



TELSTRA CORPORATION LIMITED

Telstra submission to ACCC Inquiry into NBN Wholesale Service Standards

Second discussion paper

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[C-i-c] = information not to be released without a confidentiality undertaking

[C-i-c] = information not to be released even with a confidentiality undertaking



EXECUTIVE SUMMARY

The ACCC commenced its inquiry into NBN wholesale service standards in November 2017. The inquiry was driven by a high number of complaints by consumers regarding poor experiences on the NBN, particularly in relation to connections and fault repairs. Alongside this, concerns had been raised by industry that the service standards in the Wholesale Broadband Agreement (**WBA**) are not adequate to ensure a positive consumer experience on the NBN.

This submission sets out Telstra's position on the wholesale NBN regulatory framework needed to ensure that consumers have a positive experience on the NBN. This is guided by the following high level principles:

- **NBN Co must be appropriately incentivised to meet its service standards** - NBN Co must be regulated to ensure appropriate incentives and compensate Retail Service Providers (**RSPs**) for costs it imposes on their business. In addition, NBN Co should not charge RSPs for the services that are not being received by end-users where NBN Co is at fault.
- **There should be no mandated pass-through of rebates to end-users** - Pass-through of rebates should not be mandated because RSPs incur costs as a result of NBN Co's failures and, in a competitive market, will differentiate on how they minimise or address the impact of these failures on their customers. Mandated pass-through does not recognise the costs incurred and effectively removes flexibility for RSPs to provide their customers with different solutions to address service failures.
- **NBN Co must be obliged to support retail regulation as appropriate** - Where regulation is imposed on RSPs, this must be completely and immediately supported by NBN Co. This should be facilitated through a regulatory events clause in the WBA.

The regulatory environment relating to the consumer experience on the NBN has changed since the commencement of the inquiry. In 2018 the ACMA introduced a number of instruments aimed at improving the customer experience of NBN migration and addressing a range of issues identified during the NBN rollout. However the majority of the obligations contained within the ACMA instruments are applied to RSPs rather than NBN Co, other than a general obligation to support RSPs as appropriate. In September 2018 the ACCC published a court enforceable undertaking (**Undertaking**) accepted from NBN Co which introduced a rebate for missed appointments, removed performance objective threshold requirements and simplified the process for RSPs to receive rebates. At the same time, the Undertaking places an obligation on RSPs to pass on a 'fair value benefit' of any rebate to end users.

The changes to the regulatory landscape have only served to further widen the gap between obligations placed on RSPs and those placed on NBN Co. While the undertaking is a valuable first step towards addressing the deficiencies of the WBA service levels and performance framework, there are (as acknowledged by the ACCC) elements of the WBA3 rebate framework that are unchanged and are central to the incentives placed on NBN Co to meet its service levels. Further, despite assurances from NBN Co that - in the absence of regulatory intervention - service performance would continue to improve, this is regrettably not the case in all instances.¹

RSPs have primary responsibility for consumer relationships. Many have proactively taken steps to improve the consumer experience on the NBN through, for example, the provision of failover modems or the introduction of 'no service no fee' terms. These reflect the dynamics of an increasingly competitive environment and suggests there is no need for obligations requiring pass through of rebates. However,

¹ For example, the NBN Co January 2019 dashboard shows a decline in meeting agreed installation times, fault restoration times and installed right first time (<https://www.nbnco.com.au/corporate-information/about-nbn-co/updates/dashboard-january>)



the customer experience could be further improved through strengthened incentives for NBN Co to meet its service levels. At present RSPs are simply not willing to include these in customer terms as there is no confidence they will be met. Further, where service levels are not met, the rebates paid by NBN Co are inadequate and do not reflect the costs imposed on RSPs or consumer detriment.

As set out in previous submissions, Telstra's position is that customers should not be any worse off as a result of migrating to the NBN and should continue to be provided with at least the level of service that they have come to expect. In line with this, Telstra's view is 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.

