether the access determination will promote the LTIE
- the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- the interests of all persons who have rights to use the declared service
- the direct costs of providing access to the declared service
- the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

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<sup>12</sup> DoCA, *Consumer Safeguards Review consultation – Part B: Reliability of services*.

<sup>13</sup> NBN Co, *Special Access Undertaking (SAU)*, 13 December 2013.

<sup>14</sup> NBN Co, *Wholesale Broadband Agreement (WBA)*. The WBA published on NBN Co's website is a standard form of access agreement under s 152AL(8D) of the CCA.

<sup>15</sup> Australian Government, *Competition and Consumer Act 2010* (Cth), s 152BC(3) ('CCA').

<sup>16</sup> CCA s 152BCH(1)(a)–(b).

<sup>17</sup> ACCC, *ACCC inquiry into NBN wholesale service standards*, 2 November 2017.

- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.<sup>18</sup>

The ACCC may also take into account any other matters that it thinks are relevant.<sup>19</sup>

### 2.3. Submissions to this draft decision

This draft decision provides our assessment of the matters raised in the course of our inquiry into NBN wholesale service standards. The following chapters provide:

- discussion of the key topics that have been raised in the inquiry
- the principles that we consider should apply to the formulation of wholesale terms that cover those topics
- an explanation of the relevant terms that have been included within the draft FAD instrument, and
- an assessment of the draft FAD terms against the regulatory criteria the ACCC must have regard to when making a FAD.

We encourage stakeholders to make submissions on these matters. In particular, you may wish to respond to the following questions:

1. Do you agree with the specific principles we consider should be used to guide the formulation of wholesale terms?
2. Do you agree with the terms in the draft FAD instrument and application of the regulatory criteria to these terms?

We also note that several stakeholders have raised NBN Co's WBA4 negotiations with RSPs and in some cases have suggested that the ACCC provide oversight of this process.

3. How do you consider the ACCC should proceed with the inquiry in the context of WBA4 negotiations (e.g. timing for the introduction and expiry of regulated terms)? Would you support the ACCC hosting an industry forum on service standards?

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The confidential version of the submission should clearly identify the commercial-in-confidence material by bookending the confidential material with an appropriate symbol of 'c-i-c'. The public version should ensure that all confidential material has been removed and replaced with 'c-i-c'.

The ACCC has prepared guidelines for parties wishing to submit confidential information to communications inquiries. The *ACCC-AER information policy: the collection, use and disclosure information* sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC's website.<sup>20</sup>

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<sup>18</sup> CCA s 152BCA(1); s 152BDAA(1).

<sup>19</sup> CCA s 152BCA(3); s 152BDAA(3).

<sup>20</sup> ACCC, *ACCC/AER Information Policy*, June 2014.

The ACCC prefers to receive submissions in electronic form, in either PDF or Microsoft Word format which allows the submission text to be searched. Submitters should ensure that redacted information is not searchable or otherwise able to be disclosed. Please email submissions by **5pm Friday, 1 November 2019** to [nbn@acc.gov.au](mailto:nbn@acc.gov.au) and copy to:

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## 2.4. Structure of this report

This report on the ACCC's draft determination is set out as follows:

- **Chapter 3** sets out the general approach to assessing NBN service levels that we have taken in the inquiry.
- **Chapter 4** discusses each of the substantive issues that have been raised in the course of the inquiry, including stakeholder submissions, the ACCC's views and the principles to guide the formulation of service level terms, as well as how the matter has been included in the draft FAD instrument.
- **Chapter 5** includes the ACCC's assessment of the draft FAD instrument against the regulatory criteria in Part XIC of the CCA.

### 3. General ACCC approach to service standards

This chapter sets out the ACCC's general approach to considering what the appropriate NBN service standard framework should be. In doing so, it focuses on clear service level commitments, appropriate allocation of risk and responsibility, effective incentives and improved end-user outcomes. We consider that our approach reflects the relevant matters set out in s 152BCA of the CCA, which the ACCC is required to take into account when making a FAD. This section functions as an overarching framework and context for our consideration of specific issues, principles and draft FAD terms in Chapter 4.

NBN Co's service standards framework is set out within its wholesale agreements, and includes service level terms, performance objectives and operational targets that set expectations about how NBN Co will supply wholesale services. This includes timeframes for making connections, repairing faults and attending appointments, as well as requirements for NBN Co to take corrective action and provide compensation or commercial rebates if certain service levels are not met.

NBN wholesale products are a key input to downstream markets and form the basis on which RSPs are able to provide broadband services to consumers. NBN Co's service standards determine large aspects of the quality of services delivered to end-users in retail markets. In many cases, NBN Co's actual operational performance has a direct impact on end-user experience, particularly in cases of delayed connections, unresolved faults, missed appointments and underperforming service speeds. The roles and responsibilities of NBN Co and RSPs, as set out in service standards, also play a key role in the successful delivery of services to end-users. Where service standards are not appropriate, end-users may experience significant harm, including lack of access to essential services and applications, loss of productivity, direct costs of alternative services, time spent trying to resolve issues, frustration and inconvenience.

In this inquiry we have considered whether NBN Co's service standards are appropriate and whether regulation is necessary to improve consumer experience in the context of the supply chain for the delivery of retail NBN services to consumers. That is, we have focused on the role that NBN Co and RSPs play in the provision of retail broadband services.

A key theme that has developed since this inquiry began is the apparent gap between the retail obligations on RSPs and NBN Co's commitments under its wholesale terms. We note that obligations on RSPs have been progressively tightened and significant emphasis has been given to retail service quality:

- RSPs no longer advertise NBN services using 'up to' speed claims on the basis of the underlying wholesale speed tier, and instead advertise services based on typical busy period speeds.<sup>21</sup>
- ACMA rules require RSPs to conduct post-migration testing to determine whether a consumer's NBN service is working, provide interim services if connections are unsuccessful, and offer remedies if Fibre to the node (FTTN) or Fibre to the building (FTTB) services are unable to support the service speed specified in the plan sold to the consumer.<sup>22</sup>

Some RSPs now also provide 'failover' modems that provide broadband connectivity to customers using 4G mobile networks while they wait for their connections to be activated or where outages occur.

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<sup>21</sup> ACCC, *Broadband speed claims: Industry guidance*, 23 May 2019.

<sup>22</sup> ACMA, *NBN rules: Consumer information & service continuity*.

In addition to providing an enforceable undertaking to the ACCC to improve the WBA3 service standards, NBN Co has also taken significant actions to improve NBN service quality since the inquiry was announced:

- NBN Co has undertaken wide ranging consumer experience initiatives focusing on how concerns across the end-user journey are managed between NBN Co, RSPs and NBN delivery partners. These initiatives have resulted in improvements to reduce the number of ‘aged’ orders and faults, stability and reliability improvements, and reduced connection and resolution times.<sup>23</sup>
- NBN Co has prioritised consumer experience improvements, including temporarily pausing new activations on the HFC (Hybrid Fibre Coaxial) network while it conducted network remediation to resolve end-user experience issues.<sup>24</sup>
- NBN Co has committed to invest an additional \$800 million into fixed wireless network capacity upgrades to remediate cells experiencing network congestion.<sup>25</sup> NBN Co now provides weekly reports to RSPs on fixed wireless congestion and monthly reports on its customer experience dashboard in accordance with the enforceable undertaking.<sup>26</sup>

While these developments have resulted in better overall consumer experiences, we consider that a number of issues raised in the inquiry indicate that NBN Co’s service standards do not always support positive end-user experiences. These matters are described in detail in Chapter 4.

Our general approach to assessing the appropriateness of NBN service standards includes considering the following questions, as well as an assessment against the matters set out in s 152BCA:

- Do the service standards provide clear commitments on a per-service basis?
- Do they appropriately allocate risk and responsibility between NBN Co and RSPs?
- Do they provide effective incentives for NBN Co to perform to meet its service commitments and improve performance?
- Would regulated service levels result in improved customer outcomes for end-users?

### 3.1. Clear service level commitments

We consider that NBN Co’s service standards should provide strong service commitments on a per-service basis. Service commitments should be clear and specific, and apply to each individual service rather than only as aggregate commitments that relate to NBN Co’s overall service performance (i.e. that a particular service level will be met ‘x’ per cent of the time). Commitments should be clear with respect to all aspects of the wholesale product that can have a significant effect on consumer experience, including missed appointments, failed connections, delayed connections, unresolved faults and underperforming service speeds.

We note that NBN Co’s performance objectives were defined exclusively on an aggregate basis prior to the enforceable undertaking, which introduced per-service rebates for missed connection, fault rectification and appointment service levels. We consider that aggregate performance objectives limit incentives to drive improvements beyond the performance objective, and can hide pockets of very poor performance where performance is averaged

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<sup>23</sup> NBN Co, *Submission to the first discussion paper*, pp. 74–77.

<sup>24</sup> *ibid.*, p. 77.

<sup>25</sup> See NBN Co, *Corporate Plan 2019–2022*, p. 65.

<sup>26</sup> See NBN Co, *Monthly progress reports*

out. Further, aggregate performance objectives may be less suitable where service level misses occur in non-uniform ways and are difficult for RSPs to plan for or anticipate.

More broadly, we consider that a per-service commitment approach is appropriate because wholesale performance has a direct impact on the end-user experience. Per-service commitments ensure wholesale terms are ultimately focused on supporting RSPs to deliver retail broadband services to end-users, and therefore end-user outcomes, including appropriate remedies where things go wrong. This can also provide stronger support to RSPs in meeting their retail obligations.

Further, there are a number of key service areas where NBN Co does not make clear commitments in its WBA, including service speed and delivery of service information. These gaps in NBN Co's service standards cause issues for downstream markets, including providing insufficient support for the delivery of retail broadband services and contributing to poor communication with end-users. Strong service commitments should be introduced for service speed and service information to direct NBN Co to focus on improving per-service outcomes, and support RSPs to meet their retail obligations and provide services that meet end-user needs.

As part of our assessment framework, we consider that clear service level commitments on a per-service basis for NBN Co would better support RSPs who have the right to use the declared service and promote the LTIE by reducing consumer harm and providing added certainty for industry around NBN Co's service level obligations.

### 3.2. Appropriate allocation of risk and responsibility

NBN Co's service standards should appropriately allocate risk and responsibility between NBN Co and RSPs to promote good end-user experiences.

We broadly agree with the principle proposed by NBN Co that the party that can best manage, or has responsibility for, the relevant portion of the supply chain should be accountable for it.<sup>27</sup> This is generally consistent with the approach we have taken in the inquiry. However in respect of specific issues, the optimal allocation of responsibility will not always be obvious or clear. Differing views about the responsible party in respect of some issues can exacerbate issues experienced by end-users.

Ensuring the appropriate allocation of risk and responsibility is relevant to a range of service standards, including measurement of service levels, service level rebates, underperforming service speeds, availability of service information, and liability and indemnity.

In practice, NBN Co's service standards should set out clear responsibilities for NBN Co to deliver on service commitments and be accountable for resolving performance issues for which it is responsible. RSPs should have access to service specific operational information and processes that facilitate their management of NBN services for their customers, in line with their responsibilities and obligations.

As part of our assessment framework, we consider that appropriate allocation of risk and responsibility would promote the LTIE, support the legitimate business interests of NBN Co as well as RSPs who have a right to access NBN services, and assists the economically efficient operation of the network.

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<sup>27</sup> NBN Co, *Submission to the second discussion paper*, p. 10.

### 3.3. Effective incentives

NBN Co's service standards should provide effective incentives for NBN Co to meet its service commitments and improve on its performance.

We consider the most appropriate mechanism for applying incentives in the context of NBN Co's supply of wholesale products is through service level rebates, which apply where service commitments are not met. Rebates act as an incentive by providing a tangible consequence for each service level miss, which can be minimised by performing well against the service levels. Fundamentally, the effectiveness of the incentive depends on the size and structure of the rebate. Rebates can also be designed to provide incentives with respect to different performance metrics, such as meeting the initial service level or minimising the duration of the service level miss.

Incentives may be felt at the margins and affect NBN Co's decisions in individual cases about what resources to deploy or whether to prioritise certain work. More broadly, incentives may also have an effect in the aggregate by encouraging NBN Co to pursue broader process improvements in order to improve its performance.

Combined with clear service level commitments on a per-service basis, rebates should be set to provide incentives for NBN Co to improve its service level performance on a per-service basis and beyond its 90 per cent performance objective.

The need for effective incentives to meet service level commitments has informed our consideration of rebates as part of the inquiry, particularly in relation to missed appointments, delayed connections, unresolved faults and underperforming service speeds.

We note that the NBN has reached a scale where even incremental improvements can have a positive effect for significant numbers of end-users. NBN Co's service level performance data shows that improvements to service level performance that are relatively small in percentage terms would still impact a significant number of end-users. For example, a 1 per cent uplift in connection and fault service level performance over the 12 month period to June 2019 would have benefited [c-i-c] [REDACTED] [c-i-c] end-users per month. This highlights the potential benefits from NBN Co's improved service level performance that can be achieved by improving NBN Co's incentives to meet its service levels.

As part of our assessment framework, we consider that effective incentives on NBN Co would promote the LTIE by providing increased financial incentives on NBN Co to meet its service level commitments. We have also considered the direct costs of these service level improvements for NBN Co.

### 3.4. Improved end-user outcomes

Service standards that incorporate clear service level commitments, appropriately allocate risk and responsibility, and provide effective incentives should have the overall effect of improving outcomes for end-users, primarily by driving improvements to NBN Co's service level performance. Service standards that ensure that RSPs have access to the service specific operational information and processes to better manage NBN services for their customers will also have a direct impact on end-user experience.

However, where poor end-user experiences occur due to service commitments not being met, service standards should promote meaningful recourse for end-users in the context of the supply chain. Improvements to service commitments and rebates will allow RSPs to better plan for, and ameliorate, poor end-user experience caused at the wholesale level. In particular, we consider that service level rebates should support RSPs to deliver services

that meet end-user expectations, and will improve outcomes for end-users where they are directed to actions such as:

- improved customer service and support
- monetary remedies such as compensation, bill credits and goodwill payments
- backup services such as 4G backup modems and interim services, and
- other remedies such as no-fee contract exit or service downgrades.

Overall, we consider that rebate structures should retain incentives for RSPs and NBN Co to work together to improve consumer experience.

However, we also acknowledge that there may be circumstances where RSPs could take complementary action to improve consumer experience, where this reflects their responsibility in the supply chain. We also note that poor end-user experiences can be caused by matters that are more appropriately resolved at the RSP or industry level, and that RSPs should also face incentives to improve consumer outcomes.

As part of our assessment framework, we consider that improved end-user outcomes would promote the LTIE and the interests of all persons who have the right to use the declared service.

#### *'Pass through' to end-users*

As part of the enforceable undertaking, we accepted NBN Co's proposal to introduce 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 any rebate paid to RSPs (the 'pass through' requirement). We considered that this requirement was reasonable to include within interim measures to ensure that the changes to rebates were not simply a transfer of value from NBN Co to RSPs, but that the benefits were realised by end-users.

The pass through requirement in the enforceable undertaking was a focus of RSP submissions. RSPs, in general, were not supportive of the pass through provision in the enforceable undertaking for a range of reasons:

- they cited the difficulty in working out what the 'fair value benefit' should be, particularly given that some RSPs already provide remedies to end-users
- they noted the lack of timely and accurate information from NBN Co to RSPs to identify which end-users the rebate should apply, and
- RSPs' need for flexibility in providing tailored remedies to affected end-users.<sup>28</sup>

NBN Co on the other hand 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 rebates.<sup>29</sup>

We have not included a general pass through requirement for rebates within the draft FAD instrument. However, we have included a pass through requirement for missed appointment rebates, which we consider are distinct from the other rebates. Missed appointment rebates are discussed further in Section 4.1.4.

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<sup>28</sup> 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.

<sup>29</sup> NBN Co, *Submission to the second discussion paper*, p. 16.

Our views are informed by submissions and the implementation of the pass through requirement in the enforceable undertaking. While we acknowledge that pass through requirements can reduce the risk of consumers not being compensated by their RSPs where they have suffered detriment, on balance we do not consider it is appropriate to include in the draft FAD for most rebates. In particular, we consider that regulated pass through requirements have a number of potential 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 consider that the draft FAD should include a pass through requirement for missed appointments. We note that missed appointments primarily affect RSPs' customers and that RSPs have limited capacity to offer remedies where the missed appointment is due to NBN Co. In these circumstances, we consider 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.

Broadly, we consider that more robust wholesale rebate terms reinforce expectations that RSPs will provide end-users with meaningful remedies where end-user expectations are not met. We note that the retail market is likely to be subject to direct regulation if RSPs fail to provide appropriate remedies to consumers. We will work closely with the ACMA in its role in the regulation of retail telecommunications markets to monitor outcomes for consumers.

## 4. Issues raised in the inquiry

The ACCC's draft decision in the NBN wholesale service standards inquiry is that regulated terms are likely to be required to improve end-user experiences on the NBN. We consider that regulated terms, in the form of a FAD, are likely to be needed to establish a framework for service standards on the NBN that would promote the LTIE.

This section discusses our draft decision with respect to the issues that have been raised as part of the inquiry. In particular, the draft FAD terms address service level commitments and rebates, service level measurement and exclusions, service information and consumer safeguards. The draft FAD does not include specific terms on liability and indemnity.

We note that the draft FAD terms do not specify a start date. We welcome views from stakeholders about the proposed term of the FAD.

### 4.1. Service level commitments and rebates

This section provides ACCC views on the service level commitments and rebates for the supply of NBN Co's ethernet product. These relate to:

- ensuring new connections for wholesale services are successfully completed
- commitments in relation to connection and fault timeframes, and recourse available where these commitments are not met
- commitments and rebates for missed appointments, and
- the speed and performance of NBN Co's wholesale services.

When considering these matters, an important issue that we have focused on is the potential impact of NBN Co's failure to meet its service level commitments on the downstream supply chain, particularly on end-users. When NBN Co fails to connect consumers successfully and on time, resolve faults promptly, attend scheduled appointments or deliver services that perform as expected, this may cause significant consumer harm. This harm may be caused by lost access to essential services and applications, reduced or lost productivity, costs incurred due to the need to make alternative arrangements, or time spent trying to resolve issues. End-users may also experience significant frustration and inconvenience, particularly where delays or issues are compounded by poor communication and lack of information.

#### 4.1.1. Failed connections

##### 4.1.1.1. *Background*

A failed connection refers to an RSP order for the connection of a new service that NBN Co notifies as being complete but does not function as required.

WBA3 does not include provisions that deal specifically with failed connections. It instead treats failed connections as service faults. This requires the RSPs to lodge a service fault with NBN Co in the event of a failed connection. However, we note that NBN Co's business processes include a special classification of fault, termed 'new service never worked' (NSNW), which may be applied to service faults lodged within the first 10 business days of service activation. NBN Co prioritises faults relating to new connections over other kinds of service faults.

