



ACCC inquiry into NBN wholesale service standards

Second discussion paper

December 2018

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Executive summary

The Australian Competition and Consumer Commission (ACCC) is conducting an inquiry into NBN wholesale service standards to determine whether NBN Co's wholesale arrangements with telecommunications retail service providers (RSPs) are appropriate, and consider whether regulation is necessary to improve consumer experiences.

This is the second consultation paper for the inquiry. We received submissions to the first consultation paper in March 2018 which informed our view on whether we should make regulated terms on an interim basis while the inquiry is ongoing. In September 2018, the ACCC accepted a court enforceable undertaking from NBN Co which included commitments from NBN Co to make changes to its wholesale service levels. The undertaking was offered by NBN Co after the ACCC proposed to make an interim access determination to improve consumer experiences.

The enforceable undertaking is focussed primarily on the rebates payable to RSPs in cases where NBN Co does not meet its service level targets. Specific improvements to rebates included as part of the undertaking include payment of rebates for every late connection or fault rectification (not just those below a 90 per cent threshold), new rebates for missed NBN Co appointments, simplification of the process and conditions for claiming rebates, and the requirement for a fair value benefit from rebates to be passed on to end users. The undertaking also includes a range of reporting and information commitments, particularly in relation to fixed wireless services.

The second consultation paper seeks further input on matters that have been raised by stakeholders in the inquiry that have not been fully addressed by the enforceable undertaking. The primary topics we seek input on in the discussion paper are the broader principles underpinning the long term rebate framework that were not addressed in the enforceable undertaking, 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.

The ACCC has extended the period for the inquiry to the second half of 2019. We consider the extension is required in order to assess the implementation of the commitments made by NBN Co in the enforceable undertaking and will allow us to undertake a second round of consultation. We anticipate that the inquiry will conclude by October 2019.

We note that the current version of NBN Co's Wholesale Broadband Agreement (WBA3) is due to expire in November 2019, with negotiations expected to take place between NBN Co and RSPs on WBA4 during 2019. In addition to informing our consideration of whether further regulation is necessary to improve consumer experience on the NBN, we consider the public consultation undertaken for the purpose of this inquiry, and the identification of specific issues or concerns by stakeholders, will be useful in informing discussions between NBN Co and its customers.

Submissions are sought by 15 February 2019.

1. Introduction

1.1. Background

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

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 Wholesale Broadband Agreement (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.¹

The inquiry is considering whether regulatory intervention is necessary in the form of a final access determination (FAD). We undertook an initial consultation process with interested stakeholders during 2018. The ACCC received 12 written submissions to the first discussion paper. Public versions of these submissions are available on the ACCC website.²

Through the consultation process, we identified a number of measures that could be implemented on an interim basis while the inquiry was ongoing. These proposed measures were discussed with NBN Co who subsequently offered voluntary measures in a court enforceable undertaking.

1.2. NBN enforceable undertaking

The ACCC accepted the court enforceable undertaking from NBN Co on 11 September 2018. The changes included in the undertaking will address some of the most pressing issues affecting end user experience and provide stronger incentives on NBN Co to maintain a high standard of operational performance.

We considered that there were advantages to accepting the court enforceable undertaking over the ACCC making an Interim Access Determination in the immediate term. Importantly, the undertaking would provide greater certainty as NBN Co was prepared to implement the undertaking measures within WBA3 to a clear timeframe. Under the Part XIC hierarchy of instruments, described in section 3.1.2 of the first discussion paper, an Interim Access Determination would have no effect to the extent to which it is inconsistent with WBA3 as executed between NBN Co and another party.³

NBN Co’s enforceable undertaking sets out changes to NBN Co’s wholesale service level commitments to support positive consumer experiences on the NBN.⁴ In the undertaking, NBN Co commits to amending its standard form of access agreement (i.e. the WBA) and to offer to amend its current access agreements with RSPs within three months. The requirement to offer these amendments ceases to have effect at the expiry of WBA3.

¹ The meaning of ‘NBN wholesale service standards’ is discussed in detail in the ACCC’s first consultation paper. ACCC, [ACCC inquiry into NBN wholesale service level standards: Discussion paper](#), December 2017, p.6.

² See: www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-wholesale-service-standards-inquiry/discussion-paper-and-submissions. NB: One member of the public requested that their submission remain confidential.

³ CCA, s 152BCC.

⁴ The undertaking can be found on the ACCC public register: <https://www.accc.gov.au/public-registers/undertakings-registers/nbn-co-limited>

Some of the key amendments to the service standard commitments include changes to the rebates payable under access agreements. These include:

- a change to the threshold for the payment of connection and service fault rebates so that NBN Co now pays a rebate of \$25 for every instance where its service level performance drops below 100 per cent, rather than the previous 90 per cent threshold
- a new \$25 rebate payable by NBN Co for each missed appointment, and
- a simplified process for RSPs to receive rebates, including the removal of certain conditions for claiming rebates.

As part of these changes, RSPs must also take reasonable steps to ensure their customers receive a fair value benefit from the wholesale rebates. This benefit may be in a monetary or other form.

In addition to these changes to rebates, NBN Co has undertaken to expand its reporting of service levels, including on the fixed wireless network. In accordance with the undertaking, NBN Co will report to RSPs about its service level performance sooner and will provide additional transparency to RSPs and the public on the performance of its fixed wireless network.

On 26 October 2018, NBN Co published a variation agreement on its WBA website offering to introduce the undertaking measures into existing RSP access agreements. Once entered into by access seekers, these terms will apply from 11 December 2018.

1.3. Assessment approach

We consider that the enforceable undertaking given by NBN Co addressed a number of issues that were of immediate concern in this inquiry. We are now considering longer term issues and matters that were raised in submissions to the initial discussion paper that have not been addressed in the enforceable undertaking. In this stage of the inquiry, the ACCC is considering whether it should make a final access determination (FAD).

The ACCC may make an access determination under Part XIC of the *Competition and Consumer Act 2010* (CCA) with respect to declared NBN services.⁵ The services NBN Co supplies in accordance with the WBA are declared under Part XIC of the CCA.⁶

In making a FAD, the ACCC is required to take a number of matters into account, including:

- whether the FAD will promote the long term interests of end users (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 operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility

⁵ CCA, s.152BC(1).

⁶ CCA, s.152AL(8D); The WBA published on NBN Co's website is a standard form of access agreement for the purposes of Part XIC of the CCA.

- the economically efficient operation of a carriage service, a telecommunications network or a facility, and
- any other matters the ACCC considers relevant.⁷

Submissions to this discussion paper will inform our assessment against each of these factors.