The NBN rebate structure should be as simple as possible and reflect the multiple purposes of the rebates – to recognise consumer detriment, compensate RSPs for costs incurred and, above all, provide incentive for NBN Co to meet its service levels. In order to address the current deficiencies in the rebate structure and performance framework applied to NBN Co, Telstra considers that it should incorporate the following key concepts:

- A flat daily rate which escalates after 5 business days to provide incentive to address aged orders or trouble tickets;
- Additional penalties where a ticket is closed and re-opened for the same premise, or where a subsequent appointment is missed; and
- Automatic payment to RSPs where NBN Co is at fault for the missed service level.

The detail of the rebate structure should be developed in consultation with all stakeholders, including NBN Co, to ensure that it is operationally achievable across industry.

Service speed and performance of NBN services are issues of key concern for RSPs and consumers. Given RSPs have primary responsibility for consumer relationships and responsibilities under the Australian Consumer Law to deliver services as promised to and paid for by the end-user, it follows that the information provided by NBN Co on the service to be delivered is critical. NBN Co should be required to support retail obligations in relation to service speed and performance – ensuring that RSPs are enabled to provide consumers with the service they expect (and are paying for) and, where this is not the case, facilitating the identification and provision of remedies.

The current misalignment between the expectations placed on RSPs and the expectations and incentives placed on NBN Co leads to inefficient outcomes. In some instances, NBN Co does not provide information about expected service performance until after a service is connected. Further, where a service is underperforming due to, for example, congestion in NBN Co's network, NBN Co requires RSPs to pay the full service fee. This is despite RSPs undertaking to pay remedies (in the case of fixed wireless services) or, as noted above, independently offering 'no service no fee' terms. Telstra strongly advocates for improvements in the timing and type of information provided by NBN Co. Importantly, this also applies to the provision of operational information which RSPs need to effectively and accurately communicate with their customers.

It is critical that any retail obligations are appropriately supported at the wholesale level. In the absence of changes to Priority Assistance (**PA**) and Customer Service Guarantee (**CSG**) obligations, the timeframes for these should be supported by NBN Co and, in the case of CSG, a simplified process for the recovery of costs implemented. At this point, Telstra does not consider that specific wholesale obligations are required to support the ACMA service standards. Rather, Telstra considers that the improvements in information provided by NBN Co and enhanced incentives to meet service levels advocated for in this submission, will reduce the need for the service standards.

While the ACCC Inquiry has captured the majority of issues raised by stakeholders during the Inquiry, Telstra notes that there is potential for further issues to arise as the NBN rollout completes and the focus on migration lessens. There are also several processes underway that may result in a change to the regulatory environment – such as the Consumer Safeguards Review – or that are untested in their



effectiveness – such as the ACMA standards. Further, the negotiations for WBA4 have been delayed, potentially beyond the timeframe for the Inquiry. Although this may provide an opportunity for any regulated terms to be incorporated, it highlights the risk that new issues may be raised that do not form part of this Inquiry. As a result, Telstra considers that it would be beneficial for a 'regulatory events clause' – a regulated term that provides for the inclusion of new terms in response to changes in the regulatory environment – to be included in an ACCC access determination. This would ensure that, where any retail obligations are imposed, RSPs continue to be appropriately supported by NBN Co. It is also worth noting that the delays in WBA4 negotiations mean that industry may be required to wait over 12 months to take advantage of any regulated terms. This is not acceptable and the ACCC should explore all avenues to ensure that the benefit is passed on at the earliest opportunity. This would also benefit end users, because the earlier the benefits of regulated terms are made available to RSPs, the earlier they will be able to share those benefits with end users.



INTRODUCTION

This submission is in six parts and responds directly to the questions set out by the ACCC in its Discussion Paper.

- Section 1 provides Telstra's views on the purpose, structure and availability of rebates.
- Section 2 responds to the ACCC questions relating to service speed and performance on the NBN.
- Section 3 sets out Telstra's views on the relationship between NBN wholesale service standards and retail consumer safeguards
- Section 4 provides Telstra's views on the measurement and reporting of operational outcomes to support the consumer experience.
- Section 5 sets out Telstra's responses to the ACCC's questions on the liability framework in WBA3.
- Section 6 provides Telstra's position on other matters that require implementation of wholesale service standards.