ACMA rules require RSPs to:

- perform post-migration testing within one working day of becoming aware that the migration at the consumer's premises has been successful to determine whether the NBN service is operational (i.e. the service is working as is able to be used by the consumer)
- not charge consumers unless their NBN service is operational, and
- provide consumers with an interim service if their NBN service is not operational and cannot be provided to them within three working days, unless an NBN backup service is supplied (i.e. a 4G fail-over modem) or another arrangement is reached.<sup>30</sup>

The ACMA rules require NBN Co to not advise RSPs that migration at the customer's premises is complete until it has taken all reasonable steps to ensure that successful migration at the premises has occurred.<sup>31</sup>

#### **4.1.1.2. Submissions**

Submissions that focused on failed connection related issues increased during the course of the inquiry. These issues were highlighted as the ACMA finalised its NBN Service Migration determination and NBN Continuity of Service industry standard and NBN Co's categorisation of NSNW faults was raised in the inquiry.

##### *Submissions to the first discussion paper*

The first discussion paper did not raise the specific issue of failed connections separate to the broader category of faults. However, Vodafone Hutchison Australia (VHA) raised failed connections in its submission, stating that, in its experience, NBN contractors do not always ensure end-user connections are working and that NBN should be required to ensure a service is active when connecting premises to its network.<sup>32</sup>

Other submissions referenced the ACMA's development of new rules requiring RSPs to 'line test' new services to ensure lines are working and faults are identified early.<sup>33</sup> RSP submissions emphasised the need for wholesale service standards to be consistent with and underpin any new retail obligations.<sup>34</sup>

##### *Submissions to the second discussion paper*

In the second discussion paper we raised connection issues in the context of how operational outcomes are measured and reported by NBN Co. In particular we noted the class of failed connections termed 'new service never worked' (NSNW) and asked whether these connections were a concern for stakeholders, and if so, how they should be dealt with.<sup>35</sup>

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<sup>30</sup> Telecommunications Service Provider (NBN Service Migration) Determination 2018; Telecommunications (NBN Continuity of Service) Industry Standard 2018.

<sup>31</sup> Telecommunications (NBN Continuity of Service) Industry Standard 2018, s 8.

<sup>32</sup> VHA, *Submission to the first discussion paper*, p. 4.

<sup>33</sup> ACMA, *Submission to the first discussion paper*, p. 3; NSW Business Chamber, *Submission to the first discussion paper*, p. 8.

<sup>34</sup> Telstra, *Submission to the first discussion paper*, p. 3; VHA, *Submission to the first discussion paper*, p. 3; Optus, *Submission to the first discussion paper*, p. 10.

<sup>35</sup> ACCC, *Inquiry into NBN wholesale service standards: Second discussion paper*, December 2018, p. 19 ('Second discussion paper').

Telstra, Vocus, Optus, VHA and the Australian Communications Consumer Action Network (ACCAN) each expressed concerns about either the categorisation or treatment of NSNW connections.

ACCAN raised concerns that the NSNW categorisation could contribute to delays, confusion and frustration experienced by end-users, who are not in a position to understand why their service has not been connected as expected, only to be told that records show the installation has been completed.<sup>36</sup> The ACMA submitted that NSNW faults should not be counted as a successful connection.<sup>37</sup>

Optus and Vocus submitted that NBN Co should not be able to commence charging where there is a NSNW fault.<sup>38</sup> Optus submitted that NBN Co should pay some form of rebate to RSPs where they incur costs due to NSNW faults, and that an enhanced service level commitment should apply.<sup>39</sup>

Telstra submitted that concerns about the NSNW categorisation led to the development of data for detection when Fibre to the curb (FTTC) was introduced, which has limited the scope for NSNW connections on FTTC.<sup>40</sup> VHA also raised the connection processes that currently apply to FTTC and submitted that NBN Co should check for data flows before confirming the service is active for all network technologies.<sup>41</sup> This approach was also supported by Vocus in its submission.<sup>42</sup>

In contrast, NBN Co submitted that it does not consider the NSNW categorisation as an area of concern for stakeholders. It noted that the NSNW classification was introduced to ensure that these services are treated with higher priority than other fault types to ensure they are resolved as quickly as possible.<sup>43</sup>

In response to its obligations under the ACMA rules, NBN submitted that it takes all reasonable steps to ensure that services are connected before a connection order is completed. However, NBN Co also submitted that it is continuing to enhance its systems and connection processes in response to the reasonable assistance obligation in the new ACMA rules.<sup>44</sup>

#### 4.1.1.3. ACCC views

NSNW connections represent a small but significant proportion of total connections. In the year to the end of June 2019, there were [c-i-c] [c-i-c] NSNW connections, making up an average of [c-i-c] [c-i-c] per cent of connections. However, we note that NSNW faults are more prevalent on some networks than others. For example, [c-i-c]

[c-i-c]  
[c-i-c]

While some of this variance may be attributed to the technical characteristics of the underlying network technology, a more important factor appears to be NBN Co's processes for confirming that the connection is successful before confirming it as complete with the

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<sup>36</sup> ACCAN, *Submission to the second discussion paper*, p. 9.

<sup>37</sup> ACMA, *Submission to the second discussion paper*, p. 11.

<sup>38</sup> Vocus, *Submission to the second discussion paper*, p. 4; Optus, *Submission to the second discussion paper*, p. 19.

<sup>39</sup> *ibid.*, p. 19, 23.

<sup>40</sup> Telstra, *Submission to the second discussion paper*, p. 23.

<sup>41</sup> VHA, *Submission to the second discussion paper*, p. 3.

<sup>42</sup> Vocus, *Submission to the second discussion paper*, p. 4.

<sup>43</sup> NBN Co, *Submission to the second discussion paper*, p. 34.

<sup>44</sup> *ibid.*

RSP. Most notably, the processes used for confirming successful FTTC connections demonstrates that [c-i-c]

[c-i-c]

We consider that there is scope to improve on connection processes across all network technologies to reduce the number of failed connections, and that this should continue to be a priority for NBN Co and RSPs. In line with our general approach set out in Section 3, wholesale commitments should include clear obligations about what constitutes a successful connection. We consider that it is fundamental to NBN Co's role as wholesale provider that it take responsibility for ensuring the services it provides work as expected. Wholesale commitments that ensure connections are successfully made is particularly important considering the poor end-user experience that can occur when connections fail.

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

#### **Principle**

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

#### **4.1.1.4. Draft FAD terms**

The draft FAD terms state that NBN Co may 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). These terms extend the approach that currently applies to FTTC connections to all network technologies.

We consider that these terms align with NBN Co and RSP responsibilities under the ACMA rules and are a proportionate response to the risk of failed connections, and the associated harm to RSPs and end-users that can result in the event of a failed connection. We seek stakeholder views on whether these terms would appropriately reflect NBN Co and RSP roles in ensuring connections are successful.

#### **4.1.2. Delayed connections**

##### **4.1.2.1. Background**

Under the current WBA, NBN Co classifies each premises by 'service class', which reflects the network type and status of the physical infrastructure applicable to the premises. NBN Co specifies a service level timeframe (in number of business days) for each service class. However, connection rebates are not available for standard connections where NBN Co can remotely provision services and the service level timeframe is one business day.<sup>45</sup> NBN Co aims to complete standard connections within these service level timeframes 90 per cent of the time each month (for all of NBN Co's customers).<sup>46</sup>

<sup>45</sup> See NBN Co, *WBA Ethernet Product Module, Service Levels Schedule*, section 1.

<sup>46</sup> Standard connection means the connection and activation of the access components in respect of a premises, excluding Accelerated and Priority Assistance connections.

As part of its enforceable undertaking, NBN Co committed to paying a one-off rebate of \$25 to RSPs for each missed connection service level.<sup>47</sup> This was an improvement to the previous rebate arrangements in the WBA, where the calculation of the rebate was based on the number of connections met when the service level fell below a 90 per cent performance threshold.

Separate to the WBA, RSPs face a number of other obligations in relation to connections in addition to the pass through requirement. The Consumer Service Guarantee (CSG) standard, which applies to some voice services delivered by RSPs, requires RSPs to provide interim services or compensation if the CSG timeframes for connections are not met.

We note that in certain circumstances RSPs may also be required to supply interim services or receive compensation under ACMA rules. Requirements on RSPs to provide back-up or alternative services if maximum connection timeframes are not met have also been proposed in the Consumer Safeguards Review (Part B).

#### **4.1.2.2. Submissions**

Submissions to the ACCC's first and second discussion papers indicate that stakeholders are broadly satisfied with the current service level timeframes for standard connections. However, stakeholder views differ on the appropriateness of the purpose, structure and quantum of connection rebates, and on how best to ensure NBN Co faces appropriate incentives to meet connection timeframes.

##### *Submissions to the first discussion paper*

RSPs' submissions to the first discussion paper highlighted the role of rebates in incentivising NBN Co to meet its service levels.<sup>48</sup> Telstra, Optus, VHA, the ACMA and the Competitive Carriers' Coalition (CCC) submitted that the one-off nature of rebates does not provide an incentive on NBN Co to address issues in a timely manner once the initial service level is missed.<sup>49</sup> RSPs also noted that service level rebates provide some compensation for the costs they incur when NBN Co misses its service levels, including the costs of managing end-user experience. ACCAN submitted that a one off rebate does not account for the length or extent of end-user issues.<sup>50</sup>

NBN Co submitted that the purpose of its connection rebate is to recognise the diminution in value of the service for which an RSP has paid.<sup>51</sup> Further, NBN Co submitted that it has obvious and strong incentives to improve its service performance, drawing from its economic context, regulatory framework and status as a government-owned enterprise.<sup>52</sup> NBN Co submitted that the current rebate structure is appropriate, as it faces incentives not to incur a rebate in the first instance and to resolve issues in a timely manner due to its other incentives. NBN Co noted that changing the rebate structure to incorporate time-based rebates would result in significant additional costs for NBN Co or require that the \$25 rebate amount be adjusted down.<sup>53</sup>

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<sup>47</sup> NBN Co, *Section 87B Undertaking*, 11 September 2018. Note the connection rebate applies to service classes 1, 2, 5, 8, 11, 12, 21, 22, 23, 31, 32 and 33.

<sup>48</sup> Telstra, *Submission to the first discussion paper*, p. 9; Optus, *Submission to the first discussion paper*, pp. 8 & 22–27; CCC, *Submission to the first discussion paper*, p. 1.

<sup>49</sup> Telstra, *Submission to the first discussion paper*, pp.11 & 19; Optus, *Submission to the first discussion paper*, pp. 25–26, 47; VHA, *Submission to the first discussion paper*, pp. 5–6; CCC, *Submission to the first discussion paper*, pp. 9–10; ACMA, *Submission to the first discussion paper*, p. 6.

<sup>50</sup> ACCAN, *Submission to the first discussion paper*, p. 8.

<sup>51</sup> NBN Co, *Submission to the first discussion paper*, pp. 53, 56.

<sup>52</sup> *ibid.*, pp. 19–32.

<sup>53</sup> *ibid.*, pp. 29, 65–66.



issues towards the payment of rebates.<sup>64</sup> NBN Co noted its expectation that the rebate framework will be an important part of WBA4 negotiations, as part of a wider conversation about overall service delivery arrangements. NBN Co submits [c-i-c] [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>65</sup> [c-i-c]

The second discussion paper sought views on whether connection rebates should also be available to standard connections where the service level is one business day (i.e. service classes 3, 6, 9, 13, 24 and 34). Telstra and Vocus submitted that connection rebates should apply to these premises.<sup>66</sup> Telstra noted that these premises do not have a legacy service to default to if the service level is not met<sup>67</sup> while ACCAN submitted that rebates should apply to all connections.<sup>68</sup>

Optus submitted that rebates for standard connections with a service level of one business day may be an issue for consideration once the NBN is completely rolled out, as it would prefer the focus to be on other service classes, where there may be issues relating to connections, service class misclassification, infrastructure shortfall or other matters leading to connection delays.<sup>69</sup> NBN Co submitted that standard connections where the service level is only one business day are already connected to the NBN network and only require a remote IT switch rather than physical changes, and NBN Co's performance for this service level is very high. NBN Co considers that this is not a material issue and the need for regulatory intervention has not been demonstrated.<sup>70</sup>

#### 4.1.2.3. ACCC views

We share concerns raised by stakeholders about the impacts of delayed connections on end-users, particularly in cases of lengthy delays and aged orders.

This view is informed by our consideration of NBN Co's service level performance data. NBN Co's service level performance for connections was [c-i-c] [REDACTED] [c-i-c] for the whole 12 month period to June 2019, exceeding its 90 per cent performance threshold. However, NBN Co demonstrated significant variability in performance from month to month [c-i-c] [REDACTED] [c-i-c].

Even when NBN Co meets or exceeds its 90 per cent performance threshold, a significant number of end-users are affected. On average, NBN Co missed its service level timeframes [c-i-c] [REDACTED] [c-i-c] times per month over the 12 month period to June 2019, ranging from [c-i-c] [REDACTED] [c-i-c] to [c-i-c] [REDACTED] [c-i-c] service level misses per month. Further, for cases where NBN Co missed its connection service level timeframes over the 12 month period to June 2019, the timeframe was missed by over 5 business days [c-i-c] [REDACTED] [c-i-c] of the time, over 10 business days [c-i-c] [REDACTED] [c-i-c] of the time, and over 20 business days [c-i-c] [REDACTED] [c-i-c] of the time.

In line with our general approach set out in Chapter 3, we consider that NBN Co should make commitments to meet its connection service level timeframes on a per-service basis. Further, NBN Co should face appropriate incentives to meet its service levels and connect

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<sup>64</sup> *ibid.*, pp. 7–8, 16.

<sup>65</sup> NBN Co, *Submission to the second discussion paper (confidential version)*, p. 19.

<sup>66</sup> Telstra, *Submission to the second discussion paper*, p. 10; Vocus, *Submission to the second discussion paper*, p. 2.

<sup>67</sup> Telstra, *Submission to the second discussion paper*, p. 10.

<sup>68</sup> ACCAN, *Submission to the second discussion paper*, p. 7.

<sup>69</sup> Optus, *Submission to the second discussion paper*, pp. 8–10.

<sup>70</sup> NBN Co, *Submission to the second discussion paper*, p. 17.

services in a timely manner, in the form of meaningful connection rebates. Connection rebates should also support RSPs to respond to service level misses in a way that meets end-user expectations.

We are not satisfied that a one-off rebate of \$25 for delayed connections provides adequate incentives for NBN Co to connect services in a timely manner or sufficient support to RSPs to ameliorate poor end-user experience. We consider that a daily rebate for delayed connections would provide a more effective incentive for NBN Co to connect services promptly and resolve connection delays, particularly to prevent cases of aged orders,<sup>71</sup> which represent the worst individual cases of end-user experience.

We acknowledge NBN Co's position regarding the cost impact of any rebate changes and the other concerns it has submitted. However, we consider that NBN Co should take clear responsibility for connecting customers in a timely manner, and that it is appropriate to provide incentives for this through the introduction of a daily rebate. We consider that the rebate must balance the need to strengthen the financial incentive on NBN Co by increasing its rebate liability, while avoiding being disproportionately or unnecessarily onerous.

NBN Co may be able to improve its service level performance by deploying additional resources to address connection delays or by changing how it determines whether an area is ready to connect, depending on the circumstances. In each case, this would reduce instances of long connection delays that could cause harm for consumers. This would also increase the certainty of connection timeframes so that end-user expectations can be appropriately managed. Further, we consider that a daily rebate would support RSPs to provide services to a standard that meets end-users' expectations, particularly by providing ongoing customer support and remedies such as compensation or 4G backup.

We acknowledge that NBN Co has demonstrated strong performance against its service levels for standard connections where the service level is one business day (i.e. service classes 3, 6, 9, 13, 24 and 34). However, we note that introducing connection rebates for these service classes will provide specific incentives for NBN Co to resolve any connection delays that may be impacting end-users. We also share concerns that these premises do not have an available legacy service if the service level is not met, so the harm to end-users of a delayed connection is likely to be significant.

#### **Principle**

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

#### **4.1.2.4. Draft FAD terms**

The draft FAD terms maintain NBN Co's existing service level timeframes for standard connections, accelerated connections and priority assistance (PA) connections as specified in the WBA. To implement a daily rebate, the draft FAD terms incorporate a connection rebate of \$13.50 per business day for each missed connection service level, up to a cap of 20 business days. This rebate applies to all missed service levels for standard connections, including standard connections where the service level is one business day (i.e. service classes 3, 6, 9, 13, 24 and 34), accelerated connections and PA connections.

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<sup>71</sup> Aged orders are orders that have not been connected after 28 days.

The draft FAD also includes terms adopted as part of NBN Co's enforceable undertaking. These terms:

- require NBN Co to pay rebates automatically, rather than requiring RSPs to submit claims, and
- exclude the condition that RSPs provide accurate connection forecasts in order to receive connection rebates.

#### *Rebate amount and structure*

In setting the appropriate amount for the daily rebate, we have sought to balance the introduction of significant financial incentives on NBN Co to connect services in a timely manner and resolve connection delays with the need for the cost impact of the rebate to be proportionate and appropriate.

We consider that the daily rebate for delayed connections should involve a meaningful financial consequence for each delayed connection, providing a clear incentive for NBN Co to promptly resolve connection delays and minimise harm to end-users. We acknowledge that strengthening the incentive effect of service level rebates is based on increasing the risk of higher costs for NBN Co, which it will have the opportunity to reduce through improvements in its operational performance. However, we consider that the rebate should not be disproportionate or unnecessarily onerous on NBN Co. We have carefully considered the potential cost impact on NBN Co based on the confidential data it provided to us.

We consider that a connection rebate of \$13.50 per business day for each missed connection service level, up to a cap of 20 business days, is appropriate. We have set the rebate amount with reference to 6 months of revenue for the 'typical' NBN residential offer (the \$45 a month bundle products)<sup>72</sup>, divided over the 20 business day rebate period. We consider that a potential rebate amount equal to 6 months of revenue for a typical service represents a meaningful financial incentive for NBN Co to resolve a delayed connection, while ensuring the cost impact is proportionate.

We note that we have proposed a lower daily rebate for delayed connections than that for unresolved faults, as many end-users will have legacy services in place and therefore experience less harm than where a service is not working due to a service fault. However, delayed connections can still have significant impacts on affected end-users, and as such, a meaningful financial incentive is appropriate. Further, we propose that the rebate amount be standard across different products to ensure consistent incentives to resolve delayed connections regardless of the speed tier purchased by the customer.