We previously explained the broader regulatory framework and the ACCC's approach to examining service levels in our first discussion paper.⁸

1.4. Other relevant processes

There are several other processes that are examining issues relevant to this inquiry, particularly the experiences of consumers on the NBN. These include:

- new industry standards introduced by the ACMA at the retail level, which impose new rules in relation to continuity of services, consumer information at the point of sale and complaints handling processes
- the Department of Communications and the Arts' (DoCA) review of telecommunications consumer safeguards⁹
- the Australian Government's Federal Reform Package that proposes, amongst other things, to make NBN Co the default statutory infrastructure provider (SIP) for all of Australia
- the Productivity Commission's Telecommunications Universal Service Obligation Inquiry report and the government's response to introduce a Universal Service Guarantee (USG), and
- the Regional Telecommunications Review that is considering the quality of and access to voice and broadband services in regional areas as well as the proposed USG.

1.5. Extension of inquiry

When the inquiry was announced, we stated that we anticipated that the inquiry would conclude in December 2018. We now anticipate that the inquiry will conclude by October 2019.

The extended period is reflective in part, of the time taken to review the WBA3 service level terms NBN Co volunteered to improve as part of its enforceable undertaking as well as the changes that have been made to the regulatory framework. Extending the inquiry also allows us to undertake a second round of consultation and to monitor the outcomes of NBN Co's enforceable undertaking, including the changes to rebates, which will begin taking effect from December 2018.

⁷ CCA, s.152BCA.

⁸ ACCC, [ACCC inquiry into NBN wholesale service level standards: Discussion paper](#), December 2017, pp.15-24.

⁹ Minister for Communications and the Arts, [Government announces telecommunications Consumer Safeguards Review](#), 17 April 2018.

1.6. Consultation

We encourage industry participants and other interested parties to make submissions to this discussion paper, including reasons to support their views. We will also consider submissions to the first discussion paper in this stage of the inquiry and submitters are welcome to refer directly to previous submissions if appropriate.

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.¹⁰

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, 15 February 2019** to nbn@acc.gov.au and copy to:

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¹⁰ See: <https://www.acc.gov.au/publications/acc-aer-information-policy-collection-and-disclosure-of-information>

2. Rebates

Rebates are a key component of NBN Co's service level framework. We consider that rebate commitments should provide strong incentives on NBN Co to meet its service levels. Further, rebates provide certainty to RSPs about what to expect when service levels are not achieved and assist RSPs to provide services that meet end user expectations.

The arrangements for calculating and paying rebates are set out in WBA3 and consist of a number of elements.¹¹ For each identified activity, including end-user connections, end-user faults and appointments, a service level is specified. These typically take the form of a target set by reference to the type of activity and its location. For example, for an HFC service class 21 connection (which falls within the HFC Footprint, but may require a lead-in and other work at the premises) has a service level of 14 Business Days. Under the current WBA3, RSPs are able to claim connection rebates or end-user fault rectification rebates where NBN Co's performance in meeting these service levels falls below 90 per cent. The quantum of the rebate is calculated using a formula that applies \$25 for each service level miss that falls below the 90 percent threshold. RSPs' eligibility to claim connection rebates is also subject to them submitting accurate forecasts for the number of connections orders for the month.

As discussed in 1.2, we accepted a court enforceable undertaking from NBN Co, which included a number of changes to the rebates while WBA3 is in effect. These changes will address some of the most pressing issues affecting end user experience and provide stronger incentives on NBN Co to maintain a high standard of operational performance. These include the introduction of a rebate for missed appointments, removing threshold requirements that applied before rebates were payable, and simplifying the process for RSPs to receive rebates. Generally, under these arrangements, NBN Co is liable to pay a one-off \$25 rebate to the RSP each time it misses its service level for a standard connection, end user fault rectification, or misses an appointment.¹²

The enforceable undertaking also included a requirement that RSPs take reasonable steps to ensure their customers receive a fair value benefit (in monetary or other form) from the wholesale rebates paid by NBN Co.

We also recognise that there are other elements of the WBA3 rebate framework that remain unchanged by the enforceable undertaking that are also central to NBN Co's incentives to meet service level timeframes. Importantly, these include the quantum of rebates and the basis on which rebates are applied.

We will examine these further aspects of the rebate framework for NBN wholesale services in the next stage of the inquiry and consider whether additional changes are required to further improve outcomes for end users. We will also take into account the impact of the changes made to the rebate framework under the enforceable undertaking in this consideration.

¹¹ See WBA3 Service Levels Schedule within the NBN Ethernet Product Module (<https://www.nbnco.com.au/sell-nbn-services/supply-agreements/wba>)

¹² See Attachment A to NBN Co's 87B undertaking (<https://www.accc.gov.au/public-registers/undertakings-registers/nbn-co-limited>)

2.1. Purpose of rebates

RSPs' submissions to the first consultation paper highlight the role of rebates in incentivising NBN Co to meet its service levels.¹³ Some RSPs also note that rebates provide some compensation for the costs they incur when NBN Co misses its service levels, including the costs of managing end user experience. NBN Co submits that the purpose of its connection rebate and service fault rebate is to recognise the diminution in value of the service for which an RSP has paid.¹⁴ Further, NBN Co submits 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.¹⁵

We consider that NBN Co's service levels, including rebates, have multiple inter-related purposes, including to:

- provide certainty to RSPs about the operational outcomes NBN Co will achieve and the steps that will be taken when they are not met
- allow RSPs to provide services to a standard that meets end users' expectations about their experience on the NBN, and
- appropriately allocate risk and responsibility between NBN Co and RSPs and provide incentives for NBN Co and RSPs to work together to contribute to good end user experiences.

The principles that underpin what rebates should achieve are important to our consideration of whether the rebate provisions are appropriate, and if not, what form regulated terms should take. In particular, we are interested in any further views held by stakeholders that are relevant to the Part XIC factors discussed in 1.3.

1. What are the key principles you consider should underpin NBN service level rebates?

2.2. Rebate structure

We consider that the design of the rebate framework is critical to ensure that it meets its intended purposes. This includes the size of the rebate and the basis on which the rebate is applied (e.g. one off rebate, daily rebate, or escalating rebate).

Stakeholders provided a range of views on the appropriateness of the existing rebate structure in submissions to the first consultation paper. Telstra, Optus, VHA and the CCC submit 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.¹⁶ Telstra and Optus suggest similar models of a daily rebate, where the daily amount increases once after a specified number of days.¹⁷ VHA notes that RSPs incur ongoing costs to mitigate the impact of service level misses on their customers, which is not reflected by the one off rebate.¹⁸ ACCAN submits that a one off rebate does not account for the length or extent of

¹³ Telstra, [Telstra submission to ACCC Inquiry into NBN Wholesale Service Standards – Public version](#), March 2018, p. 9; Optus, [Submission in response to ACCC Discussion Paper – NBN wholesale service standards – Public Version](#), March 2018, pp. 8 & 22-27; CCC, [Submission in response to ACCC Discussion Paper 'ACCC Inquiry into NBN Wholesale Service Standards' dated December 2017](#), 7 March 2018, p. 1.