In addition to the views set out in this submission, Telstra also refers the ACCC to our submission to the Initial Discussion Paper and [c-i-c] [c-i-c].



1. REBATES

The Discussion Paper sets out the ACCC view 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." Telstra agrees with this view. Our submission to the Initial Discussion Paper set out our position that, in many cases, the customer experience on the NBN falls short of the service standard timeframes adopted by NBN Co due to the lack of incentive provided by NBN Co's performance objectives. This specifically relates to the approach taken by NBN Co in regard to compensation when NBN Co fails to meet its service standards rather than the service standards themselves (albeit with some exceptions). The lack of incentive placed on NBN Co to meet its service standards means that RSPs are generally not willing to incorporate service standards into their retail and wholesale contracts. This is a step backwards for customers, who have come to expect that at least some RSPs will include service standards in their retail contracts and, if those standards are not met, then customers will be compensated. Historically, not all RSPs incorporated service standards into their retail contracts, but some did and this was a point of differentiation between RSPs. However, as it stands today on the NBN, there is little scope for differentiation between RSPs in terms of service standards, in large part because NBN Co does not face appropriate incentives at the wholesale level.

At a high level, Telstra's view is that the rebate structure included in the WBA3 needs to be strengthened in terms of scale and scope. The Undertaking from NBN Co was a valuable first step in introducing a rebate for missed appointments, removing performance objective threshold requirements and simplifying the process for RSPs to receive rebates. However, as acknowledged by the ACCC, there are elements of the WBA3 rebate framework that are unchanged and are central to the incentives placed on NBN Co to meet its service levels. Telstra's views on the rebate structure and potential areas for improving the incentives upon NBN Co are set out below.

The Undertaking also places an obligation on RSPs to pass on a fair value benefit to consumers of any rebate paid by NBN Co. The fair value benefit does not need to be in monetary form. While Telstra understands the intent of this obligation is to ensure that the rebates do not simply represent a transfer from NBN Co to RSPs, we consider that there should be independent flexibility for RSPs in determining how this benefit is passed on, such as providing tailored remedies to their customers when service levels are missed. Telstra believes that the pass-through requirement should have been subject to consultation before implementation to ensure that the cost and complexity of mandating pass-through was taken in account. In the absence of regulated pass-through obligations, changing the rebate structure provides an opportunity for RSPs to differentiate service offerings to customers and transform the consumer experience on the NBN.

This section responds to the questions posed by the ACCC in relation to the purpose, structure and availability of rebates. It also addresses the pass-through of benefits to consumers by RSPs.

Purpose of rebates

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

In the Discussion Paper, the ACCC sets out its view 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



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- 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.

Telstra broadly agrees with the ACCC's views but we would also argue that simplicity is a key factor, both in the rebate structure (understanding when and how much rebates will be paid) and in the payment of those rebates to RSPs – rebates should be paid automatically by NBN Co. If the onus is placed on RSPs to analyse every service level miss and make a claim, then there is a risk that this will prove too onerous and RSPs will not make any claims; in practice this would negate the incentive properties of the rebates on NBN Co. As set out in our submission to the Initial Discussion Paper, the approach currently taken by NBN Co (and set out in the WBA) does not fully satisfy any of those purposes. For example:

- Rebates are a once-off \$25 payment whether NBN Co misses a service level by one day or one month, yet clearly the customer experience in the latter scenario is much worse. This lack of a time element in the rebates does not appropriately allocate risk and responsibility between NBN Co and RSPs, nor does it incentivise NBN Co to connect a service or rectify a service fault in a timely manner.
- Prior to the Undertaking and its implementation in the WBA, NBN Co only paid connection or assurance rebates where its performance fell below a 90% performance objective target, and even then only for a subset of service level misses.² This does not support RSPs to deliver services that meet customer expectations, nor does it provide certainty about the operational outcomes that NBN Co will achieve. The Undertaking has sought to address this issue, and the principle of paying rebates for all service level misses below 100% must continue to be included in the WBA in the longer term.