Figure 4.1 below illustrates what the rebate would look like in practice, compared to current levels of CSG compensation. The proposed rebate amount is similar to the current CSG compensation amounts (\$14.52 for residential customers per business day for the first five days, then escalating to \$48.40 per working day after that). However, we did not consider that imposing an escalating wholesale rebate was appropriate in this case when balancing the proportionality of the cost impact, considering that many end-users will have legacy services in place.

We acknowledge that implementing a daily rebate is a substantial change to the rebate framework, with material costs for NBN Co. It is pragmatic and reasonable to cap NBN Co's liability under the updated scheme. We consider that a cap of 20 business days is a reasonable threshold, allowing for a straightforward incentive to ensure timely connection

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<sup>72</sup> NBN Co, *WBA3 Discounts, Credits and Rebates List*. The 25Mbps, 50Mbps and fixed wireless plus bundles are priced at \$45 per month.

within 4 weeks of the service level timeframe. We note that around [c-i-c] [redacted] [c-i-c] of connection delays extend beyond this threshold. Beyond this period, issues with connections may need to be addressed through other processes.

**Figure 4.1: Comparison of WBA3 rebate, draft FAD rebate and CSG for delayed connections**

Service level missed by	WBA3 rebate	Draft FAD rebate	CSG (residential)	CSG (business)
1 day	\$25.00	\$13.50	\$14.52	\$24.20
1 week	\$25.00	\$67.50	\$72.60	\$121.00

We also note that the Consumer Safeguards Review (Part B) has proposed that wholesale providers would be responsible for reimbursing RSP costs of providing interim or alternative services in cases of delayed connections where they are at fault.<sup>73</sup>

Overall, we consider that the daily connection rebate proposed in the draft FAD terms achieves the objective of introducing significant financial incentives on NBN Co to resolve delayed connections, while balancing the need for the cost impact of the rebate to be proportionate and appropriate. We welcome views from stakeholders about the appropriateness of the proposed rebate structure, including the proposed cap, and quantum.

### 4.1.3. Unresolved faults

#### 4.1.3.1. Background

Under the current WBA, NBN Co specifies a service level timeframe between a trouble ticket being 'accepted'<sup>74</sup> by NBN Co and the fault being rectified for each location and network type. NBN Co aims to respond to or rectify end-user faults within these service level timeframes 90 per cent of the time (for all of NBN Co's customers, each month).<sup>75</sup>

As with delayed connections, NBN Co's enforceable undertaking included a commitment to pay a one-off rebate of \$25 to RSPs for each missed fault rectification service level, replacing the previous WBA term where it only paid rebates on the number of missed fault rectification service levels that fell below a 90 per cent performance threshold.

Some RSPs face additional obligations in relation to fault rectification for voice services. In particular, the CSG standard requires RSPs to provide interim services or compensation if the CSG timeframes for fault rectification for voice services are not met. These kinds of requirements were also proposed for broadband services in the Consumer Safeguards Review (Part B).

#### 4.1.3.2. Submissions

Submissions to the ACCC's discussion papers reflect stakeholders' broad satisfaction with the current service level timeframes for fault rectification, but incorporate diverse views on the appropriate purpose, structure and quantum for the corresponding rebates. Stakeholder views also differ on how to provide appropriate incentives for NBN Co to meet service level timeframes.

<sup>73</sup> DoCA, *Consumer Safeguards Review consultation – Part B: Reliability of services*, p. 7.

<sup>74</sup> This is a manual process in which NBN Co is required to evaluate and then manually accept the trouble ticket.

<sup>75</sup> NBN Co, *WBA Ethernet Product Module*, Service Levels Schedule, section 8.4.

Stakeholder views on the service level framework for unresolved faults largely correspond with their views on the framework for delayed connections. As such, these views are only briefly summarised in this section and should be read with the more detailed submission summary at 4.1.2.2.

#### *Submissions to the first discussion paper*

RSPs, in particular Telstra, Optus, VHA and the CCC, submit that one-off service level rebates do not provide a meaningful incentive on NBN Co to address issues in a timely manner once the initial service level is missed, or provide appropriate compensation for RSP costs incurred due to the missed service level.<sup>76</sup> ACCAN and the ACMA also noted that the one-off rebate structure does not account for the length or extent of end-user issues.<sup>77</sup>

NBN Co submitted that the purpose of its service fault rebate is to recognise the diminution in value of the service for which an RSP has paid.<sup>78</sup> NBN Co submitted that the current rebate structure is appropriate. It noted that it faces incentives not to incur a rebate in the first instance, as well as other incentives to resolve issues in a timely manner, such as ensuring that NBN Co does not suffer reputational damage due to public end-user complaints.<sup>79</sup>

#### *Submissions to the second discussion paper*

The ACCC sought more detailed views on the appropriate purpose, structure and quantum for fault rectification rebates in the second discussion paper.

As for delayed connections, Vocus, Optus, Telstra and ACCAN submitted in favour of a daily rebate for missed fault rectification service levels to provide more appropriate incentives for NBN Co to address issues in a timely manner.<sup>80</sup> RSPs submitted that the rebate structure and quantum should be sufficient to enable them to manage relationships with end-users, provide meaningful remedies for end-users and reflect the costs to RSPs and end-users of missed service levels.<sup>81</sup>

The ACMA submitted that the service level rebates should provide an effective incentive for NBN Co to address issues early and minimise the impact on affected entities (RSP and/or end-user). Were rebates apply, this may suggest the amount is determined in relation to the length of time the issue remains unresolved.<sup>82</sup> Further, the ACMA submitted that rebates should ensure that RSPs are not significantly disadvantaged if they are not responsible for a fault.<sup>83</sup>

NBN Co submitted that the importance of rebates in achieving improved service outcomes should not be over stated.<sup>84</sup> NBN Co submitted that any new rebate arrangements should take into account the responsibilities of each party, costs (including the costs of diverting resources to rebates) and the wider context. That is, rebates should only be imposed on NBN Co to the extent that it is responsible for the problem and that no reasonable mitigating

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<sup>76</sup> Telstra, *Submission to the first discussion paper*, pp. 11, 19; Optus, *Submission to the first discussion paper*, pp. 25–26, 47; VHA, *Submission to the first discussion paper*, pp. 5–6; CCC, *Submission to the first discussion paper*, pp. 9–10.

<sup>77</sup> ACCAN, *Submission to the first discussion paper*, p. 8; ACMA, *Submission to the first discussion paper*, p. 6.

<sup>78</sup> NBN Co, *Submission to the first discussion paper*, pp. 53–56.

<sup>79</sup> *ibid.*, pp. 19–32, 29, 65–66.

<sup>80</sup> Vocus, *Submission to the second discussion paper*, p. 1; Optus, *Submission to the second discussion paper*, p. 9; Telstra, *Submission to the second discussion paper*, p. 9.

<sup>81</sup> Vocus, *Submission to the second discussion paper*, p. 2; Telstra, *Submission to the second discussion paper*, pp. 3, 6–9.

<sup>82</sup> ACMA, *Submission to the second discussion paper*, pp. 8–9.

<sup>83</sup> *ibid.*, p. 8.

<sup>84</sup> NBN Co, *Submission to the second discussion paper*, pp. 2, 15.

action can be taken by RSPs to reduce the impact on end-users.<sup>85</sup> NBN Co noted its expectation that WBA4 negotiations will focus on the rebate framework, however [c-i-c] [redacted]  
[redacted]  
[redacted]<sup>86</sup> [c-i-c]

#### 4.1.3.3. ACCC views

While we acknowledge that faults will occur on telecommunications networks, we agree with stakeholder concerns that delayed fault rectification has substantial impacts on end-users.

We have considered NBN Co's fault rectification service level performance data in detail. NBN Co's service level performance for fault rectification was [c-i-c] [redacted] [c-i-c] for the 12 month period to June 2019, [c-i-c] [redacted] [c-i-c]. NBN Co has made steady improvements to its fault rectification performance since June 2017, meeting the 90 per cent performance threshold for the first time in May 2018. Since then, NBN Co's service level performance for fault rectification has been relatively stable around the 90 per cent performance threshold, notably dropping below 90 per cent in early 2019 but returning to above 90 per cent in June 2019.<sup>87</sup>

A significant number of end-users are affected by unresolved faults, even when NBN Co is close to or meets its 90 per cent performance threshold overall. On average, NBN Co missed its service level timeframes [c-i-c] [redacted] [c-i-c] times per month over the 12 month period to June 2019, ranging from [c-i-c] [redacted] [c-i-c] to [c-i-c] [redacted] [c-i-c] service level misses per month.

Delays with fault rectification were generally shorter than connection delays overall. For cases where NBN Co missed its connection service level timeframes over the 12 month period to June 2019, the timeframe was missed by over 5 business days [c-i-c] [redacted] [c-i-c] of the time, over 10 business days [c-i-c] [redacted] [c-i-c] of the time, and over 20 business days [c-i-c] [redacted] [c-i-c] of the time.

We are concerned that a significant number of end-users are impacted by unresolved faults, and that end-users who are left without a working NBN service for an extended period of time experience significant harm. As outlined in our general approach, we consider that NBN Co should make per-service commitments to meet its fault service level timeframes. Further, rebates should be used to ensure that NBN Co faces appropriate incentives to rectify unresolved faults within its service level timeframes and in a timely manner in order to promote good outcomes for end-users. Rebates should also support RSPs to respond to service level misses in a way that meets end-user expectations.

We are not satisfied that the one-off fault rectification rebate of \$25 provides adequate incentives for NBN Co to rectify unresolved faults or sufficient support to RSPs to ameliorate poor end-user experience. We consider that a daily rebate for unresolved faults would provide a more effective incentive for NBN Co to resolve faults in a timely manner.

While we note the cost impact and other concerns raised by NBN Co in its submission, we consider that it is reasonable to expect NBN Co to take responsibility for promptly resolving service faults on its network through the introduction of a daily rebate. However, this must strike an appropriate balance between providing meaningful financial incentives for NBN Co through its increased rebate liability, while not having a disproportionate impact on NBN Co.

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<sup>85</sup> *ibid*, pp. 8, 16.

<sup>86</sup> NBN Co, *Submission to the second discussion paper (confidential version)*, p. 19.

<sup>87</sup> See NBN Co, Monthly Progress Reports

Additionally, we consider that a daily rebate for unresolved faults would support RSPs to deliver retail services that meet end-users' expectations, particularly by providing ongoing customer support and remedies such as compensation or 4G backup. This is particularly important for fault rectification as end-users may be without a working service while the fault remains unresolved.

### **Principle**

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

#### **4.1.3.4. Draft FAD terms**

The draft FAD terms maintain NBN Co's existing service level timeframes for end-user fault rectification and PA fault rectification. To implement a daily rebate, the draft FAD terms incorporate 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. The rebate applies to each missed end-user fault rectification and PA fault rectification service level. The draft FAD terms also include terms adopted as part of NBN Co's enforceable undertaking, including providing for NBN Co to pay rebates automatically, rather than requiring RSPs to submit claims.

Similar to delayed connections, we have sought to balance the introduction of significant financial incentives on NBN Co to rectify unresolved faults in a timely manner and minimise extended fault rectification delays with the need for the cost impact of the rebate to be proportionate and appropriate.

We consider that the daily rebate for unresolved faults should involve a meaningful financial consequence for each unresolved fault, providing a clear incentive for NBN Co to promptly rectify faults and minimise harm to end-users. The rebate is based on the increased risk of higher costs for NBN Co to provide a stronger incentive for it to meet its fault rectification service levels. It also provides NBN Co with an opportunity to reduce its rebate liability by improving its operational performance. However, we consider that it is important that the rebate not be disproportionate or unnecessarily onerous on NBN Co. We have used confidential data provided by NBN Co to carefully consider the potential cost impact of the proposed rebate.

We consider that a fault rebate of \$20.00 per business day for each missed fault rectification service level, escalating to \$30.00 per business day after 5 business days, and capped at a total of 40 business days is appropriate. We have set the rebate amount with reference to approximately 12 months of revenue for the 'typical' NBN residential offer (the \$45 a month bundle products) for each 20 business day period that a fault remains unresolved. We consider that this represents a meaningful financial incentive for NBN Co to address unresolved faults.

We have used 12 months of revenue as our reference point, compared to 6 months for connections, to account for the significant and greater harm experienced during the period where the end-user does not have a working service due to a total service failure. As for connections, we propose that the rebate amount be standard across different products in order to ensure consistent incentives to resolve faults regardless of the speed tier purchased by the end-user.

Figure 4.2 below illustrates what the rebate would look like in practice, compared to current levels of CSG compensation. The proposed rebate amount is similar to the current CSG compensation amounts (\$14.52 for residential customers per business day for the first five days, then escalating to \$48.40 per working day after that).

In the case of faults, we propose that the wholesale rebate escalate after 5 days, acknowledging that this harm increases with the length of delay. We note that [c-i-c] [c-i-c] of fault rectification delays extend beyond this threshold. We also note that 5 days is the CSG escalation threshold, and this rebate may assist in supporting RSPs' CSG obligations.

We recognise that implementing a daily rebate would be a substantial change to the rebate framework, and may result in material costs for NBN Co. We consider it is reasonable to cap NBN Co's liability in order to limit its exposure in extreme cases. We consider a cap of 40 business days is a reasonable threshold. While this is greater than the 20 business day cap proposed for connections, we note that [c-i-c] [c-i-c].

**Figure 4.2: Comparison of WBA3 rebate, draft FAD rebate and CSG for unresolved faults**

Service level missed by	WBA3 rebate	Draft FAD rebate	CSG (residential)	CSG (business)
1 day	\$25.00	\$20.00	\$14.52	\$24.20
1 week	\$25.00	\$100.00	\$72.60	\$121.00

As for connections, we acknowledge that the Consumer Safeguards Review (Part B) has proposed that wholesale providers would be responsible for reimbursing RSP costs of providing backup, interim or alternative services in cases of unresolved faults at the wholesale level.<sup>88</sup>

Overall, we consider that the daily fault rebate proposed in the draft FAD terms achieves the objectives of strengthening the incentives for NBN to address unresolved faults, while ensuring that the cost impact of the rebate is proportionate and appropriate. We welcome views from stakeholders about the appropriateness of the proposed rebate structure, including the proposed cap, and quantum.

#### 4.1.4. Missed appointments

##### 4.1.4.1. Background

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.<sup>89</sup> NBN Co reported that in 2017-18 the total number of missed appointments reached 157,268, representing around 9 per cent of their total appointments.<sup>90</sup>

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

<sup>88</sup> DoCA, *Consumer Safeguards Review consultation – Part B: Reliability of services*, p. 7.

<sup>89</sup> 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.

<sup>90</sup> NBN Co 2018, Answer to Senate Estimates Questions on Notice (Question No: 207), Supplementary Budget Estimates, Senate Standing Committee on Environment and Communications, October 2018.

\$25 rebate for each missed appointment in relation to 'end-user service connection'<sup>91</sup> and 'end-user fault rectification'.<sup>92</sup> The enforceable undertaking also included a requirement that RSPs must take reasonable steps to ensure their customers receive a fair value benefit, which may be in a monetary or other form.<sup>93</sup>

We note in the Consumer Safeguards Review (Part B) missed appointments were highlighted as a major consumer 'pain point'. In particular, the discussion paper for the review proposed a rebate of \$100 to be provided to end-users for each missed appointment.<sup>94</sup>

#### **4.1.4.2. Submissions**

Stakeholders expressed concerns about cost and detriments associated with missed appointments, and welcomed the introduction of a rebate for each missed appointment through the enforceable undertaking.<sup>95</sup>

A number of stakeholders submitted that current rebate amounts are insufficient and do not adequately compensate for the detriment and cost impact on end-users and themselves. ACCAN noted that:

*Missed appointments are a perennial point of frustration for many consumers. Consumers often need to take time off work to attend appointments and a missed appointment requires rescheduling the appointment. These are significant costs to consumers, particularly for those that cannot work from home or work a partial day (e.g. shift workers).*<sup>96</sup>

It considered that compensation for missed appointments should be increased to \$100 as a starting point.<sup>97</sup> Vocus agreed that \$25 rebate is too low for a missed appointment due to the frustration and inconvenience and detriment caused when a technician does not attend during a large appointment window.<sup>98</sup>

Telstra considered the rebate as 'a significant step change in the right direction' although the 'actual impact of the change is still to be assessed'.<sup>99</sup> It further noted that 'the rebate structure needs to be strengthened in terms of scale and scope – specifically the quantum of rebates and the basis on which they are applied'.<sup>100</sup>

NBN Co acknowledged that the purpose of rebates is to compensate RSPs for the diminution of the value of the service where a service level is missed relative to the service charge paid by the RSP. It also considered that rebates should not be seen as a penalty and the quantum of rebates should not exceed wholesale charges.<sup>101</sup>

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<sup>91</sup> The service level and rebates also apply to Professional Splitter Installation Appointments and Professional Wiring Isolation Appointments

<sup>92</sup> NBN Co, *Section 87B Undertaking*, 11 September 2018. *WBA Ethernet Product Module*, Service Levels Schedule (Revised), sections 2.4 and 10.4.

<sup>93</sup> *ibid.*, sections 2.4(e) and 10.4(e).

<sup>94</sup> DoCA, *Consumer Safeguards Review consultation – Part B: Reliability of services*, p. 12.

<sup>95</sup> Optus, *Submission to the second discussion paper*, p. 10; Michael Parker, *Submission to the first discussion paper*, p. 8; ACMA, *Submission to the first discussion paper*, p. 6.

<sup>96</sup> ACCAN, *Submission to the second discussion paper*, p. 10.

<sup>97</sup> *ibid.*, p. 10.

<sup>98</sup> Vocus, *Submission to the second discussion paper*, p. 2.

<sup>99</sup> Telstra, *Submission to the second discussion paper*, p. 8.

<sup>100</sup> *ibid.*, p. 3.

<sup>101</sup> NBN Co, *Submission to the second discussion paper*, pp. 16–17.

#### 4.1.4.3. ACCC views

We share the view that missed appointments can be particularly frustrating to end-users, and can cause consumer detriments due to costs associated with time lost or missed work. Moreover, there may be limited actions that RSPs can take to help avoid these outcomes, and RSPs may also potentially bear some costs associated with rescheduling appointments, liaising with end-users and NBN Co, and dealing with end-user complaints.

##### *NBN Co's performance*

As noted above, NBN Co's overall percentage rate for meeting appointments in relation to end-user connection and fault rectification was 91 per cent in 2017-18.<sup>102</sup> This is slightly above the performance objective for that measure set out in the WBA3, although the WBA3 performance objective relates to monthly performance rather than average performance on an annual basis.

Following our second discussion paper, we requested a detailed breakdown of the performance data from NBN Co by appointment type and network technology. NBN Co provided this data on a confidential basis. The data, which relates to the 12 month period ending June 2019, shows that during that period NBN Co's performance in meeting appointments (excluding rescheduled appointments) [c-i-c] [c-i-c]. NBN Co's performance in keeping connection appointments was mostly [c-i-c] [c-i-c] in that period. Further, there were some notable variations across the networks [c-i-c] [c-i-c].