¹⁴ NBN Co, [Submission to the ACCC – Discussion Paper on NBN Wholesale Service Standards](#), 2 March 2018, pp. 53 & 56.

¹⁵ NBN Co, pp. 19-32.

¹⁶ Telstra, pp. 11 & 19; Optus, pp. 25-26 & 47; VHA, [ACCC NBN Wholesale Service Standards Discussion Paper – Submission](#), March 2018, pp. 5-6; CCC, pp. 9-10.

¹⁷ Telstra, p. 19; Optus, p. 47.

¹⁸ VHA, pp. 5-6.

end user issues.¹⁹ The ACMA notes that the current rebate structure appears to create weak incentives for NBN Co to rectify faults after it has missed the initial service level.²⁰

NBN Co submits that the current rebate structure is appropriate. NBN Co considers that it faces incentives not to incur a rebate in the first instance and to resolve issues in a timely manner due to the reputational risk it faces. NBN Co notes 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.²¹

We consider that NBN Co should face incentives to complete connections and rectify faults within a reasonable timeframe, and that RSPs and end users should be provided with meaningful compensation or remedies when this does not occur. This is particularly important for cases of aged orders and trouble tickets which are likely to represent the worst individual cases of customer experience.

We consider that the changes made to the rebate framework in the enforceable undertaking are likely to improve NBN Co's financial incentives to meet its service levels, as a rebate will now be payable for every missed service level for connections, faults and missed appointments. However, we note that the rebate structure could be further improved in cases where connection delays or faults extend over a longer timeframe.

We see strong merits to the suggested model of a daily rebate to provide additional incentives for timely connections and fault rectification, and to ensure appropriate management of consumer experience in these cases. We are interested in stakeholder views on this proposal. We note that in the United Kingdom, contracts for Openreach's wholesale broadband services require Openreach to pay daily rebates to RSPs where it fails to connect a service or repair a fault with the applicable service level timeframe.²²

We will also monitor the effect of the changes proposed to the rebate framework on NBN Co's incentives and end user outcomes, following their implementation from December 2018, to inform our consideration of any further proposed changes to the rebate structure.

- 2. How should rebates be structured to ensure that they provide the right incentives to NBN Co and RSPs to contribute to good end user experiences?**
- 3. What factors should the ACCC refer to when considering the rebate structure and amount?**

2.3. Availability of connection rebates to service classes

Optus' submission notes that connection rebates are not available for standard connections where the service level is one business day (i.e. service classes 3, 6, 9, 13 and 24).²³ We further note that under the WBA, connection rebates do not apply to FTTC connections where the service level is one business day (service class 34). It is not clear why the rebate framework distinguishes between standard connections that have a service level of one

¹⁹ ACCAN, [ACCC Inquiry into NBN Wholesale Service Standards – Submission by ACCAN to the ACCC](#), 2 March 2018, p. 8.

²⁰ ACMA, [ACMA submission to ACCC NBN wholesale service standards inquiry – Response to discussion paper](#), March 2018, p. 6.

²¹ NBN Co, pp. 29, 65-66.

²² Openreach, [Automatic Compensation – Response to Ofcom consultation on protecting consumers from quality of service problems](#), 5 June 2017, pp. 7-9.

²³ Optus, pp. 24-25.

business day and other standard connections.

- 4. Should connection rebates also be available to standard connections where the service level is one business day? Are there any reasons why these connections should be treated differently to other standard connections?**

2.4. Pass through of benefit to consumers

The variations to WBA3 that NBN Co committed to make as part of its enforceable undertaking include a requirement that RSPs take reasonable steps to ensure that affected end users receive a fair value benefit of rebates paid from NBN Co to RSPs. This fair value benefit can be in monetary or other form.²⁴

This will require RSPs to 'pass through' value of the connection, service fault and missed appointment rebates that they receive from NBN Co. We consider that this requirement should ensure that consumers benefit from the improvements to NBN Co's service standards and that rebates do not simply function as a transfer of value from NBN to RSPs.

The requirement is framed to allow for flexibility in providing a fair value benefit. We understand that some RSPs already offer remedies in cases where NBN Co misses its service levels, including billing credits, goodwill payments, interim services and 4G backup modems. The ACMA NBN Service Migration Determination, discussed further in 4.3, also requires RSPs to provide consumers with an interim service if they are left without a working service during their move to the NBN. We consider that flexibility in RSPs' use of rebates is important, particularly to promote competition amongst RSPs on service quality. As set out above, we consider that rebates also play a role in compensating RSPs for the costs they incur when NBN Co misses a service level, including the costs of managing end user experience.

We are interested in views on how RSPs expect to apply the pass through of fair value benefit in practice. We will consider feedback from stakeholders and continue to monitor the implementation of the pass through requirement as part of our consideration of whether regulated terms are required in respect of rebates.

- 5. What processes do RSPs expect to apply to ensure end users affected by service level misses receive a benefit from wholesale rebates?**
- 6. What records will RSPs keep to demonstrate compliance with the pass through requirement? Would there be benefit in requiring RSPs to publish how they intend to pass through a benefit?**
- 7. Are there any additional wholesale measures required to support RSPs in identifying and passing through fair value benefit from rebates to affected end users?**

²⁴ NBN Co, [Undertaking to the Australian Competition and Consumer Commission given for the purposes of section 87 B](#), 11 September 2011, Attachment A pp. 9, 12 & 20.

3. Service speed and performance

RSPs have primary responsibility for the contractual arrangements and relationships with consumers. This includes responsibilities under the Australian Consumer Law to deliver services as promised to and paid for by the end-user, or providing an appropriate remedy in the event of non-delivery. The ACCC has provided detailed guidance for RSPs on how to advertise speeds for fixed-line broadband services.²⁵ The ACCC recently published a report on the effectiveness of this guidance and is consulting on proposed changes to the guidance.²⁶

Additionally, the ACMA's consumer information standard and NBN service migration determination have recently commenced.²⁷ These 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.

Actual speeds experienced for an NBN service are affected by many factors.²⁸ Some of these factors are within the control of RSPs, such as the amount or CVC acquired by RSPs. Other factors are within the control of end-users, such as the customer's in-home wiring and equipment. However, attainable speeds may also be impacted by technical limitations of the NBN network. Technical limitations impacting on service speeds are particularly relevant to FTTN services while these must co-exist with legacy copper services. Speeds on the fixed wireless network can also be affected by a number of factors, including the distance to the fixed wireless tower, whether the tower is in line of sight and network congestion. Attainable speeds on the fixed wireless network may therefore be impacted by these factors that can contribute to poor end user experiences.