Telstra has previously proposed a rebate structure that we consider addresses the above purposes and our response to Question 2 below reiterates and expands upon that proposal. The structure recognises that rebates do not serve a single purpose. Rather, as with service levels, they have multiple purposes including to:

- Recognise the detriment to consumers caused by NBN Co failing to meet a service standard. For example, inconvenience and/or cost associated with a missed appointment;
- Compensate RSPs for costs incurred when NBN Co fails to meet a service standard, including the costs of managing the user experience; and
- Most importantly, place an incentive on NBN Co to meet its service standards through an appropriate rebate structure (covering applicability and level of rebate).

Notwithstanding the structure or quantum of any rebates at a wholesale level, in many instances, RSPs have already taken responsibility for addressing sub-optimal customer experiences in migrating to or using the NBN. For example, some RSPs provide CSG compensation, interim services, 'no service no fee' initiatives or innovative services such as failover modems. However, these are not necessarily intended to be complete substitutes and they all come at a cost to RSPs. Accordingly, it is not appropriate for the rebate structure to explicitly recognise the provision of such services i.e. NBN Co should not rely on RSPs to provide such remedies to absolve it of responsibility for connecting a NBN service or fixing a fault in line with its service standards.

It is also important to recognise that the standard rebates provided by NBN Co have different intents and purposes from the compensation associated with the CSG and the provision of an interim service by RSPs. Most importantly, these are obligations imposed at the retail level and, as such, Telstra considers that they should not be explicitly incorporated into any wholesale-level regulation. Which is not to say

² For example, if NBN Co's performance was 83% against a performance objective of 90%, then it would only pay rebates against 7% of services, i.e. 90%-83%.



that NBN Co should not be required to support RSP obligations but rather that they should not be incorporated into NBN service level rebates to reduce or offset those rebates.³

The purpose of CSG compensation is to incentivise service providers to deliver services in a timely manner. At present, NBN Co nets off the rebate from the CSG amount in order to prevent 'double recovery'. As set out in Telstra's submission to the Initial Discussion Paper⁴, this means that RSPs like Telstra who provide CSG services are not compensated for the customer facing costs incurred when NBN Co fails to meet its service standards. Notwithstanding that Telstra believes the CSG regime should be subject to complete review, CSG should continue to be supported by NBN Co where applicable but, as noted above, not used to reduce or offset any service level applicable. Keeping these processes separate ensures that changes can be made to the CSG regime at the retail level without the need to make potentially complex changes at the wholesale level.

Similarly, the intent of providing an interim service is to ensure that customers have reliable access to a communications service. This is in contrast to one of the purposes of the rebate which is to place an incentive on NBN Co to connect or repair a service. Where incorporated into the NBN Co service standards framework, the existence of an interim service (which, in Telstra's experience to date, has been provided by the RSP with no compensation from NBN Co) has the potential to remove the incentive on NBN Co to address the problem with the service in question in a timely manner. The potential to claim the costs of providing an interim service should therefore not replace a rebate amount. This is also discussed with reference to PA services in response to Question 12.

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?*

As noted in Telstra's response to Question 1, one of the purposes of the rebates is to incentivise NBN Co to meet its service standards, thereby improving the end user experience.

Telstra has previously set out two key concerns with the NBN rebate structure:

- Prior to the implementation of the Undertaking, rebates only applied when NBN Co failed to meet its 90 per cent performance objective and then to the difference between the proportion of connections or service faults performed in a relevant month and the performance target; and
- Rebates are a one-off payment of \$25 regardless of the time taken to connect a service or repair a service fault.