NBN Co's performance level for rescheduled appointments over the same 12 month period [c-i-c] [c-i-c]. It is worth noting that WBA3 stipulates a higher performance target for rescheduled appointments (i.e. 95 per cent).<sup>103</sup>

##### *Missed appointment rebate*

Stakeholder submissions together with the additional data from NBN Co indicate that missed appointments have a significant impact on a large number of end-users.

In line with our general approach set out in Section 3, we consider that NBN Co should make commitments to meet its appointment service levels on a per-service basis. Further, we consider that NBN Co should be provided with meaningful incentives (in the form of a rebate) to try to avoid missed appointments. The rebate value should also be sufficient to reflect their downstream impact, particularly on end-users.

The introduction of a \$25 missed appointment rebate addresses an initial concern that NBN Co did not face any direct financial consequences when it failed to keep an appointment. However, it is also important to ensure that the quantum of the rebate provides NBN Co with meaningful incentives to consistently meet its performance objectives for missed appointments.

We have considered the rebate amounts in the context of their downstream effect in the supply chain, and primarily on end-users. We appreciate why end-users may feel deeply frustrated when NBN Co fails to attend an appointment, which can be scheduled in a typically wide window. The inconveniences and the detriment caused can be particularly

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<sup>102</sup> NBN Co 2018, Answer to Senate Estimates Questions on Notice (Question No: 207), Supplementary Budget Estimates, Senate Standing Committee on Environment and Communications, October 2018.

<sup>103</sup> NBN Co, *WBA Ethernet Product Module*, Service Levels Schedule, sections 2 and 10.

significant if they need to make arrangements to be available at their premises, such as taking time off work. In that context, a missed appointment could potentially cause even more harm and frustration than a slight delay in connection or fault rectification. We note that missed appointments were highlighted as a particular 'pain point' in the context of the Consumer Safeguards Review (Part B).

We therefore consider that, as a principle, the missed appointment rebate should take into account the cost and inconvenience to the end-user when an appointment is missed. We consider that such an approach can help ameliorate unsatisfactory customer experience while at the same time provide stronger incentives to reduce the number of missed appointments.

The proposed rebate value should be sufficiently high to compensate for poor customer experience and incentivise NBN Co to improve its services without placing an undue or disproportionate financial burden on NBN Co.

Further, we consider that it would be reasonable for RSPs to fully pass through missed rebates to affected end-users. This is because, unlike some of the other service level misses, the adverse impact of missed appointments is primarily felt by end-users. Moreover it is unlikely that RSPs can make alternative arrangements to mitigate the adverse impact on end-users for missed appointments (the issue of pass through is discussed more generally in Section 3.4).

We acknowledge some RSP concerns about practical challenges associated with implementing a pass through mechanism, including the need for timely notification and information from NBN Co. We expect NBN Co and RSPs to work together to implement systems that are required to identify affected end-users and ensure the rebates are passed through in a timely manner.

#### **Principle**

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

#### **4.1.4.4. Draft FAD terms**

The draft FAD specifies that NBN Co must attend premises at the appointment time, during the appointment window or within 15 minutes after the appointment time or window, and may only change appointment times or windows in limited circumstances. If NBN Co does not attend the appointment, that appointment is considered to have been missed.

The draft FAD provides that NBN Co is required to pay RSPs a \$75 rebate for each missed appointment. As with other rebates in the draft FAD, NBN Co would be required to pay the rebate directly to RSPs without the need for them to submit an application.

In considering an appropriate amount for the missed appointment rebate, we have sought to achieve a balance between providing incentives to NBN Co to reduce the rate of missed appointments and taking into account end-user impacts, while at the same time not creating undue or disproportionate impacts on NBN Co. This balance was also recognised in Telstra's submission, which noted that 'it is difficult to determine an appropriate rebate amount given the multiple inter-related purposes of the rebates'.<sup>104</sup> A rebate value that is set

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<sup>104</sup> Telstra, *Submission to the second discussion paper*, p. 9.

to take into account the adverse customer effects of missed appointments will also promote the efficient operation of the service by NBN Co.

We note that ACCAN argued that the consumer impacts would be addressed by setting the rebate amount at \$100,<sup>105</sup> which is also the amount proposed by the Consumer Safeguards Review (Part B). We consider that this amount would provide strong incentives to NBN Co and recognise the impacts on individual consumers. However, we also consider that the missed appointment rebate does not necessarily need to be set at that level to achieve those objectives. We consider that an increase from \$25 to \$75 represents a significant increase and will result in a sufficiently strong financial incentives to NBN Co to improve its performance on missed appointments. Our view is that \$75 is the minimum amount required to sufficiently take into account consumer harm from missed appointments and provides an appropriate balance with potential costs to NBN Co.

When considering the quantum of the rebate, we have taken into account the potential cost impact on NBN Co based on the confidential data it provided to us. Given the total number of missed appointments in the 12 month period to June 2019 ([c-i-c] [REDACTED] [c-i-c]), under the proposed \$75 rebate NBN Co would potentially be liable to a rebate amount of around [c-i-c] [REDACTED] [c-i-c] compared with [c-i-c] [REDACTED] [c-i-c] under the \$25 rebate introduced in the enforceable undertaking. The total rebate amount would increase to [c-i-c] [REDACTED] [REDACTED] [c-i-c] if a \$100 rebate was adopted. However we expect that the increased rebate amount will incentivise NBN Co to further reduce its missed appointment rates, which would lead to a lower aggregate rebate amount.

We seek stakeholder views on whether the proposed \$75 rebate for each missed appointment is appropriate and whether a higher rebate (e.g. \$100) would be justified.

The draft FAD also proposes imposing a pass through obligation for the missed appointment rebate. As noted above, we consider that because end-users are the primary party that are affected, it would be reasonable to require the missed appointment rebate to be passed through in full to affected end-users. We expect NBN Co and RSPs to work together to ensure that the rebate is passed through to customers.

#### **4.1.5. Underperforming service speeds**

##### **4.1.5.1. Background**

Retail broadband services are in large part defined and marketed on the basis of maximum and typical busy period speeds. Issues of underperforming service speed can arise where maximum and typical busy period speeds do not meet the level customers were advised to expect when signing up to a service.

RSPs have responsibilities to end-users through contractual arrangements and relationships with consumers. RSPs also have responsibilities under the Australian Consumer Law (ACL) to deliver services as promised to and paid for by the end-user, or to provide an appropriate remedy in the event of non-delivery. ACMA rules further require RSPs to provide certain information to consumers before they enter into a contract, including typical busy period speeds for fixed line connections, and to conduct post-migration testing.<sup>106</sup> Additionally, the ACCC provides detailed guidance for RSPs on how to advertise speeds for fixed-line and fixed wireless broadband services.<sup>107</sup>

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<sup>105</sup> ACCAN, *Submission to the second discussion paper*, p. 10.

<sup>106</sup> ACMA, *NBN rules: Consumer information & service continuity*.

<sup>107</sup> ACCC, *2018 Broadband speed claims guidance consultation*.

Actual service speeds experienced by the consumer can be influenced by a range of factors, including end-user equipment and in-home wiring, network technical limitations, RSP equipment and the amount of provisioned connectivity virtual circuit (CVC) capacity. Some of NBN Co's network technologies, most notably FTTN, FTTB, FTTC and fixed wireless, are subject to physical limitations that can vary between individual lines, premises or areas. Aspects of these networks that affect service speeds include the length and quality of the servicing copper pairs for FTTN, FTTB and FTTC services, and distance to a tower and line of sight for fixed wireless services. Fixed wireless services may also be affected by network congestion at the cell or backhaul level.

RSPs rely on speed information provided by NBN Co to support their sales and marketing activities. Under current wholesale arrangements NBN Co provides service speed information to RSPs. For example, at the time of order NBN Co will provide the RSP with an estimated maximum attainable line speed through its service qualification (SQ) system.<sup>108</sup> Other reporting is also available to RSPs, including weekly FTTN/B speed reports for existing connections and weekly reports on the number of cells experiencing congestion on its fixed wireless network together with the service identification of the RSP's end-users on those cells.<sup>109</sup>

ACMA rules require that RSPs identify FTTN/B/C services that are performing below ordered speeds on migration to the NBN. Where a service is underperforming, the end-user has the option of retaining their services, downgrading to a lower speed plan, or exiting their contract.

In terms of wholesale arrangements, NBN Co's AVC products are defined by peak information rates (PIRs). However, for higher speed services on the FTTN, FTTB and FTTC networks, these PIRs are expressed in terms of a range. For example, the 25-50/5-20 Mbps product on these networks signifies that the peak information download rate on one of these networks may be anywhere between 25 and 50 Mbps (and between 5 and 20 Mbps for uploads). A similar product is also in place in the 25-100/5-40 Mbps ranges for FTTN/B/C services. The ranges reflect the fact that variability in the performance of services on these networks will result in some customers not being able to receive the upper bound for PIRs on the line or service to their premise.

There are no obligations on NBN Co to downgrade services to a lower speed product if service speed does not perform to expectations. The WBA also allows for NBN Co to commit to lower PIRs on the FTTN, FTTB and FTTC networks during co-existence (when legacy services are supplied over copper lines simultaneously with NBN services) and during remediation of copper lines. NBN Co's PIR objective is for these lines to be capable of achieving 12/1 Mbps for FTTN services during coexistence and 25/5 Mbps thereafter, and 25/5 Mbps for FTTB and FTTC services.

#### **4.1.5.2. Submissions**

The second discussion paper sought stakeholder views on the extent to which current speed information provided by NBN Co is appropriate to support RSP advertising and selling of services.<sup>110</sup> Stakeholder views were also sought on the nature of the wholesale commitments that should apply where service performance consistently falls below what is

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<sup>108</sup> Services with PIRs and asymmetrical wholesale and download speeds (TC-4). NBN Co, *WBA Operations Manual*, section 4.3.1.

<sup>109</sup> NBN Co, *Section 87B Undertaking*, 11 September 2018.

<sup>110</sup> ACCC, *Second discussion paper*, p. 12.

ordered or reasonably expected, and the structure of a possible fixed wireless rebate for underperforming services.<sup>111</sup>

Stakeholders gave a range of views on the level of service speed information that could be expected to be provided for services on different NBN technologies, and the necessity and nature of remedies where services are underperforming (relative to the ordered product).

Stakeholders also submitted on the nature of current wholesale commitments and RSP obligations, NBN Co reporting and measurement of service speed performance, and the nature of remedies they considered should be available.

#### *Wholesale commitments and RSP service obligations*

A number of stakeholders have argued for a closer alignment of wholesale and retail service standards to ensure the effective delivery of broadband services.<sup>112</sup>

Telstra, Optus and VHA raised concerns with NBN Co's current wholesale commitments on PIRs.<sup>113</sup> Optus advised that NBN Co only commits to a PIR for FTTN services of 25Mbps (regardless of whether the RSP has paid for a higher speed service). During the co-existence period, NBN Co's FTTN commitment is a PIR of 12/1 Mbps. NBN Co has no other obligations under the WBA to address the line, or provide any compensation or rebate to the RSP, despite having sold the RSP a service that the line is technically not capable of achieving.<sup>114</sup>

Optus also considered that wholesale commitments and processes for line remediation needed to improve. Optus submitted that, as the PIR commitments are low, it is difficult to get lines remediated. It added that remediation processes should be clarified so that underperforming lines are addressed more promptly and rebates applied where an FTTN/B/C line is not capable of delivering the wholesale speed tier sold to the RSP.<sup>115</sup> Similarly, Telstra noted that NBN Co has a performance objective to complete a remediation solution two years from the date that a remediation case is opened and that NBN Co requires RSPs to continue paying the applicable charges during that period.<sup>116</sup> The ACMA considered that additional wholesale commitments were necessary to enable RSPs to better identify FTTN/B lines that are subject to co-existence, remediation or interference mitigation actions. It also suggested that NBN Co provide an estimate of the date by which the co-existence period for FTTN/B lines is expected to end.<sup>117</sup>

In respect of fixed wireless, Optus submitted that NBN Co should introduce a range of binding wholesale commitments in regards to fixed wireless services, including commitments around minimum service performance, and that where these are not met, NBN Co should provide compensation or rebates to RSPs.<sup>118</sup>

#### *NBN Co reporting and measurement of wholesale speed performance*

Transparency and accurate measurement of service speed and performance were highlighted by some stakeholders as important to service delivery and improved consumer

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<sup>111</sup> *ibid.*, p. 14.

<sup>112</sup> ACMA, *Submission to the second discussion paper*, p. 4; Telstra, *Submission to the second discussion paper*, p.18; Optus, *Submission to the second discussion paper*, p.19.

<sup>113</sup> Telstra, *Submission to the second discussion paper*, p. 16; Optus, *Submission to the second discussion paper*, p. 17; VHA, *Submission to the second discussion paper*, pp. 2, 5–6.

<sup>114</sup> Optus, *Submission to the second discussion paper*, p. 17.

<sup>115</sup> Optus, *Submission to the second discussion paper*, p. 17.

<sup>116</sup> Telstra, *Submission to the second discussion paper*, p.16.

<sup>117</sup> ACMA, *Submission to the second discussion paper*, p. 10.

<sup>118</sup> Optus, *Submission to the second discussion paper*, pp. 14–18.

outcomes.<sup>119</sup> However, there was disagreement about whether current levels of performance information are adequate.

In general terms, Optus proposed that NBN Co should be subject to transparent independent oversight similar to other regulated industries where quality of service has been a concern.<sup>120</sup> Similarly, Telstra added that NBN Co should be required to report on how its network is performing against its service standards (amongst other things), similar to that included in the undertaking in relation to its fixed wireless network. In addition, it considered that aggregated performance reporting should be publicly available.<sup>121</sup>

In terms of service speed information, Telstra submitted that NBN Co needed to improve the timing and form of information, to allow RSPs to set expectations for end-users and meet retail obligations. A number of RSPs<sup>122</sup> requested the provision of maximum attainable speeds for FTTN services to support RSP customer service obligations. Telstra submitted that maximum attainable speeds are not currently provided by NBN Co until after the connection of the service.<sup>123</sup> VHA also regarded NBN Co's weekly speed reports for copper-based services as an unreliable indicator of maximum line speed as they are for a single point in time and subject to weather variability.<sup>124</sup>

Optus also noted gaps in the information provided by NBN Co. In particular, it identified weekly line capability data sent to RSPs with sections left blank and issues with using 'birth certificates' for FTTN/B/C services (because there is no automated way of extracting speed information). Optus described the current practice of being provided with an estimated range for speed information at the point of sale (which can be as broad as 40Mbps) as inadequate.<sup>125</sup> Telstra also made the observation that under the terms of the WBA, SQ information falls under the definition of confidential information and RSPs are unable to disclose that information to their customers.<sup>126</sup>

In terms of fixed wireless, Telstra advised that the information that NBN Co provides on the extent of fixed wireless congestion would be more meaningful if it focused on the number of customers impacted, rather than the number of congested cells. Telstra also suggested enhancements to fixed wireless performance information and automation of information transfers to overcome the manual handling of data which is "inefficient, introduces delays and risks data being accidentally amended or lost during the process".<sup>127</sup> Vocus suggested that NBN Co provide RSPs with technician availability and congested cell data for fixed wireless services to enable RSPs to provide clearer and more relevant information to consumers prior to sale, while better managing their expectations.<sup>128</sup> Similarly, Optus noted that as NBN Co can only provide information at a cell level, it is difficult to determine if, at the time a cell is experiencing congestion, the customer's individual service is experiencing congestion.<sup>129</sup> Telstra and Optus noted that fixed wireless performance information should

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<sup>119</sup> ACMA, *Submission to the second discussion paper*, p.10; Telstra, *Submission to the second discussion paper*, pp. 10, 23; Optus, *Submission to the second discussion paper*, p. 8.

<sup>120</sup> Optus, *Submission to the second discussion paper*, p. 8.

<sup>121</sup> Telstra, *Submission to the second discussion paper*, p. 10.

<sup>122</sup> VHA, *Submission to the second discussion paper*, p. 5; Telstra, *Submission to the second discussion paper*, p. 14; Vocus, *Submission to the second discussion paper*, p. 2; ACMA, *Submission to the second discussion paper*, p. 10.

<sup>123</sup> Telstra, *Submission to the second discussion paper*, p. 14.

<sup>124</sup> VHA, *Submission to the second discussion paper*, p. 5.

<sup>125</sup> Optus, *Submission to the second discussion paper*, p. 14.

<sup>126</sup> Telstra, *Submission to the second discussion paper*, p. 14.

<sup>127</sup> Telstra, *Submission to the second discussion paper*, pp. 14–15.

<sup>128</sup> Vocus, *Submission to the second discussion paper*, pp. 2–3.

<sup>129</sup> Optus, *Submission to the second discussion paper*, pp. 14–15.

be available so that RPSs can inform prospective customers whether they will be located with a congested cell.<sup>130</sup>

NBN Co submitted that it is willing to consider providing additional information, but this should take account of the cost, reliability and usefulness of the information and its value to RSPs. It cautioned that the creation, dissemination and use of information is not costless (to the RSP or NBN Co), and that the utility and benefits of providing additional information should not exceed the cost of producing it. It also submitted that current levels of information on maximum attainable speeds were appropriate given the inherent limitations of different NBN access technologies.<sup>131</sup> It noted, for example, that it cannot provide the forecast date for the end of the co-existence period for services on FTTN technologies because the migration timeframe is not within its control. In addition, NBN Co noted that it is also difficult to produce accurate estimates of attainable line speed before a service is activated as there are factors outside of NBN Co's direct control such as the quality of copper pairs, interference from other services and devices, in-home wiring and devices.

#### *Remedies for underperforming services*

There was general consensus amongst stakeholders<sup>132</sup> that NBN Co should not be able to charge the full price for specific wholesale services where the speed associated with the wholesale product is not attainable or not capable of providing the higher speed.

In terms of remedies, there was broad support for reduced wholesale charges or rebates. In the case of fixed wireless, Optus submitted that NBN Co should be required to pay compensation or rebates to RSPs, as they provide compensation to customers who may be affected by congestion on the fixed wireless network.<sup>133</sup> Telstra noted that it also provides remedies and compensation to customers affected by network congestion, and it stated that NBN Co should reduce the charges payable by RSPs for each service that is impacted by congestion.<sup>134</sup>

Stakeholders also suggested a number of other remedies, including:

- broader incentives for addressing fixed wireless issues to reduce the need for a fixed wireless rebate such as a wholesale service level specific to fixed wireless network congestion. The service level would act as a trigger threshold at which NBN Co would be required to promptly rectify the fixed wireless network congestion issues.<sup>135</sup>
- a requirement for NBN Co to upgrade the line and undertake remediation, where those lines are not capable of providing the minimum requirements, even if the consumer decides to downgrade its speed tier.<sup>136</sup>
- a clear and reasonable definition of throughput for each of NBN Co's speed tiers to ensure RSPs and consumers receive what they pay for.<sup>137</sup>

NBN Co submitted that it is already responding to fixed wireless performance issues with its additional \$800 million investment in capacity upgrades and that there is no strong basis for a fixed wireless rebate. NBN Co stated that a fixed wireless rebate might also divert

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<sup>130</sup> Telstra, *Submission to the second discussion paper*, pp. 14–15; Optus, *Submission to the second discussion paper*, p. 14.