We consider the availability of speed information to RSPs is essential to support their sales and marketing activities, and their compliance with their regulatory requirements. Wholesale arrangements should also support RSPs to identify and provide remedies for services that are connected where the service is not performing in accordance with the bandwidth profiles specified for the service due to technical limitations.

3.1. Service speed information available to RSPs

Under the WBA, NBN Co provides RSPs with estimated attainable line speed data prior to an order being placed over the NBN access network, including via its service qualification tools where available.²⁹

Information commitments relating to service speed information have been raised in the context of the ACCC's assessment of NBN Co's proposed 2017 SAU variation.³⁰ NBN Co submitted that it provides "birth certificates" and weekly speed reports in relation to end-user connections. Telstra submitted that NBN Co's reporting to RSPs provides sufficient visibility in relation to services affected by co-existence.³¹ However, Optus highlighted the need for

²⁵ ACCC, [Broadband Speed Claims Industry guidance](#), August 2017.

²⁶ See: <https://consultation.accc.gov.au/communications-1/2018-broadband-speed-claims-guidance-consultation/>

²⁷ See: <https://www.acma.gov.au/theACMA/nbn-rules-consumer-information-service-continuity>

²⁸ NBN Co, WBA Product Description, Ethernet Product Module, section 14.1(b).

²⁹ NBN Co, WBA Operations Manual, section 4.3.1.

³⁰ See: <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-co-sau-variation-2017>

³¹ Telstra, [Submission to ACCC Consultation on Revised Variation to NBN Co Special Access Undertaking](#), 1 September 2017, p. 5.

additional wholesale commitments to identify FTTN/B lines that are subject to co-existence, remediation or interference mitigation actions, and an estimate of the date by which the co-existence period is expected to end.³²

In respect of the fixed wireless performance, we understand that NBN Co does not currently provide estimated attainable line speed data for fixed wireless connections before or after an order is placed. However, NBN Co, as part of its undertaking, committed to provide information on busy hour speeds of fixed wireless cells. This includes weekly reports to RSPs that identify wireless cells with a 30-day average busy hour throughput of less than 6 Mbps, and its planned forecasts for upgrading those cells.³³ NBN Co will also provide information on speeds on cells with an average downlink throughput above 6 Mbps, however the speeds will not be further broken down, e.g. whether the cell's average throughput is 6-12 Mbps, 12-25 Mbps, etc.

This information can help RSPs to inform their current customers of whether they are on a congested cell and when the cell will be upgraded. However we understand that RSPs will not have sufficient information to determine the likely busy hour speeds a prospective fixed wireless customer will receive if they choose to connect to the NBN, in particular whether their service address is located in a congested cell. Accordingly, RSPs may not be able to advise prospective customers if an alternative to fixed wireless might be the better option if they would be served by a congested cell.

We consider that the following measures could enable RSPs to better manage consumer expectations during the sales and activation process for fixed wireless services:

- Provision of information by NBN Co to RSPs to enable them to determine whether a prospective customer is likely to be serviced by a congested cell
- Provision of maximum attainable line speed data by NBN Co to RSPs.

- 8. Does the information NBN Co makes available to RSPs about service speeds appropriately support RSPs advertising and selling of services?**
- 9. Please indicate what, if any, additional fixed wireless performance information is necessary to enable RSPs to better set consumer expectations for current and prospective customers.**

3.2. Underperforming services

In the context of FTTN/B services that co-exist with legacy copper networks, Telstra submits that NBN Co expects the RSP to continue to pay the AVC charges as per the price list, even though the customer is receiving a service that is slower than they would expect.³⁴ Submissions from ACCAN, Optus and Telstra to the ACCC's consultation on NBN Co's proposed 2017 SAU variation also suggest rebates or discounted charges should apply where the PIR or CIR cannot be achieved due to co-existence, remediation or interference mitigation.³⁵

³² Optus, [Submissions to ACCC in Response to Revised First Variation to NBN Co Special Access Undertaking](#), September 2017, p.14.

³³ NBN Co, [Undertaking to the Australian Competition and Consumer Commission given for the purposes of section 87 B](#), 11 September 2011.

³⁴ Telstra, p 18.

³⁵ ACCAN, [Submission to ACCC consultation paper](#), 18 August 2017, p. 1; Optus, [Submission to ACCC in response to Revised First Variation to NBN Co Special Access Undertaking](#), September 2017, p.15; Telstra, [Submission to ACCC Draft Decision on Variation to NBN Co Special Access Undertaking](#), 28 April 2017, p. 8.

We share stakeholders' concern that NBN Co may continue to charge for the higher speed products during remediation, even for lines that are not capable of providing that speed. We are also concerned that if the customer chooses to downgrade to a lower speed tier, NBN Co may not be required to undertake remediation. In some cases, the higher charges and/or lower service quality could persist for an extended period of time.

We note that the current wholesale terms generally appear to require RSPs to proactively identify services that are performing below ordered speeds and then downgrade the wholesale service being purchased from NBN Co. However, in some cases NBN Co takes a more active role to identify the technical capability of the service during the ordering process. For AVC TC-2 orders³⁶ on the FTTN/B network NBN Co will test the copper pair to determine whether it is capable of supporting the ordered bandwidth profile. If a copper pair is determined not to be capable of supporting the ordered bandwidth profile, NBN Co will notify the RSP for further action.³⁷

Fixed wireless issues

Throughout the course of this inquiry, it has become increasingly apparent that a number of consumers serviced via the fixed wireless network have been impacted by network congestion, particularly during the busy hours.³⁸ While congestion is not formally defined, we note NBN Co has adopted an engineering standard that will deliver an average throughput of at least 6 Mbps during the busy hours. NBN Co has a program in place to upgrade cells that do not meet this standard. As noted above, NBN Co has agreed to provide additional reporting to RSPs and the public relating to its fixed wireless networks.

We acknowledge that these continued upgrades are designed to contribute to improved end user experiences. However, we note that NBN Co will continue to charge the full rate for the services delivered via congested cells, even if speeds during busy hours may be a fraction of the headline speed of the service. Furthermore, and similar to the issue described above, NBN Co may continue to charge for higher speed services, such as the 25 Mbps or 25-50 Mbps AVC services. However, the end user experience of customers on these higher speed plans may be negatively impacted until the cell is upgraded, e.g. 12 Mbps service may more closely match the service being delivered on a congested cell, at least during the critical busy hours.

NBN Co recently announced that it would undertake additional investment in upgrading network capacity for its fixed wireless network.³⁹ NBN Co expects it will be significantly progressed in its remediation efforts by September 2019,⁴⁰ however there appears potential for ongoing investment so that the network has capacity to meet forecast demand over a longer timeframe. While we acknowledge that NBN Co is taking steps to address congestion, we consider that the provision of a rebate that would be payable based on each end user on a congested cell would incentivise NBN Co to ensure there is sufficient capacity on the network on an ongoing basis. It would also recognise that NBN Co is not delivering the full capability of its fixed wireless service to end users when they are impacted by congestion, especially during the critical busy hours.