The Undertaking from NBN Co, which came into effect on 11 December 2018, addresses the first concern in that rebates now apply to every late connection and fault rectification. The Undertaking also extended the rebate structure to apply to every missed appointment. Although the actual impact of the change is still to be assessed, this is a significant step change in the right direction. However, the rebate structure still does not address the issue of aged orders or faults in that, after paying the one-off \$25 rebate, there is no incentive for NBN Co to ensure that missed connections or faults are rectified as soon as possible. This could have unintended consequences and it is entirely feasible that the focus of NBN Co under a regime that does not address aged or ongoing concerns will be on ensuring that service standards associated with new connections or fault tickets are not missed.

³ This would also allow for any changes to retail obligations to be addressed without a corresponding need to consider the impact on NBN rebates once the structure is confirmed. Telstra acknowledges that further consideration may need to be given to the treatment of CSG compensation to ensure that there is no over-recovery of costs.

⁴ P.13



[c-i-c]⁵ [c-i-c].

As noted in our response to Question 1, Telstra has previously proposed an alternative rebate structure, which we consider would address some of our key concerns with the current NBN Co rebates. Nevertheless, we strongly recommend that any proposed changes to the NBN Co rebate structure and quantum must be developed in consultation with all stakeholders, including NBN Co, to ensure that it is operationally achievable across industry. We continue to believe that the rebate structure applicable to NBN Co should be as simple as possible and include the following key principles:

- Simple flat daily rebate that applies to all instances where NBN Co misses the relevant service standard (connections, fault rectification and appointments).
- Daily flat rate to increase after five business days to provide more incentive to resolve the issue as soon as possible.
- Additional penalty rebate applicable if an order/trouble ticket is closed and then re-raised, to ensure performance is not manipulated.
- Rebates continue to be paid automatically to RSPs where NBN Co is responsible for the failure to meet the service standard.
- The second missed appointment on an order or ticket should generate a higher rebate than the first missed appointment.

There are also other scenarios that need to be addressed to improve the end user experience and these are discussed in more detail later in this submission. Examples include services placed in a Repair Profile, those that require remediation or interference mitigation, or those that are (in the short term) impacted by co-existence. Where the detriment to the customer experience is within NBN Co's control, Telstra believes that NBN Co should at the very least be required to reduce the charges payable by RSPs – this would align with the expectations on RSPs, who are generally required to provide remedies to their customers.

3. *What factors should the ACCC refer to when considering the rebate structure and amount?*

In order for the rebate scheme to be successful and deliver on the purposes identified above, Telstra believes that the rebate structure and amount must be developed in a way such that it is more beneficial for NBN Co to meet the SLAs rather than pay the rebate. This is not currently the case with the once-off \$25 payment.

Telstra acknowledges that it is difficult to determine an appropriate rebate amount given the multiple inter-related purposes of the rebates. Above all, as noted above, the amount of the rebate should be set at a level that ensures there is an incentive on NBN Co to meet its service standards given this is the primary purpose of the rebate. This may, for example, be an amount where it would be fiscally more responsible for NBN Co to engage additional resources to meet its service standards rather than incur the rebate amount. At the same time, the rebate amount also needs to reflect the costs imposed on RSPs and consumers when NBN Co does not meet its service standards. As with the structure of the rebate, this should be the subject of further consultation to ensure that an appropriate balance between incentive and compensation is achieved.

There are a number of other relevant factors that Telstra believes the ACCC should refer to when considering the rebate structure and amount. These include:

- Separation of NBN rebates from CSG compensation and the provision of interim services given the different intents and purposes (see response to Question 1 above); and

⁵ [c-i-c] [c-i-c]



- Automatic payment of rebates to RSPs when NBN Co is responsible for the failure to meet a service standard.

In addition, the WBA includes a number of exclusions from the service standards framework. These include Force Majeure exemptions (Head Terms – E6) and exclusions contained in the Service Level Schedule (Clause 21). The latter identifies specific scenarios where missed service standards will be excluded in relation to appointments. The exclusions in the Service Level Schedule do not apply to connections and service fault rectification which are instead subject to a suspension in performance measurement, whereby NBN Co “stops the clock” on measuring performance if it is unable to continue with the task for a reason out of its control (i.e. until the issue outside of NBN Co's control is resolved, the timing against the relevant service standard is placed on hold). While the categories of exclusions used by NBN Co may be reasonable, there is a lack of transparency regarding when and why exclusions are applied. At present, where NBN Co excludes an appointment or suspends performance measurement for a connection or fault rectification, no explanation is provided for why this has occurred. As a result there is also no opportunity – or simple process available - for an RSP to dispute an exclusion if appropriate. Telstra considers that NBN Co should be obliged to provide greater transparency in relation to the use of exclusions or stop the clock reporting.