<sup>131</sup> NBN Co, *Submission to the second discussion paper*, pp. 20–22.

<sup>132</sup> ACCAN, *Submission to the second discussion paper*, p. 8; Optus, *Submission to the second discussion paper*, p. 17; Telstra, *Submission to the second discussion paper*, p. 16; VHA, *Submission to the second discussion paper*, pp. 2–3; Vocus, *Submission to the second discussion paper*, p. 3.

<sup>133</sup> Optus, *Submission to second discussion paper*, p. 16.

<sup>134</sup> Telstra, *Submission to second discussion paper*, p. 17.

<sup>135</sup> ACMA, *Submission to the second discussion paper*, p. 10.

<sup>136</sup> Vocus, *Submission to the second discussion paper*, p. 3.

<sup>137</sup> VHA, *Submission to the second discussion paper*, pp. 5–6.

resources currently directed to network investment in its view, and that it would be unable to respond to any incentive properties of the rebate for a considerable period of time, given the lead-times associated with the required network upgrades. NBN Co further noted that fixed wireless is a loss-making service and it is unclear how NBN Co could fund significant additional investments in network capacity beyond the current program without significantly raising prices for all services or obtaining new Government funding.<sup>138</sup>

NBN Co submitted that a rebate for copper-based services performing below 12/1 during the co-existence period would have no meaningful incentive effect on NBN Co, due to factors outside its control. It submitted that it is unable to end co-existence until all remaining legacy services have been migrated. Further, it submitted that only a limited number of services cannot achieve 12/1 Mbps during co-existence and there is already a process in place to address this issue, which is that RSPs lodge a fault and NBN Co seeks to address it within service level timeframes.<sup>139</sup>

NBN Co considered it RSPs' responsibility to place FTTN services on the appropriate speed tier for the service during co-existence, except for the limited cases below 12/1 Mbps. It noted that these are PIR services which do not guarantee a particular speed will be achieved in all circumstances and it would have concerns if the imposition of additional wholesale commitments amounted to an attempt to change the nature of the declared product itself.<sup>140</sup>

Overall, NBN Co considered that any further enhancements to service standards must occur in a commercially negotiated manner that takes into account its operating environment, and the needs of RSPs and end-users. It stated that further enhancements should also recognise some inherent limitations that cannot be accelerated by incentives or penalties as well as the improvements that NBN Co has made and is continuing to make.<sup>141</sup>

#### **4.1.5.3. ACCC views**

The delivery of broadband services to end-users requires stronger wholesale commitments from NBN Co with respect to service speed and performance. Instances where NBN services that do not achieve expected speeds are a clear area of concern for both RSPs and end-users.

Currently, underperforming services represent around 12 per cent of NBN fixed-line services in the ACCC's Measuring Broadband Australia program.<sup>142</sup> These are services where no more than 5 per cent of speed tests conducted in the month achieved 75 per cent of the maximum speed tier. In the case of fixed wireless, as of August 2019, 2.4 per cent of cells were experiencing congestion during the busy hours and approximately three per cent of cells were connected to congested backhaul links.<sup>143</sup>

Maximum attainable speeds for NBN Co's wholesale services may be limited by technical characteristics of the NBN network, such as the length and quality of the copper loop or other elements of NBN infrastructure.

We note that NBN Co has undertaken a number of measures to improve service speeds experienced by end-users. NBN Co is engaged with industry to identify and resolve service

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<sup>138</sup> NBN Co, *Submission to the second discussion paper*, pp. 23–24.

<sup>139</sup> NBN Co, *Submission to the second discussion paper*, pp. 24–25.

<sup>140</sup> NBN Co, *Submission to the second discussion paper*, p. 25.

<sup>141</sup> NBN Co, *Submission to the second discussion paper*, p. 3.

<sup>142</sup> See ACCC, *Measuring Broadband Australia – Report 5 – May 2019* and ACCC, *Measuring Broadband Australia – Report 6 – August 2019*.

<sup>143</sup> NBN Co, Monthly progress report August 2019, 17 September 2019.

speed issues where in-home wiring is a limiting factor.<sup>144</sup> On the fixed wireless network, NBN Co is undertaking network upgrades to deliver an average throughput of at least 6 Mbps during busy hours, and is providing additional reporting to RSPs and the public.<sup>145</sup> While we anticipate a decline in the level of congestion on fixed wireless networks once these measures are finalised, we are concerned by the number of NBN services that continue to underperform relative to the speed of the ordered product. We note that the proportion of congested cells remained around three per cent between March and July 2019. While NBN Co has undertaken considerable work to upgrade its fixed wireless backhaul as a result of congestion identified in that part of the network, it does not appear to be on target to meet its objective of less than one per cent of cells congested this year.

We consider that stronger wholesale commitments relating to service speeds are required in respect of:

- the information NBN Co provides about the speed and performance of services
- the clarity of the commitments for how services should perform, and
- the remedies available when services are underperforming.

#### *Service speed information*

Stronger commitments in relation to NBN Co's provision of information on speed, congestion and underperformance more generally would directly impact RSPs' ability to market to, and provide support to, end-users on speed issues. RSPs need accurate and timely information to advertise and sell services, to manage the expectations of their customers and to sell the most appropriate products to end-users, relative to what their connection can support.

We agree with RSPs that the timing and type of information and how that information is provided can be improved, particularly prior to connection, so that RSPs can better manage customer expectations and customers can make more informed decisions. We also understand that NBN Co already measures service specific information that it does not currently provide to RSPs. This could be provided to RSPs with minimal cost. As such, we consider that NBN Co could and should provide additional information in relation to FTTN/B/C and fixed wireless attainable speeds and congested fixed wireless services where already available. In particular, NBN Co should provide reliable forecasts for FTTN/B/C attainable speeds (including maximum attainable line speeds) prior to connection. For fixed wireless services, NBN Co should introduce reporting on the existence of congested fixed wireless services prior to orders being placed and provide maximum attainable line speed data post-connection.

We note Optus' submission on the limitations of trying to extract relevant speed information from blank sections of reports and birth certificates. A number of RSPs have also asked for automated information.<sup>146</sup> We consider it incumbent upon NBN Co to provide information in a form that is useful to RSPs. We consider that NBN Co should introduce more automated information systems to ensure that key information about the capability of a line or service is available to RSPs at the time they are contacted by an end-user. The combination of improved information about maximum attainable speeds, and having it immediately available to RSPs through an automated system, will enable RSPs to have meaningful discussions about expectations for and suitability of different products over that line or service. This information should not be regarded as confidential by NBN Co.

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<sup>144</sup> NBN Co, *Submission to the second discussion paper*, p. 13; Communications Day, "How a ten buck splitter can boost NBN speeds by 11Mbps", 19 February 2019.

<sup>145</sup> NBN Co, Media release: NBN Co on track for 2020 completion, 31 August 2018.

<sup>146</sup> Telstra, *Submission to the second discussion paper*, p. 15; Optus, *Submission to the second discussion paper*, p. 3; Vocus, *Submission to the second discussion paper*, p. 3.

We consider that the increased transparency measures for fixed wireless services that have been introduced through the enforceable undertaking, including the weekly reporting that NBN Co provides to RSPs in relation to fixed wireless congestion, have enabled RSPs to better support their end-users as they are now able to inform their current customers whether they are on a congested cell and when the cell will be upgraded.

We consider that the provision of maximum attainable line speed data for fixed wireless services by NBN Co to RSPs (as it does for FTTN/B/C services) after their fixed wireless service has been connected will help RSPs to better manage consumer expectations about the maximum speed that the service can deliver. The provision of this information would also provide a baseline for the end-user so that if speeds outside the busy hours drop substantially below this maximum attainable speed, the customer will be able to seek a resolution and/or discuss whether a more appropriate plan or service may be more suitable.

We also understand that NBN Co is developing initiatives to improve the quality and accessibility of maximum attainable speeds on FTTN, FTTB and FTTC networks and has been consulting with RSPs. We consider that these initiatives could address, at least in part, some of our concerns on service speed information NBN Co provides to RSPs. We have not included any proposed terms on speed information as part of the draft FAD. In response to this draft decision we would welcome further information from NBN Co on the initiatives it is undertaking and how these may address speed information concerns. We would also welcome any feedback from RSPs on NBN Co's initiatives.

#### *Clearer service speed commitments*

We consider that although end-users have regard to the maximum speed of a product when purchasing an NBN retail service, wholesale commitments in providing those specific PIRs are weak. Under the WBA, the FTTN/B access component speed tiers can be purchased with downstream PIRs of 12Mbps, 25Mbps, 25-50Mbps, and 25-100Mbps. These commitments mean that a service that achieves a PIR of 25Mbps would satisfy the criteria for all speed tiers purchased at 25Mbps and above, i.e. 25-50 Mbps and even 25-100 Mbps. We also understand that NBN Co does not accept trouble tickets relating to slow speeds where the speed being experienced by the customer is more than 25Mbps, irrespective of service purchased.<sup>147</sup>

In contrast, RSPs must comply with strict ACL requirements and ACMA rules that require remedies be provided if lines are incapable 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. We agree with NBN Co, that RSPs are responsible for ensuring their customer is on the right service. However, we also consider that wholesale terms should support these outcomes.

We consider that wholesale speed performance standards should be clarified.

For fixed-line services, at minimum NBN Co should not sell wholesale services at higher tiers where their maximum attainable service speed falls below the upper range of a lower service tier. For example, NBN Co should not sell services within the 25-100 Mbps downlink range if the maximum attainable speed is 50 Mbps or less. Similarly, 25-50 Mbps services should not be sold where their maximum attainable speed is less than 25 Mbps. This is consistent with the principles that NBN Co should not charge for services it is not providing.

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<sup>147</sup> VHA, *Submission to the second discussion paper*, pp. 3, 5–6.

Further, we consider that the PIR objectives as specified in the WBA reflect the minimum speed and coverage objectives set out in the Government's broadband policy objectives for the NBN.<sup>148</sup> We consider this is an appropriate minimum standard for fixed-line services.

In the case of fixed wireless, we consider that NBN Co should be held to its design standard, which is to provide services to an average throughput of at least 6 Mbps during the busy hours (or greater than 0.25 per cent packet loss on backhaul links).

#### *Remedies for FTTN/B services*

We consider there is a strong rationale for NBN Co to provide specific recourse to RSPs where it has failed to meet the service speed commitments for FTTN, FTTB and FTTC services, as described above. As previously discussed, the current wholesale arrangements leave RSPs wholly responsible for selecting the correct wholesale product and NBN Co will charge for the selected product irrespective of whether it is able to provide that service over a particular line.

We consider that NBN Co is responsible for the maximum attainable speed for its wholesale products and should not charge for services that it does not provide. Where the maximum attainable speed is known prior to the service being provisioned, then it is reasonable for the RSP to manage how that service is marketed and sold to the end-user. However, if the maximum attainable speed does not perform in accordance with reasonable expectations, NBN Co should provide remedies for failing to meet service speed commitments.

We consider a rebate for failing to meet FTTN, FTTB and FTTC service speed commitments would provide an effective remedy in both of the instances outlined above.

By having to pay a rebate if the maximum attainable speed is below the 12 Mbps or 25 Mbps PIR objective, NBN Co will face a financial consequence for not meeting the minimum speed requirements it has committed to and reflected in the WBA. This would provide incentives to NBN Co to investigate and resolve remediation cases in a timely manner.

Additionally, we have considered including a rebate that would apply where the maximum attainable speed falls below 50 Mbps for the 25-100 Mbps service, 25 Mbps for the 25-50 Mbps service and 12 Mbps for the 25 Mbps service. This would provide strong incentives for NBN Co to ensure it only provides the products that can adequately supported by a particular line.

Rather than applying to a minimum level of performance, a rebate of this kind would provide NBN Co with incentives to ensure end users are on the appropriate wholesale product that can be supported on a particular line. This arrangement would appropriately support the obligations on RSPs, who are responsible for ensuring end-users receive a suitable product in the first instance. It would also recognise that the service is not performing in accordance to the product that was sold to the customer.

More fundamentally, rebates for underperforming services would ensure that NBN Co is held to deliver on the service speeds set out in wholesale agreements.

We also note that NBN Co is not currently obliged to continue to remediate a service once an end-user elects to go down to a lower speed tier. We consider that NBN Co should continue to remediate lines even if a customer downgrades, as this is necessary to provide the end-user with a choice of higher speeds once remediation is complete.

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<sup>148</sup> NBN Co Statement of Expectations, 24 August 2017.

### *Remedies for fixed wireless services*

NBN Co charges the full rate for fixed wireless services delivered, even where the speeds during the busy hours do not meet NBN Co's design standard due to network congestion. Several RSPs and ACCAN submitted that NBN Co should provide rebates or compensation for each fixed wireless service that is impacted by congestion.

While we recognise that NBN Co has taken a number of measures to improve end-user experiences on the fixed wireless network, including upgrading congested backhaul links as noted above, NBN Co does not appear to be on target to meet its objective of less than one per cent of cells congested this year.

We consider that the introduction of a fixed wireless rebate to be payable for each fixed wireless service supplied over a congested cell (including those served by congested backhaul links) would provide NBN Co with an incentive to ensure that it continues to invest in addressing congestion on the network in a timely and efficient manner.

As part of its fixed wireless cell and backhaul capacity upgrade program NBN Co priorities cells for upgrade that meet the follow design criteria:

- for cell performance, cells with an average 30 day downlink throughput of less than 6Mbps during the busiest hour of the day (typically between 7–11pm), and
- for backhaul links, links operating with an average 28 day busy hour link packet loss of 0.25% or greater.<sup>149</sup>

At present, NBN Co's fixed wireless revenue is largely unaffected by congestion in fixed wireless cells. The rebate would therefore incentivise NBN Co to upgrade its fixed wireless network to ensure that fixed wireless cells meet its design standards on an ongoing basis. We also note that this rebate would compensate RSPs that are currently providing redress to end-users who are affected by congestion on the fixed wireless network as outlined above.

While we have proposed a fixed wireless rebate, we do recognise there are some risks involved with this measure. As outlined above, there is a risk that the rebate might divert resources currently directed to network investment to paying for the rebate. We also note as fixed wireless is a loss-making service, further investments beyond that currently allocated may require additional funding and/or service revenue. We note that as a proportion of NBN Co's additional \$800 million upgrade budget, a fixed wireless rebate of \$20 per month would equate to a percentage in the low single digits. We consider this is unlikely to result in a significant diversion of resources away from upgrading the network.

On balance, we consider that the fixed wireless rebate would provide appropriate incentives to NBN Co to upgrade the network at a reasonable cost while providing compensation for services that are significantly below consumer expectations. We note that in the longer term, if congestion remains an issue, it may be a question for NBN Co and the Government to consider the most optimum solution to delivering quality fixed wireless services that meet the expectations of consumers.

#### **Principle**

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

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<sup>149</sup> NBN Co, *Monthly progress report (customer experience)*, August 2019.

#### **4.1.5.4. Draft FAD terms**

##### *Fixed line services*

For fixed line services, the draft FAD terms will require NBN Co to pay a rebate of \$20 for each month that the maximum attainable downlink information rate for a service is less than the PIR objective.

We are still considering wholesale terms that would best ensure the wholesale products that NBN Co supplies are suited the capabilities of the line, noting that NBN Co can move an end-user to a lower speed service if it cannot deliver the higher speeds. The draft FAD terms would require NBN Co to pay a rebate for each month that the maximum attainable downlink information rate for a service is: less than 50 Mbps for an AVC with a PIR of up to 100 Mbps, less than 25 Mbps for an AVC with a PIR of up to 50 Mbps and less than 12 Mbps for an AVC with a PIR of up to 25 Mbps. We would welcome submissions on this proposed mechanism and what the appropriate rebate amount would be to achieve this aim.

##### *Fixed wireless services*

The draft FAD terms would require NBN Co to provide the 'birth certificate' maximum attainable speed to the RSP for each fixed wireless service that is installed.

The draft FAD terms introduces a \$20 per month fixed wireless rebate. This rebate requires NBN Co to make 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. The rebate would be applied by NBN Co to the RSPs' invoice for the relevant billing period, without the access seeker having to submit a claim.

The \$20 rebate is set at around half of the bundled price of the most popular fixed wireless speed tier (25-50/5-20 Mbps, soon to be withdrawn in place of fixed wireless plus) on the basis that fixed wireless services in congested cells typically retain some functionality (albeit limited during the busy hour). NBN Co would cease providing the monthly rebate once the fixed wireless cell meets the 6 Mbps design metric and is no longer served by any backhaul with greater than 0.25 per cent packet loss.

## **4.2. Service level measurement and exclusions**

### **4.2.1. Background**

Service level measurement and exclusions refer to the provisions in the WBA that specify 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. These provisions therefore play a role in the allocation of responsibility between NBN Co and RSPs, and where a commercial rebate is payable in respect to a service level, they can determine NBN Co's liability. The integrity of the rebate terms therefore rests on these measurement and exclusion terms.

#### *'Stop the clock' exclusions*

The WBA describes when NBN Co is also able to 'stop the clock' in its measurement against its service levels. Generally, NBN Co is able to rely on these provisions to the extent that its ability to meet the service level is adversely affected by circumstances outside of its reasonable control (a 'held' ticket status), or where it is awaiting action from an RSP (a

'pending' ticket status).<sup>150</sup> These general exclusions apply in addition to defined exclusions such as force majeure events and acts of RSPs or end-users.<sup>151</sup>

In its enforceable undertaking NBN Co committed to remove some of the broader exclusions for NBN Co to 'stop the clock' in its measurement of services levels, described as "any matter, thing, event or circumstance that is not within NBN Co's reasonable control".<sup>152</sup>

#### *Measurement of service levels for faults*

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.<sup>153</sup> The service level for NBN Co to review and evaluate a trouble ticket is 2 hours from the time it is lodged.<sup>154</sup>

### **4.2.2. Submissions**

Submissions to the inquiry focused on the general 'stop the clock' exclusions and provisions that apply to the measurement of end-user fault rectification service levels.