³⁶ These feature a symmetrical committed information rate designed for business grade services.

³⁷ NBN Co, WBA Operations Manual, section 4.5.2 (Connect Orders).

³⁸ Senate Environment and Communications Legislation Committee, [Estimates](#), 10 April 2018, p.15; and [Estimates](#), 24 May 2018, p.128.

³⁹ NBN Co, [Media release: NBN Co on track for 2020 completion](#), 31 August 2018

⁴⁰ NBN Co, [Stephen Rue – CommsDay Melbourne 2018 – Keynote address](#), 9 October 2018

- 10. What wholesale commitments should apply where service performance consistently falls below what is ordered or reasonably expected?**
- 11. If a fixed wireless rebate was introduced, how should it be structured to ensure that it provides the right incentives to NBN Co and RSPs and contributes to good end user experiences?**

4. Retail consumer safeguards

We acknowledge that the consumer experience on the NBN is influenced by factors at both the wholesale and retail levels. While this inquiry is focused on wholesale service levels, there are a number of consumer safeguards that are specified at the retail level. These include legacy consumer safeguards such as priority assistance (PA) and the customer service guarantee (CSG).

In order to meet these retail service obligations, RSPs must be supported by appropriate arrangements at the wholesale level. We are interested in stakeholder views on the extent to which the WBA arrangements support these consumer safeguards, as well as the ACMA's recently introduced instruments to improve the NBN consumer experience.⁴¹

We are also cognisant that telecommunications consumer safeguards are currently under review through DoCA's consumer safeguards review.⁴² Part B of the review is considering the reliability of services, including measures such as connections, fault repairs and appointments, and includes proposals that target both retail and wholesale service levels. However, we note that DoCA is seeking feedback on proposals that would commence only after the forecast completion of the NBN rollout. Our focus in this inquiry is to ensure that retail obligations are appropriately supported at a wholesale level where those elements are dependent on NBN Co's actions.

4.1. Priority assistance

PA is available to customers who have a diagnosed life threatening medical condition, and whose life may be at risk if they don't have access to a working phone line service. PA customers are entitled to priority connection and fault repair of their telephone service, within 24 hours in urban and rural areas and 48 hours in remote areas. According to the ACMA, there were over 240,000 PA customers as at 30 June 2017, and this number increased by 12 per cent on the previous year.⁴³

Only Telstra is currently required to offer PA services as part of its carrier licence conditions. However, the 24 and 48 hour timeframes do not apply when Telstra has to rely on infrastructure or other services being provided by another network owner (e.g. NBN Co).⁴⁴ Other RSPs can choose to offer PA services provided they comply with the Priority Assistance for Life Threatening Medical Conditions Industry Code (ACIF C609:2007).⁴⁵

PA connection timeframes are only available under the WBA for services where an NBN connection is already in place that can be provisioned remotely (service classes 3, 13, 24 and 34). All other connection types are ineligible to receive PA connection timeframes. However, accelerated connection timeframes are available for PA connections where no legacy service is in place. Where a legacy service is in place, standard connection timeframes apply. Once connected to the NBN, the 24 and 48 PA fault rectification service levels apply for PA customers.

⁴¹ The ACMA instruments include: Telecommunications (NBN Consumer Information) Industry Standard 2018, Telecommunications (NBN Continuity of Service) Industry Standard 2018, Telecommunications Service Provider (NBN Service Migration) Determination 2018, Telecommunications (Consumer Complaints Handling) Industry Standard 2018 and the Telecommunications (Consumer Complaints) Record-Keeping Rules 2018).

⁴² See: <https://www.communications.gov.au/what-we-do/internet/consumer-safeguards-review>

⁴³ ACMA, *Communications report 2016-17*, p.115.

⁴⁴ Telstra, Priority assistance for Life threatening medical conditions policy, paragraph 5.3.2. Note however, that Telstra seeks to meet these timeframes where possible.

⁴⁵ See: <https://www.commsalliance.com.au/Documents/all/codes/c609>

The accelerated and standard connection timeframes are longer than the PA timeframes and Telstra has raised PA connection timeframes as a key concern in its submission to our first discussion paper.⁴⁶ We are of the view that the service level obligations associated with the first category of connections (that is, where an NBN connection is already in place) appear to be comparable with the arrangements under the legacy network. However, we agree with Telstra that there is a gap between the service levels provided for the other two categories of connections compared to the service levels currently provided over the legacy networks. This gap may be less of a concern for premises if legacy services are still available and a connection can be made on the legacy network within PA timeframes. We consider instances where legacy services are not available at a premises and NBN Co cannot connect the 24 hour or 48 hour timeframes is likely to be of greater concern,

The WBA also provides for claims by RSPs for costs of interim services where WBA PA timeframes are not met. If NBN Co does not meet the PA connection timeframe for a FTTP (service class 3) connection and the RSP provides the PA customer with an interim service until the connection is completed, the RSP may claim an interim service amount from NBN Co.⁴⁷ Similarly, if NBN Co does not meet its service level for PA fault rectification and the RSP provides an interim service until the fault is rectified, the RSP may claim an interim service amount.⁴⁸

The process for making a claim requires the RSP to provide full particulars of the proposed supply of an interim service, including the expected period for providing the interim service. In addition, the RSP and NBN Co must reach agreement on the interim service amount and the period that the amount will apply. We understand from our discussions with stakeholders that this process is difficult to apply in practice. Concerns about the difficulty of claiming compensation for providing interim services are exacerbated by the fact that connection rebates and service fault rebates under the WBA are not available to PA connections or PA faults.

We consider that PA is an important consumer safeguard and should be supported by the WBA as far as is possible. This may require changes, such as the wholesale PA arrangements to apply to all PA connections, regardless of the service class, and for the processes in place for RSPs to claim interim service amounts to be reviewed.

12. How should the PA connection and fault rectification service standards be designed to support the needs of PA customers, having regard to:

- **the availability of PA connection fault rectification service levels**
- **the process for claiming interim service amounts**
- **the interaction between interim service amounts and connection rebates and service fault rebates**
- **the appropriateness of the WBA PA service standards to RSPs other than Telstra who would seek to supply PA or equivalent services.**

⁴⁶ Telstra, [Telstra submission to ACCC Inquiry into NBN Wholesale Service Standards – Public version](#), March 2018, pp.13-14.

⁴⁷ An interim service amount is the amount paid by NBN Co to an RSP to reimburse it for the costs of providing an interim service to consumers in instances where NBN Co is unable to meet priority assistance timeframes. The process for determining and claiming the interim service amount is set out in Module 6 of the WBA Operations Manual.