Further, as set out in our response to the Consumer Safeguards Review – Part B⁶, 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. While NBN Co does provide monthly performance reports to RSPs these are only made available at individual RSP level. In order to provide further incentives for good performance against service standards, aggregated performance reporting should be publicly available. It may also be appropriate to consider whether systemic failure to meet service standards could be addressed via sanctions or fines.

Availability of connection rebates to service classes

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?*

In its response to the initial Discussion Paper, Optus submitted that:

The conditions and exclusions related to the availability of rebates for RSPs in relation to these service standards are cumbersome and complex and appear designed to minimise the extent to which RSPs can claim rebates. It is unclear, for example, why NBN Co would exclude premises where the service level timeframe for connection is one business day.

The ACCC 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) and FTTC connections where the service level is one business date (service class 34).

Telstra agrees with Optus that it is unclear why these premises are excluded by NBN Co. Further, these premises do not have a legacy service to default to in the event that the service level timeframe for connection of one business day is not met. As a result, Telstra considers that these premises should have connection rebates available to them.

Pass through of benefit to consumers

5. *What processes do RSPs expect to apply to ensure end users affected by service level misses receive a benefit from wholesale rebates?*

⁶ Telstra, Submission to Consumer Safeguards Review – Part B/Reliability of Services, January 2019



As noted above, the Undertaking from NBN Co has resulted in some important changes to the rebate structure in the WBA. Most notably, introducing a rebate for missed appointments, removing performance objective threshold requirements and simplifying the process for RSPs to receive rebates. The Undertaking also places an obligation on RSPs to pass on a fair value benefit to consumers of any rebate paid by NBN Co. The benefit may be in monetary or other form. The Undertaking was introduced at approximately the same time as the introduction of a number of additional obligations at the retail level – specifically, ACMA instruments aimed largely at improving the customer experience of NBN migration. The majority of the obligations contained within the ACMA instruments are applied to RSPs rather than NBN Co, other than a general obligation to support RSPs as appropriate.

These changes have only served to further widen the gap between obligations placed on RSPs and those placed on NBN Co. Further, as noted elsewhere in this submission, the focus of this Inquiry is to ensure that NBN Co has appropriate incentives in place to meet its wholesale service levels. Telstra considers that it is therefore inappropriate for the Inquiry to place additional obligations on RSPs (in the form of a mandated pass through), particularly where it is evident that they are already independently, proactively and competitively undertaking activities or providing service aimed at improving the customer experience on NBN.

Telstra understands the intent of the obligation – to ensure that customers who experience detriment from NBN Co failing to meet its service standards are appropriately compensated and that the rebates are not simply a transfer from NBN Co to RSPs. Further, that the benefit may be passed on in monetary or other form recognises that RSPs are providing products and services that contribute towards positive customer experiences on the NBN even where their NBN service may not be working as expected. However, Telstra's experience is that RSPs are best placed to determine how this benefit is passed on. This is because the risk in mandating pass-through is that the cost and complexity of doing so outweighs the benefit received.

The complexity of passing through the benefit of an NBN rebate to customers is illustrated by the recent work undertaken by Telstra to implement the Undertaking. At a high level, there appears to be two options open to RSPs:

- Straight pass-through of the monetary value of the rebates or a proportion of the rebates to customers; or
- Compare the value of remedies already provided to customers with the value of the rebate and pass on any difference to customers.