#### *Submissions to the first discussion paper*

Optus' submission to the first discussion paper set out concerns with NBN Co's measurement of service levels. Optus submitted that a consequence of the NBN Co's 'stop the clock' processes was that NBN Co's reported performance against a service level could be very different from the actual time taken to complete an activity.<sup>155</sup> [c-i-c]

[REDACTED]

[REDACTED]

[REDACTED] [c-i-c]<sup>156</sup>

In reply, NBN Co submitted that the mere fact that "further action is needed" by NBN Co does not allow it to stop the clock. Only when a ticket has a 'held' status for a reason beyond its control (e.g. bad weather), it is not responsible for the delay in progressing the ticket and the 'clock will stop'.<sup>157</sup>

Additionally, Telstra and Optus raised concerns relating to the measurement of fault rectification timeframes. Specifically, NBN Co's trouble ticket acceptance process arguably delays the start in measuring performance against the fault rectification service level timeframes and does not reflect the actual experience of end-users.<sup>158</sup>

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<sup>150</sup> NBN Co, *Supplementary submission to the first discussion paper*, pp. 8–9.

<sup>151</sup> See NBN Co, *WBA Ethernet Product Module*, Service Levels Schedule, section 21.

<sup>152</sup> See, for example, NBN Co, Section 87B Undertaking, 11 September 2018, clause 21 'Exclusions'.

<sup>153</sup> 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.

<sup>154</sup> NBN Co, *WBA Ethernet Product Module*, Service Levels Schedule, section 7.1.

<sup>155</sup> Optus, *Submission to the first discussion paper*, p. 18.

<sup>156</sup> Optus, *Submission to the first discussion paper (confidential version)*, p. 21.

<sup>157</sup> NBN Co, *Supplementary submission to the first discussion paper*, pp. 8–9.

<sup>158</sup> Optus, *Submission to the first discussion paper*, pp. 17–18; Telstra, *Submission to the first discussion paper*, p. 33.

### *Submissions to the second discussion paper*

In the second discussion paper we sought further views on NBN Co's practice of beginning measurement once a trouble ticket is accepted, rather than when the trouble ticket is acknowledged as received by NBN Co's systems.<sup>159</sup>

With the exception of NBN Co, stakeholders submitted that measurement of service levels for end-user fault rectification should begin from the time when an RSP trouble ticket is acknowledged within NBN Co's systems. ACCAN submitted that changing the measurement of service levels to when a ticket is acknowledged would assist in closely aligning the measurement with when end-users experience a fault and encourage timely responses from NBN Co.<sup>160</sup> The ACMA also submitted that commencing service level measurement from the time the trouble ticket is received in NBN Co's system would be consistent with the operation of the CSG Standard.<sup>161</sup>

Optus and Telstra reiterated views stated in their submissions to the first discussion paper that service level measurement should begin from trouble ticket acknowledgement, as was the process under WBA2.<sup>162</sup> This approach was also supported by VHA and Vocus.<sup>163</sup> Vocus' submission noted that when a customer first calls with an issue, it often spends hours trouble-shooting before lodging a trouble ticket with NBN Co.<sup>164</sup>

NBN Co responded to these concerns by submitting that it is reasonable that the service level timeframes only commence upon acceptance of the trouble ticket. This is so that it can assess whether the RSP has correctly submitted all the information required for it to begin rectifying the fault, as incomplete or inaccurate trouble tickets can delay the resolution of end-user issues. It submitted that NBN Co's review of trouble tickets is designed to achieve the best actual outcome for end-users and appropriately allocates accountabilities and responsibilities between NBN Co and RSPs.<sup>165</sup>

However, Optus reiterated its concerns about NBN Co's 'stop the clock' processes, noting that the criteria NBN Co applies for 'stopping the clock' or excluding a service level are not always clear.<sup>166</sup> In the context of apportionment of CSG liabilities, Optus submitted that NBN Co applies too low of a threshold as to the matters it considers outside of its reasonable control. Optus submitted that NBN Co's views were out-of-step with exclusions that could be relied on in respect of the CSG standard (e.g. extreme weather, natural disasters, or damage caused to facilities not caused by the service provider).<sup>167</sup> For example, **[c-i-c]**

**[c-i-c]**.<sup>168</sup>

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<sup>159</sup> ACCC, *Second discussion paper*, pp. 19–20.

<sup>160</sup> ACCAN, *Submission to the second discussion paper*, p. 10.

<sup>161</sup> ACMA, *Submission to the second discussion paper*, p. 11.

<sup>162</sup> Optus, *Submission to the first discussion paper*, p. 23; Telstra, *Submission to the second discussion paper*, pp. 23–24.

<sup>163</sup> VHA, *Submission to the second discussion paper*, p. 6; Vocus, *Submission to the second discussion paper*, p. 4.

<sup>164</sup> Vocus, *Submission to the second discussion paper*, p. 4.

<sup>165</sup> NBN Co, *Submission to the second discussion paper*, p. 35.

<sup>166</sup> Optus, *Submission to the second discussion paper*, p. 23.

<sup>167</sup> *ibid.*, p. 22.

<sup>168</sup> Optus, *Submission to the second discussion paper (confidential version)*, p. 24.

### 4.2.3. ACCC views

#### *'Stop the clock' exclusions*

We consider that service level exclusions should be appropriate and clearly defined to ensure that relevant processes are carried forward by the responsible party in the interests of the end-users.

It is reasonable and appropriate for NBN Co to 'stop the clock' on measurement of a service level in circumstances that are caused by the RSPs, a downstream provider or the end-user. It is also reasonable that NBN Co be excused from the service level timeframes due to causes of an exceptional nature, provided the cause for the delay is communicated to the RSP. Well-established examples of this are set out in the CSG standard framework and provisions relating to force majeure events.

However, we do 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.

In NBN Co's enforceable undertaking, NBN Co committed to remove some of the broader exclusions in the WBA service levels schedule, described generally as "any matter, thing, event or circumstance that is not within NBN Co's reasonable control".<sup>169</sup> However, exclusions of this nature continue to apply within the service levels schedule.

We consider that exclusions should be set out more clearly within the wholesale terms and describe the specific circumstances NBN Co may rely on to 'stop the clock' on service levels. These should continue to include allowances for RSP actions, end-user actions, force majeure events, and known technical limitations for the satellite network that cannot be controlled or mitigated.

#### *Measurement of service levels for faults*

In the second discussion paper we expressed the view that timely validation of trouble tickets should be undertaken as part of NBN Co's ordinary operational processes, and that commencing fault rectification timeframes from trouble ticket acknowledgement is preferable because it would more closely align with the end-user's experience of the fault.<sup>170</sup> We continue to hold this view.

We recognise NBN Co introduced changes in WBA3 in an effort to improve end-user outcomes – that is, by providing further incentives for RSPs to ensure all relevant information is provided to NBN Co within the trouble ticket. However, we are not convinced that this process is responsible for the substantial decline in NBN Co's mean time to restore metric (the time NBN takes to resolve faults), as suggested by NBN Co.<sup>171</sup> Consistent with other service levels, responsibility for an action should rest with the party that is undertaking that action as was the case for fault rectification prior to WBA3.

We note that RSPs already have strong incentives to resolve faults as quickly as possible as they are directly responsible to their customers. Rather than attempting to improve on these incentives, we consider that improved end-user outcomes are more likely to be achieved through focus on the systems and process that RSPs are required to engage with prior to

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<sup>169</sup> See NBN Co, *Section 87B Undertaking*, 11 September 2018.

<sup>170</sup> ACCC, *Second discussion paper*, p. 20.

<sup>171</sup> NBN Co, *Supplementary submission to the first discussion paper*, p. 3. Other factors impacting on MTTR were identified in NBN Co's submission to the first discussion paper, p. 73.

raising a fault ticket.

### **Principle**

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

#### **4.2.4. Draft FAD terms**

The draft FAD terms provide that NBN Co may only 'stop the clock' in its measurement of connection or 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.

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

In respect of the measurement of end-user faults, the draft FAD terms specify that service levels for faults begin from the time of trouble ticket acknowledgement (as opposed to trouble ticket acceptance).

We consider that these terms appropriately balance risk and responsibility between NBN Co and RSPs and provide the right incentives for each party to improve on operational processes and end-user outcomes. We seek stakeholder views as to whether the proposed FAD terms meet those objectives.

### **4.3. Service information**

#### **4.3.1. Availability of service information**

##### **4.3.1.1. Background**

The effective provision of NBN retail services relies on coordinated operational arrangements and information flows between NBN Co, service providers and the consumer. If the wholesale arrangements between NBN Co and RSPs do not include appropriate provision of information about the status of individual services, RSPs will be unable to advise end-users about the status of their service. RSPs are particularly reliant on NBN Co providing time-sensitive information, including on matters such as the progress of a connection order, appointments, or steps being taking to rectify a fault

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, which also allows RSPs to perform key business transactions including activations, appointments, assurance, billing,

and test and diagnostics. NBN Co also provides information to RSPs via reports (e.g. FTTN and FTTB AVC maximum attainable speeds) or on an ad hoc basis.

#### **4.3.1.2. Submissions**

Submissions are in agreement about the importance of timely service information to support RSP activities.

In response to the first discussion paper, the ACMA submitted that industry data for a three month period in 2017 showed that the absence of good information flows through the supply chain had contributed to some of the issues that consumers were experiencing. Examples leading to poor consumer experiences related to appointment keeping and complaint handling by RSPs. The ACMA stated that better information flows between wholesalers and retailers should lead to clearer communications to the customer.<sup>172</sup> The NSW Business Chamber submitted that consumer outcomes are a shared responsibility of all parties in the supply chain. It supported obligations for the sharing and exchange of information on faults and service interruptions.<sup>173</sup>

Optus and the CCC also raised the importance of service information in their submissions to the first discussion paper. Optus submitted that the extent to which it can develop innovative and beneficial systems to deliver better customer experiences can be dependent upon the underlying wholesale arrangements. It identified the lack of information as a key driver of end-user discontent when attempting to resolve faults and in relation to installation appointments.<sup>174</sup> The CCC similarly submitted that the lack of requirements in WBA3 relating the provision of timely information means that RSPs are often unable to provide certainty to end-users. It also recommended that the inquiry consider information flow requirements.<sup>175</sup>

The second discussion paper raised the availability of operational information directly and sought comments on the wholesale arrangements that should be put in place to facilitate the provision of a reasonable level of customer service to end-users by RSPs.<sup>176</sup>

Optus' submission to the second discussion paper reiterated concerns from its initial submission. Optus noted difficulties in obtaining up to date information where issues arise in relation to connections or rectifying faults, including when an issue may be resolved. Optus submitted that RSPs would be able to provide better consumer experience if NBN Co built an Application programming interface (API) to provide near real time information about appointments and order progress. Further, it also submitted that processes notifying RSPs of unplanned outages should be enhanced.<sup>177</sup>

Telstra submitted that operational information is critical for RSPs to communicate effectively with their customers regarding service status and other service-related activities, and that in many instances, the flow of information from NBN Co to RSPs limits Telstra's ability to communicate effectively with its customers. In particular, Telstra highlighted the need for better near-real-time information about time-sensitive matters such as delays or changes to appointments for connection or fault rectification, and that at times operational information does not always include enough detail in relation to service status.<sup>178</sup>

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<sup>172</sup> ACMA, *Submission to the first discussion paper*, p. 3.

<sup>173</sup> NSW Business Chamber, *Submission to the first discussion paper*, p. 5.

<sup>174</sup> Optus, *Submission to the first discussion paper*, p. 4, 12.

<sup>175</sup> CCC, *Submission to the first discussion paper*, p. 6.

<sup>176</sup> ACCC, *Second discussion paper*, p. 21.

<sup>177</sup> Optus, *Submission to the second discussion paper*, p. 34.

<sup>178</sup> Telstra, *Submission to the second discussion paper*, p. 24.

Vocus submitted that provision of timely, accurate and useable operational information would enhance its ability to provide an appropriate level of customer service to its customers.<sup>179</sup>

NBN Co submitted that it accepts that providing RSPs with appropriate and timely operational information will allow RSPs to better manage end-users' experience, particularly in relation to the handling of time-sensitive matters. NBN Co submitted that real-time updates for fixed-line services are already available to RSPs through its B2B interface and service portal. It argued that these measures provide a reasonable degree of visibility of some of the issues described in the second discussion paper. NBN Co also advised that it was assessing options to improve RSP access to relevant information, and that this is an active area of development.<sup>180</sup>

#### **4.3.1.3. ACCC views**

Operational information is clearly important for RSPs communicating with end-users. As noted by Optus in its submission, not all end-users will want to understand the operational detail of their service.<sup>181</sup> Nonetheless, some end-users will, and RSPs require detailed information for a range of purposes, including:

- understanding and testing the credibility of NBN Co's assessment of how long an issue will take to resolve
- deciding how to respond to the end-user with respect to the retail service (e.g. notifying the end-user about the issue and providing remedies as necessary), and
- coordinating their own staff where RSP action is required.

The introduction of a contractual pass through mechanism in NBN Co's service level improvements in October 2018 provided an example of the importance of robust information flows to facilitate good consumer experience. As part of those changes, NBN Co implemented a rebate payable for each missed appointment on the condition that the RSP pass through a 'fair value benefit' of the rebate to the end-user. To pass through the rebate to end-users, RSPs rely on NBN Co to put in place processes that identify the end-users that are affected by the NBN missed appointment. However, we are aware of RSPs not signing on to the service level improvements because of difficulties with the processes implemented by NBN Co.

Vocus submitted that how it will pass through a benefit from wholesale rebates is dependent on NBN Co's processes and information flows. It submitted that it needed real-time notification from NBN Co that it will receive a wholesale service level rebate, and that this type of information is also expected by its customers.<sup>182</sup>

We understand that several improvements to the supply of operational information have been made over the course of the inquiry. NBN Co has consulted on and enhanced the information provided to RSPs when an order is placed in a held or pending status, including greater transparency over the underlying root cause and resolution timeframes.<sup>183</sup> NBN Co has also recently implemented an API to automate information transfers for fixed wireless

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<sup>179</sup> Vocus, *Submission to the second discussion paper*, p. 4.

<sup>180</sup> NBN Co, *Submission to the second discussion paper*, p. 36.

<sup>181</sup> Optus, *Submission to the second discussion paper*, p. 34.

<sup>182</sup> Vocus, *Submission to the second discussion paper*, p. 2.

<sup>183</sup> NBN Co, *Submission to the second discussion paper*, p. 32.

maximum attainable speed and network congestion. Previously this information was required to be manually downloaded from the NBN customer portal and processed manually.<sup>184</sup>

However, we also note that there appears to be some uncertainty about the extent to which service specific information is subject to WBA confidentiality provisions and can be disclosed to end-users.<sup>185</sup>

We consider the wholesale terms should include express commitments to provide information in an accurate, timely and accessible way, and allow RSPs to be able to communicate this information to their customers as appropriate. This is particularly important to time-sensitive activities that impact directly on end-user services.

### **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. This should include whether a relevant service level has been missed and is able to be used by RSPs to inform end-users where appropriate.

#### **4.3.1.4. Draft FAD terms**

The draft FAD terms would require NBN Co to automate the transfer of all regular and ongoing operational information provided to RSPs. Where relevant operational information is not yet automated, the draft FAD terms require NBN Co to maintain a roadmap, including timeframes for consultation with RSPs, and implementation of an automated solution.

The draft FAD terms require that operational information must be logged so that the RSP may review the service history, and must include:

- the progress of appointments, order status, modify orders, and fault tickets, and
- the extent to which a relevant service level has been missed and a wholesale rebate payable.

Finally, the draft FAD terms clarify that service specific operational information can be disclosed to the end-user by their RSP to support their experience.

We acknowledge that changes to operational IT systems can present significant costs to NBN Co and RSPs that need to make corresponding IT and operational changes in their systems. However, we note that operational reporting that is not provided effectively increases the transactional costs on the use of that information by RSPs, and may limit its utilisation. We therefore consider the costs to set up these systems is reasonable and should be planned for. We seek stakeholder views on the draft FAD terms.

#### **4.3.2. Service level reporting**

##### **4.3.2.1. Background**

Under the WBA, NBN Co provides monthly reports to RSPs detailing its performance against its service levels for that month.<sup>186</sup> RSPs use this information to understand how NBN Co is tracking against its service level commitments. Additionally, where NBN Co's aggregate

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<sup>184</sup> Telstra, *Submission to the second discussion paper*, p. 15.

<sup>185</sup> Telstra, *Submission to the second discussion paper*, p. 14.

<sup>186</sup> NBN Co, *WBA Ethernet Product Module, Service Levels Schedule*, section 15.3.

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.<sup>187</sup>

We note that following the implementation of WBA3 in November 2017, NBN Co reduced the level of detail in its monthly service level reports. Rather than reporting on each service level activity, NBN Co reported only its performance objectives, which generally aggregate multiple service levels into a single metric.<sup>188</sup> This detail was subsequently reintroduced into NBN Co reports after these concerns were raised in response to the ACCC's first discussion paper.

Commitments within NBN Co's enforceable undertaking improved on the timeliness of its monthly reporting, reducing the timeframe in which NBN Co reports to RSPs from 20 business days to 10 business days after the relevant month. The enforceable undertaking 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.<sup>189</sup>

#### **4.3.2.2. Submissions**

In response to the first discussion paper, Telstra and Optus both submitted that the more granular information that was previously provided was of value to RSPs, as it allowed them to identify issues, understand the status of services and work with NBN Co to lift its performance.<sup>190</sup>

In the second discussion paper, we stated that we considered detailed reporting for key service levels to be important as it allows RSPs to understand how NBN Co's performance is tracking and provides greater certainty of operational outcomes. We considered that a baseline level of reporting for key service levels should be specified within the WBA to ensure this information is available to RSPs. The second discussion paper sought views on the key service level outcomes that NBN Co should report to RSPs.<sup>191</sup>

With respect to NBN Co's weekly fixed wireless reporting, Telstra submitted that this information could be improved by reporting on the number of services affected by congestion, rather than the number of cells. Telstra also submitted that NBN Co should provide an estimated time of remediation for all congested cells so that Telstra can advise its customers accordingly.<sup>192</sup>

#### **4.3.2.3. ACCC views**

We consider NBN Co reporting at an appropriate level of detail is essential to allow RSPs to understand how NBN Co's performance is tracking and to provide greater certainty. Reporting should be current to allow RSPs to actively respond to NBN Co's performance where this is necessary.

NBN Co's reporting obligations within the service standards schedule did not change from WBA2 to WBA3, although the level of detail provided to RSPs in its monthly reports was

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<sup>187</sup> NBN Co, *WBA Ethernet Product Module*, Service Levels Schedule, section 16.

<sup>188</sup> Optus, *Submission to the first discussion paper*, p. 20; Telstra, *Submission to the first discussion paper*, p. 27.

<sup>189</sup> NBN Co, *Section 87B Undertaking*, 11 September 2018. *WBA Ethernet Product Module*, Service Levels Schedule (Revised), section 15.5.