⁴⁸ NBN Co, WBA Operations Manual, section 7.6

4.2. Customer Service Guarantee

The CSG standard aims to protect residential and small business customers from the provision of poor-quality voice services. It sets out timeframes for the connection of services, the repair of faults and the attendance of appointments by carriage service providers. Customers are entitled to compensation if these timeframes are not met. While the CSG standard only applies to the provision of standard telephone services, the performance standards set out in the CSG standard are still relevant in the context of the NBN to the extent that the NBN is used to provide fixed line voice services.

RSPs may 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 if:

- the RSP contravenes a performance standard that applies to the CSG standard
- that RSP is required to pay primary damages to the contracted end user for the contravention
- that contravention is wholly or partly caused or contributed to by an act or omission by NBN, and
- the RSP has discharged its liability for primary damages.⁴⁹

In response to the first consultation paper, submissions raised concerns relating to:

- the complexity of the CSG compensation claims process^{50, 51}
- the suitability of the CSG Standard in a vertically-separated industry,^{52, 53, 54} and
- the effectiveness of WBA3 in facilitating retail-level obligations under the CSG Standard.^{55, 56}

In addition to the submissions received, we note that this matter was recently considered by the Productivity Commission in its report on the Telecommunications Universal Services Obligation.⁵⁷ The Productivity Commission considered that more appropriate baseline standards need to be considered that manage both broadband and voice services and ensure technology-neutral minimum reliability standards for connection and repair timeframes.

We understand that there are considerable practical issues associated with applying the current CSG standard in an NBN context, given its origins in a market structure defined by a single provider responsible for all aspects of service delivery. However, we are concerned that the arrangements in place under the current WBA are overly complex, do not result in NBN Co compensating an amount that reflects its contribution to RSP failures to meet CSG

⁴⁹ NBN Co, WBA Ethernet Product Module, Service Levels Schedule, section 17.1

⁵⁰ Telstra, pp.28-29.

⁵¹ ACCAN, [ACCC Inquiry into NBN Wholesale Service Standards – Submission by ACCAN to the ACCC](#), 2 March 2018, p. 5.

⁵² VHA, [ACCC NBN Wholesale Service Standards Discussion Paper – Submission](#), March 2018, p. 4.

⁵³ Telstra, p. 7.

⁵⁴ Optus, [Submission in response to ACCC Discussion Paper – NBN wholesale service standards – Public Version](#), March 2018, p.40.

⁵⁵ Optus, p. 36.

⁵⁶ NBN Co, [Submission to the ACCC – Discussion Paper on NBN Wholesale Service Standards](#), 2 March 2018, p. 49.

⁵⁷ Productivity Commission, [Telecommunications Universal Service Obligation – Productivity Commission Inquiry Report No.83](#), 28 April 2017, p. 346.

timeframes, and are not reflective of arrangements that appropriately support the obligation on RSPs. We consider there is scope to simplify the existing wholesale arrangements to better support retail obligations under the CSG standard.

13. How could the CSG compensation processes be simplified to better support RSPs' retail obligations?

4.3. ACMA instruments

In our first discussion paper, the ACMA was in the early stages of developing a number of instruments to improve the customer experience on the NBN. Since that time, the ACMA has now implemented several new instruments. These include a service continuity industry standard aimed at ensuring legacy services remain in place in cases where the NBN connection is not made successfully, a consumer information standard requiring RSPs to provide certain information before entering a contract with RSPs for NBN services, a complaint handling standard requiring parties to work together to resolve customer complaints, and a line-testing determination requiring RSPs to undertake post-connection line testing.⁵⁸

We note that the ACMA instruments are targeted at the RSP level, but they also recognise NBN Co's role in ensuring or facilitating the consumer outcomes intended by the instruments. More specifically, the direct obligations on RSPs under the instruments are supported by a range of general obligations on wholesale providers, including NBN Co, to provide reasonable assistance to RSPs so that RSPs can satisfy their obligations.

We consider that it is important that appropriate wholesale arrangements are in place to support the retail level obligations under the ACMA instruments. This is most crucial in cases where compliance with the retail obligation depends on a direct action of NBN Co. We expect NBN Co and RSPs to agree on the specific ways NBN Co will provide reasonable assistance to RSPs in order for them to comply with their obligations.

We recognise that the ACMA instruments have only recently been released. As part of this inquiry, we are considering whether any further measures are required at the wholesale level to support the ACMA instruments. In doing so, we are interested in the extent to which NBN Co and RSPs have been able to agree on ways NBN Co can provide reasonable assistance, and whether there have been instances in which RSPs have encountered difficulties in meeting retail obligations because of matters relating to, or caused by the underlying wholesale network.

14. Are additional measures required at the wholesale level to support the ACMA's instruments? If so, what measures should be introduced?

⁵⁸ See: <https://www.acma.gov.au/theACMA/nbn-rules-consumer-information-service-continuity>

5. Measurement and reporting of operational outcomes

We acknowledge several submissions have raised concerns with NBN Co's operational processes which can have a large impact on RSPs' ability to both understand NBN Co's performance against its service levels and manage consumers' expectations when receiving NBN services.

We are seeking further input on a range of operational issues relating to NBN Co's measurement of its service levels, its commitments to report on performance against the service level standards, and the availability of other operational information that RSPs require to manage end users' experiences on the NBN.

5.1. Measurement of service levels

The WBA sets out processes and timeframes for measuring NBN Co's performance against its service levels. The way that NBN Co measures its service levels may affect how it and RSPs identify and respond to problems, and can have implications for whether rebates are available in certain cases. Stakeholders have raised concerns relating to how NBN Co measures its fault rectification service levels.⁵⁹

We are aware of cases of failed installations defined as "new service never worked".⁶⁰ We understand that in these cases, NBN Co sends a completion advice to the RSP that the end user has been connected. However, the service does not work, requiring the RSP to lodge a trouble ticket for fault rectification. For reporting purposes, we understand these cases are categorised as successful connections, with a fault recorded shortly after.

"New service never worked" installations have the potential to distort the measurement of NBN Co's performance against its service levels and subsequent outcomes under the WBA. For example, we understand that RSPs must begin paying for the service from receipt of the completion advice, which does not accurately reflect when the service was successfully connected. In contrast, we note that under the recent ACMA standards, RSPs are unable to charge an end user for a service until it has been successfully connected.

15. Is the categorisation of "new service never worked" installations a concern for stakeholders? If so, how should these cases be dealt with?

Under the current WBA, the timeframes for rectifying end user faults generally begin once NBN Co has evaluated and accepted a 'trouble ticket' lodged by an RSP.⁶¹ Under the previous WBA2, timeframes for all end user faults began from the time a trouble ticket was acknowledged by NBN Co, which is an automated process.