Telstra began by identifying the remedies that it already provides to customers when an issue arises with connecting to or using the NBN. These remedies include CSG compensation, provision of interim services, and provision of failover modems. We then attempted to consider how we would reconcile these remedies with the rebates provided by NBN Co, but this is difficult due to:

- Complexity associated with the different types of rebates (connections, fault, missed appointments) and scenarios in which the rebates will apply;
- Difficulty in determining the non-monetary value of the various remedies that may be provided to customers compared to the value of the rebate;
- Complexity in administering a process which recognises non-monetary benefit in certain circumstances based on a set of business rules. This is also likely to result in confusion amongst frontline staff regarding applicability with potential for a poor customer experience; and
- High cost of implementation to create a process that recognises variable application of the rebate and aligns with NBN Co implementation of rebate to RSPs.

As a result, Telstra made the decision to [c-i-c] [c-i-c].



It is unfortunately not the case that the apparent flexibility of the benefit pass-through (i.e. monetary or other form) assists with implementation. Further, Telstra considers that allowing flexibility in the application of the rebate within the parameters of the Undertaking requirements is also likely to result in customer disgruntlement. This is because customers are unlikely to recognise the value of non-monetary benefits (such as a failover modem) compared to a straightforward \$25 rebate amount. [c-i-c] [c-i-c].

Telstra's position is that NBN Co should have incentives to meet its service levels through the application of an appropriate performance regime, incorporating a revised rebate structure as described above. However, there should be no assumption or requirement that this necessitates value pass-through to consumers. To do so undermines RSP ability and incentives to meet customer needs and to differentiate in a competitive market, imposes unnecessary costs and complexity without giving customers what they actually want and means that RSPs are not compensated for the costs imposed on their already tight margins by NBN Co failure to meet its service standards. It is unnecessary and inappropriate to create an artificial link between NBN Co and end users through a pass-through requirement.

The cost to RSPs associated with a mandated pass-through requirement is evident through the work Telstra undertook to determine the best approach to implementing the Undertaking. [c-i-c] [c-i-c].

In the absence of regulated pass-through obligations, changing the rebate structure provides an opportunity for RSPs to differentiate service offerings to customers and transform the consumer experience on the NBN. Telstra recognises that the ACCC may wish to ensure that RSPs are not simply receiving the rebate without customer detriment being addressed or recognised. In this case, Telstra considers that a more general requirement on RSPs to demonstrate to NBN Co (and the ACCC) the remedies they provide to customers aimed at improving the NBN experience would be appropriate. This would include, for example, provision of fail-over modems and 'no service no fee' terms.

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?*

At this point, Telstra does not propose to keep any formal records to demonstrate compliance with the existing pass through requirement. For the purposes of the pass through requirement contained in the Undertaking, [c-i-c] [c-i-c]. This is because, as detailed in our response to Question 5, it is complex and costly to do otherwise. Further, as set out above, Telstra considers that the removal of a regulated pass-through obligation is in the long term interests of end users through the promotion of differentiated and innovative service offerings.

Record-keeping also tends to result in compliance costs which outweigh the benefits of keeping the records in question. Telstra does not consider that there is any benefit in keeping records to demonstrate compliance with the pass-through requirement nor is there likely to be any benefit in an obligation on RSPs to publish or report on how they intend to pass through a benefit to end users. This is due to a number of factors:

- Potential for confusion regarding eligibility for rebates given the various circumstances in which rebates may be paid and the exclusions that may be applied.
- The need for RSPs to retain flexibility in how they choose to pass on the benefit to end users.
- Difficulty in ensuring consistency where RSPs are reliant on the provision of the rebate by wholesale suppliers.

While Telstra acknowledges and supports the ACCC view that end users are compensated where NBN Co's fails to meet its service standards, we do not consider that the imposition of reporting and compliance obligations on RSPs is required to ensure that the rebates do not simply function as a 'transfer of value' from NBN to RSPs. The high level of competition and continuous striving for service differentiation in the market for NBN services will ensure that end users benefit from any rebates paid by



NBN Co, whether in monetary or other form. As set out elsewhere in this submission, RSPs are already providing their customers with innovative solutions to ensure continuity of service and should not be financially disadvantaged by any failure by NBN Co to meet its service standards. Further, classification of any rebate as a 'transfer of value' fails to recognise the significant costs imposed on RSPs when NBN Co fails to meet its service standards, including the damage done to customer relationships.