<sup>190</sup> Optus, *Submission to the first discussion paper*, p. 48; Telstra, *Submission to the first discussion paper*, p. 27.

<sup>191</sup> ACCC, *Second discussion paper*, pp. 20–21.

<sup>192</sup> Telstra, *Submission to the second discussion paper*, pp. 14–15.

reduced.<sup>193</sup> We consider it is important to clarify NBN Co's commitments around the scope and detail of the reporting it provides. Specifically, NBN Co should report performance for each activity set out under the service levels schedule (i.e. each service level), and this should be broken down by location, service class and network. Reporting on fixed wireless congestion and remediation should also continue to be provided, and be complemented by information on whether prospective fixed wireless end-users are likely to be located within a congested cell.

#### **Principle**

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

#### **4.3.2.4. Draft FAD terms**

The draft FAD terms specify that NBN Co will provide monthly reporting to RSPs within 10 business days of the relevant month. The terms specify that NBN Co will 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).

The draft terms require NBN Co to provide weekly wireless performance reporting by 2 business days after the end of each week that includes wireless congestion metrics and NBN Co's plans to remediate congested fixed wireless cells. The draft terms also require NBN Co to provide 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.

We consider that this reporting provides an appropriate level of transparency to RSPs over NBN Co's performance. NBN Co will retain flexibility to provide additional reporting to RSPs where this is beneficial. This may include metrics that depend on both NBN Co and RSP action, for example, the mean time to connect services and the mean time to resolve faults for the individual RSP and the average for all RSPs.

We seek stakeholder views on the draft FAD terms.

### **4.4. Consumer safeguards**

#### **4.4.1. Background**

The primary safeguards relevant to this inquiry are the CSG and PA framework. These safeguards were designed to apply primarily to Telstra voice services, or voice services supplied by other RSPs provided over its legacy copper network. The introduction of the NBN has dramatically affected the market structure of the telecommunications industry, along with the appropriateness of these existing consumer safeguards to provide adequate protections for consumers.

The DoCA has recognised the need to review the consumer safeguards framework that applies in the Australian telecommunications sector to ensure it is fit for purpose and meets consumers' needs in a post-2020 environment – when the NBN rollout is expected to be completed. This includes extending the application of consumer safeguards to the provision

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<sup>193</sup> NBN Co, *Supplementary submission to the first discussion paper*, p. 7.

of broadband services, and including requirements for connections, faults and appointments.<sup>194</sup>

### *Customer Service Guarantee*

The CSG sets out performance standards in relation to the supply of standard telephone services. The CSG does not apply to mobile services, internet or broadband services, customer equipment or preselection delays. Under the CSG requirements, RSPs must meet or exceed maximum timeframes for connection of a CSG service, repair of a fault or service difficulty, and appointments.<sup>195</sup>

Customers may wholly or partly waive their rights under the CSG Standard. However, the CSG Standard cannot be waived for certain Telstra services. Telstra and Optus are the only major RSPs that currently supply CSG services – most other RSPs provide services on the basis that customers agree to waive their rights under the CSG.

Under the WBA a special category of connection, termed an 'accelerated connection', is available to support RSPs in meeting their CSG obligations. Additionally, the fault rectification timeframes in the WBA are equivalent to maximum timeframes for repairing faults under the CSG standard. RSPs may then claim CSG compensation from NBN Co for accelerated connections, appointments associated with end-user connections, end-user fault rectifications and end-user fault rectification appointments.<sup>196</sup>

### *Priority assistance*

PA is a higher service standard for new voice connections and fault repairs available to consumers who have a diagnosed life threatening medical condition, and that may require their telephone to access emergency medical treatment or advice in the event of a rapid, life threatening deterioration in their medical condition.<sup>197</sup>

Telstra is the only carrier that is required to provide PA services as part of its carrier licence conditions. These require Telstra to connect voice service and repair faults within 24 hours in urban and rural areas, and within 48 hours in remote areas. Telstra is not obliged to meet these timeframes where it has to rely on infrastructure or other services being provided by another network owner (e.g. NBN Co).<sup>198</sup> Although other RSPs can choose to offer PA services, we are not aware of other RSPs offering PA services to new customers.

PA connection timeframes are only available under the WBA for service classes where an NBN connection is already in place that can be provisioned remotely. While other service classes are ineligible to receive PA connection timeframes, accelerated connection timeframes are available for PA connections where no legacy service is in place. Where a legacy service is in place, the standard connection timeframes apply. Once connected to the NBN, the 24 and 48 hour PA fault rectification service levels apply for PA customers.

## **4.4.2. Submissions**

Stakeholders have raised general concerns that gaps exist between RSPs' consumer safeguard obligations to end-users that are not adequately supported by NBN Co's WBA terms. Telstra submitted that it is critical that any retail obligations are appropriately

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<sup>194</sup> See DoCA, *Consumer Safeguards Review consultation – Part B: Reliability of services*.

<sup>195</sup> See *Customer Service Guarantee: FAQs* on the ACMA website.

<sup>196</sup> NBN Co, *WBA Ethernet Product Module, Service Levels Schedule*, section 17.1.

<sup>197</sup> ACIF C609:2007 PA for Life Threatening Medical Conditions Industry Code.

<sup>198</sup> Telstra, *Priority assistance for life threatening medical conditions policy*, paragraph 5.3.2. We note however, that Telstra seeks to meet these timeframes where possible.

supported at the wholesale level and in the absence of any changes to the PA and CSG obligations the timeframes should be supported by NBN Co.<sup>199</sup> Telstra's position is that customers should be no worse off on the NBN today as compared to on their legacy copper network.<sup>200</sup> The ACMA submitted that there was a strong need for close coordination between the wholesale and retail level to assist retailers with their obligations along with providing strong consumer protections.<sup>201</sup>

Submissions raised the following specific concerns relating to the CSG:

- the overly complex nature of the CSG compensation claims process<sup>202</sup>, which should be simplified.<sup>203</sup>
- the suitability of the CSG Standard in a vertically-separated industry.<sup>204</sup>
- the effectiveness of the WBA in facilitating retail-level obligations under the CSG Standard.<sup>205</sup>
- the need for NBN Co to compensate RSPs for a NBN Co service level miss that contributes to the RSP being liable to pay CSG compensation to its customer (or a penalty, if applicable).<sup>206</sup>

Submissions raised the following specific concerns relating to PA:

- Telstra submitted that PA connection timeframes are a key concern as the majority of connection timeframes under the WBA do not support the timeframes under the PA framework that PA customers expect.<sup>207</sup>
- the ACMA submitted that a retail provider of PA is dependent on the provision of a wholesale PA service.<sup>208</sup>
- Telstra and the ACMA submitted that for PA customers, connection and fault rectification timeframes should apply to all service class categories.<sup>209</sup>

Telstra also made a broader point in its submission that there is a risk that changes will occur to the regulatory environment, and new issues may arise, outside of the timeframe of the inquiry. To address this risk, Telstra submitted that it would be beneficial for the ACCC to include a 'regulatory events clause' within an access determination that would provide for the inclusion of new terms or amendments to existing terms in response to changes in the regulatory environment to ensure that where any retail obligations are imposed, RSPs continue to be appropriately supported by NBN Co.<sup>210</sup>

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<sup>199</sup> Telstra, *Submission to the second discussion paper*, p. 3.

<sup>200</sup> Telstra, *Submission to the first discussion paper*, p. 21.

<sup>201</sup> ACMA, *Submission to the second discussion paper*, p. 4.

<sup>202</sup> Telstra, *Submission to the first discussion paper*, pp. 28–19; ACCAN, *Submission to the first discussion paper*, p. 5.

<sup>203</sup> Telstra, *Submission to the second discussion paper*, p. 3.

<sup>204</sup> VHA, *Submission to the first discussion paper*, p. 4; Telstra, *Submission to the first discussion paper*, p. 7; Optus, *Submission to the first discussion paper*, p. 40.

<sup>205</sup> Optus, *Submission to the first discussion paper*, p. 36; NBN Co, *Submission to the first discussion paper*, p. 49.

<sup>206</sup> ACMA, *Submission to the second discussion paper*, p. 7.

<sup>207</sup> Telstra, *Submission to the first discussion paper*, p. 12.

<sup>208</sup> ACMA, *Submission to the second discussion paper*, p. 5.

<sup>209</sup> Telstra, *Submission to the second discussion paper*, p. 19; ACMA, *Submission to the second discussion paper*, p. 5.

<sup>210</sup> Telstra, *Submission to the second discussion paper*, p. 4.

NBN Co has expressed the following views in submissions:

- The WBA terms support a wider range of activities than are governed by RSP regulatory or legislative obligations, while enabling RSPs to fulfil those obligations.<sup>211</sup>
- When the WBA service level categories are compared against the equivalent retail service level categories that apply to PA and CSG, the timeframes provided by NBN Co are the same or shorter than the maximum regulated timeframe under the retail framework.<sup>212</sup> However, it is difficult to provide a completely equivalent comparison of NBN Co's wholesale timeframes to the retail service level framework timeframes.<sup>213</sup>
- Although NBN Co plays a role in supporting PA providers, more effective solutions exist that would genuinely prioritise and protect the needs of dependent and medically vulnerable end-users. These include RSPs being responsible for providing a backup service to PA customers that is equipped with an inbuilt mobile network module and battery so that it can be used in the case of a power or network outage until a more permanent physical infrastructure is in place.<sup>214</sup>
- A number of challenges make the application of PA difficult, including end-users that live in a home that does not have a physical NBN connection but which need to be connected as soon as possible, and end-users that require service continuity during power outages.<sup>215</sup>
- The WBA CSG Compensation claims process offers a material improvement over the statutory Federal Court process and that the current process presents challenges to RSPs as there is a considerable amount of operational detail required to allow accurate apportionment of responsibility for CSG compensation. NBN Co submitted that simpler approaches that are less onerous for both RSPs and NBN Co would allow a reasonable apportionment of responsibility to be made more quickly however, there would need to be a trade-off between accuracy and simplicity.<sup>216</sup>

#### 4.4.3. ACCC views

Consumer safeguards help to ensure consumers, particularly vulnerable consumers, have access to reliable telecommunications services and access to recourse when things go wrong. Consumer safeguards are typically applied as obligations on RSPs to their customers, as RSPs are responsible for managing the retail customer relationship and are best placed to assess end-users' individual needs.

However, for consumer safeguards to be effective in a structurally separated market, obligations placed on RSPs must be supported by NBN Co as the wholesale inputs it provides will invariably impact upon the service an RSP is able to provide to end-users.

The ACCC agrees broadly with many of the concerns raised by industry that the current WBA does not fully support PA obligations and the CSG Standard. We consider that the NBN wholesale terms should support these consumer safeguards to the greatest extent possible.

In particular, we consider 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

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<sup>211</sup> NBN Co, *Submission to the first discussion paper*, p. 38.

<sup>212</sup> *ibid.*, p. 108.

<sup>213</sup> *ibid.*

<sup>214</sup> NBN Co, *Submission to the second discussion paper*, p. 29.

<sup>215</sup> *ibid.*

<sup>216</sup> *ibid.*, p. 33.

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 also observe that the PA and CSG standard were developed prior to the NBN rollout, and designed to apply to Telstra voice services or voice services supplied by other RSPs over its copper network.<sup>217</sup> Due to the significant changes in market structure, these safeguards are unlikely to be as effective in an NBN context without appropriate consideration of NBN Co's responsibilities in the supply chain.

As previously noted, the DoCA is currently conducting a review of the consumer safeguards to prepare the framework for a post-2020 environment, to ensure they remain relevant and useful as fixed-line voice services continue to decline in favour of services provided over the NBN and other access technologies. The ACCC supports a comprehensive review of the safeguards to ensure they are fit for purpose and meet consumer needs.

Acknowledging NBN Co's role in the supply chain, we consider that NBN Co should commit to updating the WBA terms to support future changes to the consumer safeguards framework where these changes apply to NBN services.

#### **Principle**

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

#### **4.4.4. Draft FAD terms**

We have not proposed specific FAD terms for consumer safeguards in the draft FAD. However, we consider it is essential that the level of support vulnerable customers receive under the PA safeguards should remain at high levels and be appropriately allocated between NBN Co and RSPs. Noting the complexity of the terms that are currently in place, we consider it is appropriate for these terms to be agreed between NBN Co and the relevant RSPs.

However, as set out in sections 4.1.2 and 4.1.3, the draft FAD extends connection and fault rebates to apply to accelerated connections, PA connections and PA faults to improve incentives for NBN Co to meet these service level timeframes and rectify issues promptly.

The draft FAD also includes a 'regulatory recourse' clause. This would require NBN Co to review its terms to support any changes to the broader telecommunications consumer safeguards framework that are implemented in the future. We consider that this is appropriate to provide certainty to RSPs about how wholesale terms will be adopted in the future so they can fulfil any new retail obligations.

The draft FAD also clarifies that where NBN Co is liable to pay CSG compensation under the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) it can reduce the amount of any rebates payable up to the amount of the CSG compensation. This avoids the ability for RSPs to 'double dip' by receiving CSG compensation on top of commercial rebate amounts.

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<sup>217</sup> ACCC, *ACCC submission to Part B of the Consumer Safeguards Review*, p. 1.

## 4.5. Liability and indemnity

### 4.5.1. Background

The WBA3 liability and indemnity terms include provisions for liability caps, material service failures and third party claims. These terms relate to consumer experience as they allocate risk between NBN Co and RSPs and can function to incentivise NBN Co to appropriately invest in its network in order to mitigate risks of serious issues arising (such as mass outages).

#### *Liability caps*

Under WBA3, each party to the contract is subject to a liability cap of \$200 million for direct losses arising from or in connection with the WBA. Importantly this cap does not apply to commercial rebates, CSG compensation and other cases such as negligent or wilful acts that cause or contribute to death or personal injury or damage to tangible property.<sup>218</sup>

Conversely, to the extent permitted by law, NBN Co's only liability in respect of losses arising by reason of a failure to achieve a service level, a delay in supplying, failing to supply, or an error or defect in the supply of an ordered product is the applicable commercial rebate or CSG compensation.<sup>219</sup>

#### *Material service failures*

WBA3 sets out NBN Co's liability for losses resulting from material service failures. These provisions were introduced with the implementation of WBA3.

The criteria for determining whether a service failure constitutes a material service failure is set out in the relevant product terms.<sup>220</sup> For example, 90 per cent of consumers from a single point of interconnect must be affected by an outage, and the outage must persist for a certain period of time (up to 20 days for a general failure) before it is classified as a material service failure.<sup>221</sup>

In the event of a material service failure, NBN Co's liability is limited to the pro-rated changes paid by the customer in the period in which the material service failure event applies, as well as liability caps based on a percentage of billings for the relevant year.

#### *Third party claims*

Certain terms within the WBA3 obligate RSPs to indemnify NBN Co against liability to end-users and downstream service providers in respect of certain losses that end-users may suffer due to failures of NBN Co's network in certain situations.<sup>222</sup> WBA3 includes model terms that RSPs may choose to include in their customer contracts. If an RSP does not use the model terms (or other similar measures), the RSP is required to indemnify NBN Co. The model terms limit end-users and downstream service providers from making claims against NBN Co (to the extent permitted by law) but do not limit claims for damage to, or loss of, tangible property, or for death or personal injury caused by NBN equipment or negligent or wilful acts.<sup>223</sup>

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<sup>218</sup> NBN Co, *WBA Head Terms*, Clause E1.4.

<sup>219</sup> NBN Co, *WBA Head Terms*, Clause E1.2(a).

<sup>220</sup> NBN Co, *WBA Head Terms*, Clause E1.4.

<sup>221</sup> ACCC, *ACCC inquiry into NBN wholesale service standards: Discussion paper*, December 2017, p. 41.

<sup>222</sup> NBN Co, *WBA Head Terms*, Clause E2.5.

<sup>223</sup> NBN Co, *WBA Head Terms*, Clause E2.5.

## 4.5.2. Submissions

Submissions from NBN Co, Optus and Telstra to the first and second discussion papers raised specific concerns regarding the liability caps, material service failures and the operation of the liability and indemnity provisions, including the appropriate allocation of risk and incentives in place for NBN Co to ensure a positive end-user experience.

### *Liability caps*

In response to liability caps, Optus submitted that the key concern with the WBA liability regime is not the quantum of the liability caps or the regime governing downstream customer claims. Instead, it is the clause that excludes all liability for any loss relating to any service failure or delay except for any commercial rebates or CSG compensation.<sup>224</sup> Optus considered concerns would be overcome if the service level regime in the WBA were strengthened to deliver tangible outcomes for consumers.<sup>225</sup>

Telstra submitted that the annual liability cap of \$200 million is insufficient to incentivise NBN Co to manage its risks appropriately. It expressed concerns that the quantum remains the same as under WBA2 despite the scale of the NBN rollout being significantly greater under WBA3. Telstra submitted that the liability cap is insufficient and does not provide incentives for NBN Co to invest in and maintain its underlying infrastructure to avoid risk and liability issues.<sup>226</sup> Telstra considered that the provision exposed the RSPs that spend in excess of the cap amount to greater risk as there is a potential that losses are not fully covered by NBN Co's liability cap.<sup>227</sup>

NBN Co submitted that it has uncapped exposure to RSPs for commercial rebates (including the Connection Rebate, Service Fault Rebate and Enhanced Fault Rebate), and CSG liabilities. Therefore, it considered the liability caps to be irrelevant to the end-user experience issues that are the subject of the Inquiry.<sup>228</sup> It further submitted that it has strong incentives to improve its performance for the matters where its liability is uncapped.<sup>229</sup>

### *Material Service Failures*

Optus submitted the material service failure regime does not provide appropriate incentives for NBN Co or appropriate protections or recourse for customers in the event of significant network outages.<sup>230</sup> It submitted the material service failure regime would only be available in exceptional circumstances and that more realistic thresholds should be established.<sup>231</sup> Optus also considered that, as the regime created a liability without establishing a remedy, legitimate claims could potentially be bogged down in technical legal argument.<sup>232</sup>

Telstra submitted that although the introduction of the novel material service failure regime as part of WBA3 is an improvement compared to NBN Co's liability regime offered under WBA2, it has some significant limitations.<sup>233</sup> Telstra considered the thresholds for

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<sup>224</sup> Optus, *Submission to the first discussion paper*, p. 28.

<sup>225</sup> Optus, *Submission to the first discussion paper*, p. 28; Optus, *Submission to the second discussion paper*, p. 25.

<sup>226</sup> Telstra, *Submission to the first discussion paper*, p. 15.

<sup>227</sup> Telstra, *Submission to the second discussion paper*, p. 26.

<sup>228</sup> NBN Co, *Submission to the second discussion paper*, p. 86.

<sup>229</sup> *ibid.*, p. 43.