Telstra and Optus' submissions express concerns with NBN Co's approach to measuring its performance against the service level timeframes.⁶² Specifically, the new trouble ticket acceptance process arguably delays the start in measuring performance against the fault

⁵⁹ Optus, [Submission in response to ACCC Discussion Paper – NBN wholesale service standards – Public Version](#), March 2018 pp. 17-18; Telstra, [Telstra submission to ACCC Inquiry into NBN Wholesale Service Standards – Public version](#), March 2018, p 13.

⁶⁰ NBN Co, Answers to Senate Estimates Questions on Notice, Budget Estimates May 2017, Question no 243.

⁶¹ NBN Co, WBA Ethernet Product Module, Service Levels Schedule, section 8.1. However, for Priority Assistance Faults and Enhanced Faults timeframes begin once the trouble ticket is acknowledged.

⁶² Optus, pp. 17-18; Telstra, p. 13.

rectification service level timeframes and does not reflect the actual experience of end-users.⁶³

NBN Co submits 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.⁶⁴ NBN Co submits that WBA3 contains a new service level requiring the acceptance or “More Information Required Notification” to be issued within two operational hours of acknowledging the trouble ticket to provide an incentive for it to accept trouble tickets within a rapid timeframe.⁶⁵

We do not consider that NBN Co’s process for beginning measurement of end user faults at trouble ticket acceptance by NBN Co, rather than trouble ticket acknowledgement, is justified. While we recognise NBN Co’s efforts to improve the timeframes for reviewing trouble tickets, we consider that timely validation of trouble tickets should be part of its ordinary operational processes. Further, we consider commencing fault rectification from trouble ticket acknowledgement is preferable to the current process as it would more closely align with the end user’s experience of the fault. We understand that this change would be a reversion to the measurement of the end user fault rectification service level timeframes as they applied prior to WBA3.

16. Is there any reason why end user fault rectification should not begin from the time a trouble ticket is raised or acknowledged by NBN Co? Are there any other changes that should be made to more closely align wholesale processes with end users’ experience of faults?

5.2. Reporting of service level performance

Under the WBA, NBN Co provides monthly reports to RSPs detailing its performance against its service levels for that month.⁶⁶ Following the implementation of WBA3, NBN Co reduced the level of detail in these 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.⁶⁷ At the same time, since March 2018, NBN Co has published a number of high level service metrics on its website.⁶⁸

Telstra and Optus both submit 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.⁶⁹

We consider that detailed reporting for key service levels is important as it allows RSPs to understand how NBN Co’s performance is tracking and provides greater certainty of operational outcomes. A baseline level of reporting for key service levels should be specified within the WBA to ensure that this information is available to RSPs.

⁶³ Optus, pp. 17-18; Telstra, p. 33.

⁶⁴ NBN Co, [Submission to the ACCC – Discussion Paper on NBN Wholesale Service Standards](#), 2 March 2018, p 63.

⁶⁵ NBN Co, p. 63

⁶⁶ NBN Co, WBA Ethernet Product Module, Service Levels Schedule, section 15.3.

⁶⁷ Optus, p. 20; Telstra p. 27.

⁶⁸ See: <https://www2.nbnco.com.au/corporate-information/about-nbn-co/updates/>

⁶⁹ Optus p. 48; Telstra p. 27.

17. What are the key service level outcomes that NBN Co should report to RSPs?

5.3. Availability of operational information

RSPs rely on timely operational information from NBN Co to effectively inform consumers of the status of their service and for a range of customer service activities. This is reflective of RSPs' responsibilities in managing end users' experience, including for connections and resolution of faults. The effective flow of information from NBN Co to RSPs is crucial to the effective flow of information from RSPs to consumers.

Submissions to our first consultation paper highlighted a number of concerns with the current flow of information through the supply chain. Optus⁷⁰ and the CCC⁷¹ flagged the importance of receiving near-real-time updates in relation to time-sensitive matters, such as delays or changes to appointments for connection or fault rectification. The ACMA⁷² also found evidence that some RSPs did not hold historical information of customer appointments, which suggests that deficiencies in the flow of information between the wholesale and retail layers is limiting the ability of some RSPs to effectively communicate with their customers.

18. What additional wholesale arrangements should be put in place in relation to operational information to facilitate RSPs providing a reasonable level of customer service to end-users?

⁷⁰ Optus, pp.45-46.

⁷¹ CCC, [Submission in response to ACCC Discussion Paper 'ACCC Inquiry into NBN Wholesale Service Standards' dated December 2017](#), 7 March 2018, pp. 6-7.

⁷² ACMA, [ACMA submission to ACCC NBN wholesale service standards inquiry – Response to discussion paper](#), March 2018, pp. 3-4.

6. Liability framework

Module E of the WBA3 Head Terms sets out the risk management terms, which include, among other things, provisions regarding liability and indemnity. Stakeholder submissions to the ACCC (discussed further below) have raised specific concerns regarding these liability and indemnity arrangements. We acknowledge that these concerns were not addressed in the enforceable undertaking and as such is seeking further views from stakeholders in this consultation paper and recognise that liability is an important issue for stakeholders. These terms can impact on service incentives and outcomes and are therefore relevant to the end-user experience. We consider that for services to be provided efficiently, risk should be allocated to the party who is best able to manage that risk.

We understand that issues relating to liability are often agreed through commercial negotiation rather than regulation. However, the ACCC is aware of some instances of regulated liability terms. We are continuing to consider whether regulated terms are required in respect of the liability framework. In doing so, we are seeking to understand whether the liability and indemnity provisions included in WBA3 are consistent with standard commercial practices.

6.1. Liability caps and material service failures

Under WBA3, NBN Co's liability is generally limited to direct losses up to an annual cap of up to \$200 million.⁷³ This limit does not apply to commercial rebates, CSG and certain other cases such as negligent or wilful acts. WBA3 also sets out NBN Co's liability for losses resulting from material service failures.⁷⁴ The criteria for determining whether a service failure constitutes a material service failure is set out in the relevant product terms.

RSPs submit that the criteria for satisfying a material service failure is unreasonably high,⁷⁵ and Telstra submits that the annual liability cap is an insufficient incentive on NBN Co to manage its risks appropriately and is inconsistent with the liability caps often used in commercial contracts.⁷⁶ Optus also suggests that the concerns of NBN customers regarding the liability regime could be significantly ameliorated if the service levels regime could be strengthened.⁷⁷

We consider that liability and indemnity clauses can promote the economically efficient use of and investment in infrastructure by managing the allocation of risk between the parties. As a general principle, we would expect that suppliers accept liability for losses that they cause or contribute to, including to retail customers of its customer.

We agree with stakeholders that the criteria for a material service failure within the NBN ethernet product terms would only be met in highly exceptional circumstances. For example, in the case of a combination software and hardware failure that simultaneously causes services faults to 90% or more of the services at a POI, this would only constitute a material service failure if the event is not resolved within 20 Business Days. Additionally, the period in

⁷³ NBN Co, WBA Head Terms, Clause E1.4.