<sup>230</sup> Optus, *Submission to the first discussion paper*, p. 27.

<sup>231</sup> Optus, *Submission to the first discussion paper*, p. 26.

<sup>232</sup> Optus, *Submission to the second discussion paper*, p. 25.

<sup>233</sup> Telstra, *Submission to the first discussion paper*, p. 14.

establishing a material service failure are too high, and also that the liability is not paid automatically.<sup>234</sup>

NBN Co submitted that the material service failure regime should be outside the scope of the inquiry, primarily because it was an initiative that was a product of commercial negotiation.<sup>235</sup> NBN Co considers that its material service failure regime has been negotiated with RSPs and provides protections for significant service failures as well as incentives for NBN Co to respond to these events in a timely manner.<sup>236</sup> It submitted that the thresholds used for the material service failure regime were designed with reference to detailed engineering assessments and represent the time it would take an efficiently-acting NBN Co to recover from the relevant failure.<sup>237</sup>

### *Third party claims*

Optus submitted that the third party claims provisions within WBA3 have the potential to avoid the need for RSP indemnification of NBN Co. However it considered that the procedure is complex to implement in downstream contracts and imposes onerous obligations on customers.<sup>238</sup>

Telstra considered that it is not appropriate for NBN Co to shift its potential liability onto its customers, particularly where costs have been incurred due to a failure by NBN Co.<sup>239</sup> Although Telstra considered RSPs to be best placed to manage the risk of a customer bringing a claim against NBN Co (because of their direct relationship with customers), it noted that this assumption fails to consider that an RSP is not in the best position to manage risks associated with NBN Co's network that are NBN Co's responsibility.<sup>240</sup>

NBN Co considered that third party indemnity terms should be outside the scope of the inquiry, primarily because it has accepted liability for matters where most network operators would exclude liability.<sup>241</sup> NBN Co submitted that the clause also sets out one way in which RSPs can discharge the obligation, through a commitment by end-users to not sue for pure economic losses due to the NBN network in cases that are contrary to the claim bar. NBN Co considers that no network can be fault-free and that liability to downstream parties should not be seen as a form of exposure necessary or appropriate to further incentivise NBN Co to improve the reliability of its network.<sup>242</sup>

Additionally, NBN Co considered that the third party claims provisions protect NBN Co from being liable for pure economic losses, and therefore are predominantly related to business services. It considered that in this case, it is the business end-users that are best placed to understand their business continuity risk and to determine how to respond in a proportionate and efficient manner".<sup>243</sup>

### **4.5.3. ACCC views**

Liability and indemnity terms influence consumer experience and the allocation of risk between the parties involved in the supply chain and as such, are within the scope of the

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<sup>234</sup> *ibid.*

<sup>235</sup> NBN Co, *Submission to the first discussion paper*, p. 78.

<sup>236</sup> NBN Co, *Submission to the second discussion paper*, pp. 5, 49.

<sup>237</sup> NBN Co, *Submission to the second discussion paper*, pp. 39, 46.

<sup>238</sup> Optus, *Submission to the first discussion paper*, p. 28.

<sup>239</sup> Telstra, *Submission to the first discussion paper*, p. 15.

<sup>240</sup> *ibid.*

<sup>241</sup> NBN Co, *Submission to the first discussion paper*, p. 78.

<sup>242</sup> *ibid.*, p. 81

<sup>243</sup> NBN Co, *Submission to the second discussion paper*, p. 5.

inquiry. In general, we agree with the principle that risk should be allocated to the party best able to manage that risk. However, we are aware that this principle can be interpreted in multiple ways.

Terms and conditions relating to liability are often agreed through commercial negotiation, but there are also instances where regulated liability terms are set out by regulation.<sup>244</sup> We note that liability caps in WBA3 do not apply to commercial rebates that are paid where NBN Co misses a service level commitment. As commercial rebates are the focus of this inquiry and, of themselves, represent NBN Co's liability on an individual service basis, we have decided not to provide draft views on the broader liability framework in the WBA.

#### **4.5.4. Draft FAD terms**

We welcome stakeholder views on our draft decision not to include liability or indemnity terms within the draft FAD.

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<sup>244</sup> ACCC, *Second discussion paper*, p. 22.

## 5. Regulatory assessment

The ACCC has taken into account the matters set out in subsection 152BCA(1) of the CCA in forming a position on the draft FAD terms. These are described in Section 2.2 of this paper. In particular, we note the following matters:

- whether the FAD will promote the LTIE
- the legitimate business interests of NBN Co, and NBN Co's investment in facilities used to supply the declared service
- the interests of access seekers who have a right to use the declared service
- the direct costs of providing access to the declared service, and
- the economically efficient operation of carriage services, telecommunications networks or facilities.

We do not consider the following factors set out in subsection 152BCA(1) are relevant to the draft FAD terms:

- the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else, and
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or facility.

This chapter is to be read together with the ACCC's specific analysis in Chapters 3 and 4 of this draft decision, including the sections that deal with each of the terms and conditions in detail.

### 5.1. Promotion of the long-term interests of end-users

In considering whether to make a FAD, the ACCC must have regard to whether it would promote the LTIE of carriage services, or services provided by means of carriage services.

The ACCC considers the term LTIE refers to the end-users' economic interests, which include lower prices, increased quality of service and greater diversity and scope in product offerings.

The ACCC must consider the long-term consequences of the FAD on end-users' interests. However, this does not mean the ACCC will exclude consideration of the short to medium-term, but it will consider the consequences of the FAD over a period beginning with the immediate future and extending to the long-term.<sup>245</sup>

To determine whether a particular thing promotes the LTIE, the ACCC must have regard to the extent to which it likely to result in the achievement of the objectives of:

- Promoting competition in markets for carriage services, or services provided by means of carriage services.
- Achieving any-to-any connectivity in relation to carriage services that involve communication between end-users.

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<sup>245</sup> ACCC, *A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010*, pp. 28–29.

- Encouraging the economically efficient use of, and economically efficient investment in, infrastructure by which listed services are supplied and any other infrastructure by which listed services are, or are likely to become capable of, being supplied.<sup>246</sup>

We consider that the draft FAD would promote the LTIE by promoting competition in relevant markets and encouraging economically efficient use of and investment in infrastructure. We do not consider that the draft FAD would affect any-to-any connectivity.

### 5.1.1. Promoting competition

We consider that the draft FAD would promote competition in downstream retail markets for broadband and voice services over the NBN. While there is strong price competition in the retail market for NBN broadband services, there appears to be more limited competition with respect to aspects of service quality.<sup>247</sup>

In line with our general approach set out in Chapter 3, if the ACCC proceeds to make the FAD, it would have the immediate effect of setting out clearer service level commitments for NBN Co, strengthening incentives on NBN Co to meet its service level commitments and providing greater certainty about the redress available to RSPs where service levels are not met. In particular, these improvements would apply to missed appointments, delayed connections, unresolved faults and underperforming service speeds. The draft FAD would also have the effect of improving NBN Co's provision of information about services to RSPs.

We consider that these measures would promote competition by increasing certainty for RSPs in retail markets and by minimising distortions in consumer switching behaviour.

#### *Certainty for RSPs*

In order to provide services that meets its customers' needs and expectations, RSPs must have sufficient certainty about services delivered over the NBN. This includes not only the technical specifications and performance of NBN Co's products, but also commitments about what actions will be taken if the specified quality of service cannot be delivered, what remedies (including rebates) will be provided and what processes will be in place for an RSP to access those remedies.

Certainty around remedies (including rebates) is particularly important due to their key role in allowing RSPs to better manage end-user expectations and outcomes, as it improves their capacity to provide interim services, increase their customer support or make goodwill payments directly to consumers. Retail competition provides incentives for RSPs to improve their service quality and customer experience in order to gain or avoid losing customers. However, RSPs cannot meaningfully compete on service quality without certainty regarding the underlying service levels framework. Particularly, smaller RSPs may rely on rebates from NBN Co to offer end-users appropriate remedies, compared to larger RSPs who may have the scale and capacity to offer more remedies in the absence of meaningful rebates.

Certainty also promotes competition by providing RSPs with a reliable basis on which to develop differentiated product offerings. With a clear service levels and rebate framework, RSPs will have greater ability to develop different sorts of remedies for service failures as a point of differentiation compared to other retailers. RSPs will also have more capacity to develop a portfolio of differentiated product offerings to appeal to different groups of consumers.

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<sup>246</sup> CCA, s 152AB.

<sup>247</sup> ACCC, *Communications sector market study*, p. 43.

Currently, we consider that RSPs do not have sufficient certainty around the services that they can deliver to consumers, which is likely to be constraining their ability to plan their strategies for operating and competing in retail markets.

The measures proposed in the draft FAD would be likely to have the effect of increasing certainty for RSPs and therefore promoting competition in the retail broadband market. We consider that the draft FAD terms would increase certainty by:

- specifying clear service commitments for missed appointments, delayed connections and unresolved faults on a per-service basis
- improving NBN Co's service level rebates, providing stronger incentives for NBN Co to meet its service commitments and ensuring clarity about the remedies NBN Co will offer RSPs where it does not meet its service commitments
- ensuring that NBN Co is responsible for conducting appropriate testing to confirm that it has successfully completed a connection
- limiting and clarifying the specific circumstances under which NBN Co can extend its timeframes for meeting its service commitments
- clarifying how service levels for faults should be measured to promote timely fault rectification
- improving RSP access to information about the ongoing performance of NBN services by requiring automated transfer of operational information and locking in service level reporting commitments, and
- committing NBN Co to updating its service standards to support any changes to the consumer safeguards framework that affect NBN services.

Together, the changes proposed in the draft FAD would likely improve certainty for RSPs, which would provide a stronger basis for RSPs to deliver NBN services to end-users and promote competition in downstream retail markets.

#### *End-user switching behaviour*

Poor wholesale service quality can also distort the competitive process by affecting consumer switching behaviour in downstream retail markets. Consumer switching promotes competition in retail markets as it provides incentives for RSPs to compete for customers by improving or varying their service offerings, including with respect to non-price factors. If consumers have difficulty getting connected or have faults repaired due to issues caused by, or contributed to, by NBN Co, this may distort their decision to switch RSPs in different ways:

- Long wait times for connections or missed appointments may cause consumers to abandon their decision to switch providers or to choose a different RSP, despite the delay being caused by NBN Co and not the RSP.
- Consumers may be reluctant to switch RSPs if they remember that connecting to the network was difficult or subject to substantial delays, as they may assume that getting connected to a new provider will be similarly difficult.
- Consumers may blame their RSP for difficulties or delays getting faults repaired which may cause them to switch RSP, despite the issue being caused by NBN Co and not the RSP.

Distortions to switching behaviour based on wholesale service performance issues damage RSPs' ability to compete for customers on the basis of their service offerings, as well as causing them to lose customers based on issues over which they have no control. Further,

distortions to switching behaviour harm consumers where they cause consumers to choose services that do not best suit their needs, where their decision is based on misattributing a performance issue to their RSP rather than NBN Co.

The measures in the draft FAD that incentivise improved performance by NBN Co are likely to reduce the distortions to switching behaviour based on service performance issues, and therefore promote retail competition.

### **5.1.2. Encouraging economically efficient use of and investment in infrastructure**

We consider that the draft FAD would likely encourage the economically efficient use of and investment in infrastructure. This would be achieved by improving the allocation of risk and responsibility in the supply chain between NBN Co and RSPs, and strengthening incentives on NBN Co to invest in activities that reflect consumer preferences and make the best use of the NBN network.

We consider that FAD terms that reflect consumer preferences for strong service level commitments at both wholesale and retail segments of the supply chain would likely encourage efficient use of the network.<sup>248</sup> In particular, improved service levels regarding appointments, connections, faults and speed issues would likely to result in the use of the NBN network in ways that are most valued by end-users.

Several provisions within the draft FAD also clarify NBN Co and RSPs' responsibilities in the supply chain for retail broadband services. We consider that the draft FAD terms would improve the allocation of responsibility by:

- clarifying the specific circumstances under which NBN Co can extend its service level timeframes and when it will begin measuring service levels for faults
- strengthening NBN Co's incentives to address delayed connections and unresolved faults in a timely manner by causing service level rebates to accrue over time
- clarifying and improving NBN Co's responsibility to provide assurance of connections and service speeds, and
- requiring NBN Co to improve access to information about the ongoing performance of NBN services, including service level performance.

We consider that these terms would encourage NBN Co and RSPs to focus their investment in infrastructure on matters that are within their control and where they are best placed to deliver improvements in service performance to the benefit of end-users. This would also promote better coordination of investments between NBN Co and RSPs and would be likely to encourage economically efficient investment, as we consider that investments of this kind would have the effect of minimising industry-wide costs.

## **5.2. The legitimate business interests of NBN Co**

We acknowledge that NBN Co would incur costs in order to implement the draft FAD and drive service performance improvements. However, we note that NBN Co would have the opportunity to recover these costs under the long term revenue constraint methodology set out in its SAU. We do not consider that the introduction of the draft FAD terms would impact on NBN Co's ability to recover a return on its investment.

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<sup>248</sup> See DoCA, *Consumer Safeguards Review consultation – Part B: Reliability of services*, p. 4.

The draft FAD terms would provide an appropriate incentive for the NBN Co to maintain, improve and invest in the operationally efficient provision of the services. We consider that this reflects NBN Co's legitimate interests to supply services to a standard that is required in the context of the supply chain.

### 5.3. The interests of access seekers

The interests of access seekers are reflected through measures that appropriately allocate risk and responsibility between NBN Co and RSPs.

Several terms within the draft FAD would increase NBN Co's liability for rebate payments where its service commitments are not met for appointments, connections, and faults. These terms would be in the interests of access seekers as they provide additional incentives on NBN Co to meet the relevant service levels, and also improve the ability of RSPs to plan for actions they can take to mitigate harm to end-users. They would also help to more closely align RSPs' obligations in the retail market and NBN Co's commitments in providing the declared services.

Other draft FAD terms would improve on the information NBN Co will provide to RSPs, which will allow them to be more responsive to the needs and preferences of their customers. These include terms relating to NBN Co's provision of service specific information and clarification of how NBN Co will report on its service level performance.

We note NBN Co's submission that bargaining power is evenly distributed between NBN Co and the larger RSPs (the benefits of which flow to smaller RSPs) due to their knowledge about telecommunications networks and countervailing market power based on their ability to opportunistically bypass NBN Co's network.<sup>249</sup> However, we do not consider that this dynamic has been borne out in practice. Commercially negotiated outcomes to date, including the negotiation of WBA3, have not always resulted in provisions that appropriately balance RSP interests with NBN Co's.

We consider the draft FAD appropriately reflects RSPs' interests in the declared services, taking into account NBN Co and RSP roles in the supply chain. Further, if RSPs became subject to new consumer safeguards over the term of the FAD, the FAD would require NBN Co to review its wholesale terms to support these obligations.

### 5.4. The direct costs of providing access to the declared services

The primary factors relevant to NBN Co's costs of providing access to the declared services are implementation costs and ongoing operational costs relating to the draft FAD terms, which would likely include increased rebate payments.

NBN Co submitted that any proposed changes to service standards must take account of the cost impact of implementing that change, including:

- whether the change would require NBN Co to bear unreasonable costs in making required enhancements to its network, and
- whether the cost would be disproportionate to the value that end-users will ultimately derive from any change (particularly given changes may ultimately result in increased prices for end-users).<sup>250</sup>

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<sup>249</sup> NBN Co, *Submission to the second discussion paper*, p. 9.

<sup>250</sup> NBN Co, *Submission to the second discussion paper*, p. 11.

We note that NBN Co's wholesale terms are subject to ongoing negotiation. We consider that the significant concerns raised with the current terms mean changes to NBN Co's operational systems and processes are necessary. We do not consider that any of the terms and conditions in the draft FAD would impose unreasonable costs on NBN Co.

While the draft FAD rebate terms would likely increase NBN Co's costs in supplying services, particularly in the short term, we consider that these costs would be reasonable in respect of each of the rebate terms as:

- increased service level rebates, which carry the risk of increased costs, are essential to strengthening NBN Co's incentives to improve its service level performance
- NBN Co would have the opportunity to reduce the extent of its liability for rebate payments through improvements in its operational performance
- any increase in costs for NBN Co should result in an appropriate transfer of value in the context of the supply chain, reflecting the downstream impact of the service level commitments not being met, and
- as set out above, NBN Co would have the opportunity to recover its costs in the long term through the SAU's long term revenue constraint methodology.

We consider that the value end-users would derive from the draft FAD terms is proportionate to the necessary costs. We do not anticipate that the cost of NBN Co services would be significantly impacted in the period in which the full effect of the FAD would be felt.

## 5.5. The economically efficient operation of carriage services, telecommunications networks or facilities

As discussed in detail in section 5.1.2, we consider that the draft FAD terms would encourage the economically efficient use of, and economically efficient investment in, infrastructure. We consider that these reasons would also apply to the economically efficient operation of services, networks and facilities.

## Annexure: Consultation questions and principles described in this draft decision

### Consultation questions

1. Do you agree with the specific principles we consider should be used to guide the formulation of wholesale terms?
2. Do you agree with the terms in the draft FAD instrument and application of the regulatory criteria to these terms?
3. How do you consider the ACCC should proceed with the inquiry in the context of WBA4 negotiations (e.g. timing for the introduction and expiry of regulated terms)? Would you support the ACCC hosting an industry forum on service standards?

### Principles described in this draft decision

1. NBN Co should only confirm to the access seeker that a connection is completed, and begin charging for that service, after conducting appropriate testing to ensure installation activities are successful.
2. Connection rebates should apply to all standard connections and should accrue on a daily basis if the relevant service level is not met.
3. Fault rebates should accrue on a daily basis if the relevant service level is not met.
4. Missed appointment rebates should take into account the cost and inconvenience to the end-user when an appointment is missed, while at the same time provide a stronger incentive to reduce the rate of missed appointments.
5. NBN Co should be responsible for the speed and performance of its wholesale product and not charge for services that it does not provide.
6. To ensure a robust service level framework, NBN Co should only extend service level timeframes under limited specified circumstances, for example if NBN Co is waiting for customer or RSP action before completing a connection or remediating a fault, or NBN Co's operations are affected by a force majeure event.
7. NBN Co should record service specific information about the progress of appointments, connections and faults and make this available to access seekers in a way that is accurate, timely and accessible. This should include whether a relevant service level has been missed and is able to be used by RSPs to inform end-users where appropriate.
8. NBN Co should provide regular reports to access seekers about the overall performance of its network. This should include its performance meeting service levels by location, service class and network.
9. NBN Co should support the delivery of NBN services in line with existing consumer safeguards, where they apply. PA connections and faults should be prioritised over standard connections and faults. NBN Co should commit to updating the WBA service standards to support any changes to the consumer safeguards framework that affect NBN services.