⁷⁴ NBN Co, WBA Head Terms, Clause E1.4.

⁷⁵ Optus, [Submission in response to ACCC Discussion Paper – NBN wholesale service standards – Public Version](#), March 2018, pp. 27-28; Telstra, [Telstra submission to ACCC Inquiry into NBN Wholesale Service Standards – Public version](#), March 2018, p.14.

⁷⁶ Telstra, p.15.

⁷⁷ Optus, p.28.

which the event constitutes a material service failure would begin from the end of the 20 business days until the date it is resolved.⁷⁸

6.2. Third party claims

Clauses E2.5(a)-(e) of the WBA3 head terms oblige RSPs to protect 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. 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 law⁷⁹) 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.⁸⁰

NBN Co submits that the WBA3 third party claims terms only protect it from claims in respect of pure economic loss, including lost profits or revenues, lost management time and loss of goodwill. NBN Co submits that these types of claims could be brought in negligence.⁸¹ Both Telstra and Optus raise concerns about the third party claims regime. Telstra states that there are legitimate reasons why RSPs may not be able to flow down the model terms in WBA3 and in those instances the RSP effectively gives NBN Co an uncapped indemnity for all losses suffered by NBN Co for a claim brought against NBN Co by an end customer.⁸² Telstra does not consider that it is 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.⁸³ Optus considers that the regime is complex and imposes some potentially onerous obligations on customers.⁸⁴

We consider the indemnity provisions could transfer the risk of certain matters within NBN Co's areas of responsibility to either customers or RSPs. We are concerned that this may result in downstream consumers or end users bearing liability for risks over which they have no control, or which NBN Co is in a better position to manage.

As discussed above, we acknowledge that liability and indemnity clauses are often determined through commercial negotiation rather than regulated terms. However, we are aware of some examples of regulated liability and indemnity terms, including the ACCC's 2015 fixed line services final access determination.⁸⁵ We are interested in how the terms in WBA3 compare with standard commercial terms and whether liability and indemnity terms should be considered in any final access determination in relation to NBN service levels.

19. How do the liability and indemnity terms in WBA3 compare with liability and indemnity terms in other wholesale telecommunications customer agreements?

⁷⁸ NBN Co, WBA Ethernet Product Module, Product Terms, section 22.

⁷⁹ The model terms do not exclude, restrict or modify any rights of remedies available to the end user or downstream service provider under Parts 3-2 (Consumer transactions) and 5-4 (Remedies relating to guarantees) of the Australian Consumer Law.

⁸⁰ NBN Co, WBA Head Terms, Clause E2.5.

⁸¹ NBN Co, [Submission to the ACCC – Discussion Paper on NBN Wholesale Service Standards](#), 2 March 2018, p. 81.

⁸² Telstra, p. 15.

⁸³ Telstra, p. 15.

⁸⁴ Optus, p. 28.

⁸⁵ See: <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fad-inquiries-non-price-terms-conditions-supplementary-prices/final-report>

20. To what extent would an improved rebates regime address RSP concerns about the liability framework?

21. Are the limitations on third parties bringing claims against NBN Co reasonable?

7. Other issues

We note that a broad range of factors at the wholesale level may impact consumer experience, and that these factors may develop over time. We are interested in views on whether any other changes are required to the wholesale service level terms to further support positive consumer experience.

Since our first discussion paper, consumer experience on the NBN has been a focus of several processes include the ACMA instruments described above and DoCA's Consumer Safeguards Review. New or proposed regulatory settings may require adjustments to the wholesale service level terms. For example, the Consumer Safeguards Review consultation paper proposes that the wholesalers be prevented from charging for any period where a network connection is not made or has a fault. Additionally, it proposes to reduce the population area categories for connections and repairs to two (significant urban areas and other areas).

We invite stakeholders to comment on any other matters that should be brought to the attention of this inquiry.

22. Are there any other wholesale service level terms that you consider should be implemented? How should these be implemented, and why?

Annexure A – List of questions

Rebates

1. What are the key principles you consider should underpin NBN service level rebates?
2. How should rebates be structured to ensure that they provide the right incentives to NBN Co and RSPs to contribute to good end user experiences?
3. What factors should the ACCC refer to when considering the rebate structure and amount?
4. Should connection rebates also be available to standard connections where the service level is one business day? Are there any reasons why these connections should be treated differently to other standard connections?
5. What processes do RSPs expect to apply to ensure end users affected by service level misses receive a benefit from wholesale rebates?
6. What records will RSPs keep to demonstrate compliance with the pass through requirement? Would there be benefit in requiring RSPs to publish how they intend to pass through a benefit?
7. Are there any additional wholesale measures required to support RSPs in identifying and passing through fair value benefit from rebates to affected end users?

Service speed and performance

8. Does the information NBN Co makes available to RSPs about service speeds appropriately support RSPs advertising and selling of services?
9. Please indicate what, if any, additional fixed wireless performance information is necessary to enable RSPs to better set consumer expectations for current and prospective customers.
10. What wholesale commitments should apply where service performance consistently falls below what is ordered or reasonably expected?
11. If a fixed wireless rebate was introduced, how should it be structured to ensure that it provides the right incentives to NBN Co and RSPs and contributes to good end user experiences?

Retail consumer safeguards

12. How should the PA connection and fault rectification service standards be designed to support the needs of PA customers, having regard to:
 - the availability of PA connection fault rectification service levels
 - the process for claiming interim service amounts
 - the interaction between interim service amounts and connection rebates and service fault rebates
 - the appropriateness of the WBA PA service standards to RSPs other than Telstra who would seek to supply PA or equivalent services.
13. How could the CSG compensation processes be simplified to better support RSPs' retail obligations?

14. Are additional measures required at the wholesale level to support the ACMA's instruments? If so, what measures should be introduced?

Measurement and reporting of operational outcomes

15. Is the categorisation of "new service never worked" installations a concern for stakeholders? If so, how should these cases be dealt with?
16. Is there any reason why end user fault rectification should not begin from the time a trouble ticket is raised or acknowledged by NBN Co? Are there any other changes that should be made to more closely align wholesale processes with end users' experience of faults?
17. What are the key service level outcomes that NBN Co should report to RSPs?
18. What additional wholesale arrangements should be put in place in relation to operational information to facilitate RSPs providing a reasonable level of customer service to end-users?

Liability framework

19. How do the liability and indemnity terms in WBA3 compare with liability and indemnity terms in other wholesale telecommunications customer agreements?
20. To what extent would an improved rebates regime address RSP concerns about the liability framework?
21. Are the limitations on third parties bringing claims against NBN Co reasonable?

Other matters

22. Are there any other wholesale service level terms that you consider should be implemented? How should these be implemented, and why?