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?

NBN Co have indicated that the rebate will be applied at the PRI (product instance identification number) level for all categories except missed connection appointments, which will be aggregated and applied on a single (dummy) PRI. The aggregation to a single PRI imposes significant complexity in dealing with missed appointments due to the requirement for RSPs to undertake additional administration to identify end users who should receive a rebate. It would therefore be beneficial for NBN Co to be required to provide the rebate at the PRI level rather than in aggregated form.

The time taken for RSPs to receive data from NBN Co regarding missed service standards is also a concern. Current reports for missed SLAs show customer data that is 6-8 weeks old. As RSPs will not be in a position to pass on the benefit of any rebate to customers until after reporting is received from NBN Co, this is likely to result in confusion for end users, and potentially additional costs to industry, as end users are likely to make enquiries once the rebate is finally received. It would therefore be beneficial if NBN Co was required to provide the data earlier to ensure that end users benefit from any rebate as soon as practical after any detriment is experienced.



2. SERVICE SPEED AND PERFORMANCE

Service speed and the performance of NBN services are issues of key concern for RSPs and consumers. As noted in the Discussion Paper, RSPs have primary responsibility for consumer relationships and responsibilities under the Australian Consumer Law to deliver services as promised to and paid for by the end-user. It therefore follows that the information provided by NBN Co on the service to be delivered is critical to ensuring that RSPs are able to provide accurate information to end-users. Telstra agrees with the ACCC that the availability of speed information to RSPs is essential to support sales and marketing activities and compliance with regulatory requirements. Telstra's view that NBN Co should be required to support retail obligations where appropriate also extends to service speed and performance – ensuring that consumers receive the service they expect (and are paying for) and, where this is not the case, facilitating the identification and provision of remedies.

This section sets out Telstra's response to ACCC questions relating to service speed and performance, including the information made available to RSPs to support the accurate provision of services to customers and wholesale commitments required to support underperforming services.

Service speed information available to RSPs

8. *Does the information NBN Co makes available to RSPs about service speeds appropriately support RSPs advertising and selling of services?*

The availability of service speed information from NBN Co is critical in setting expectations for our customers. As explained below, Telstra believes improvements can be made to the nature of the information provided by NBN Co and how this information is communicated to RSPs. However, even if the information that is communicated to RSPs is improved, there remains an issue for RSPs communicating with their customers. This is because under the terms of the WBA, Service Qualification (SQ) information falls under the definition of confidential information and RSPs are unable to disclose that information to their customers. Naturally, this makes it difficult for RSPs to appropriately set customers' expectations because we cannot refer to the specific SQ results during conversations. This is an issue that Telstra raised with NBN Co during the term of WBA 2, most notably during the negotiations of the FTTN WBA variation, but it remains unresolved. Further, NBN Co itself states that its SQ results are not necessarily accurate and should not be relied upon.

Improving the information for FTTN/B/C services

The maximum attainable speed is important for identifying the speeds that can be supported by a FTTN/B/C service. Currently, information about the maximum attainable speed is not provided by NBN Co until after the connection of the service, so we are unable to use it to set customer expectations when the service is ordered. In the case of an address which has been previously connected to another RSP, NBN Co should be able to disclose the maximum attainable speed so we can set appropriate expectations with customers when they place an order for service at that address.

Additionally, it would be helpful if NBN Co could provide information for all addresses about the timeline for the ending of any coexistence measures, so this can be factored into our conversations with customers when placing an order.

Improving the information for Fixed Wireless (FW) services

Currently, we only receive information from NBN Co about FW cells that it regards as being 'congested', i.e. those cells with an average busy hour downlink throughput of less than 6 Mbps. However, we are strongly of the view that information from NBN Co about the forecast trends in network congestion would be more meaningful if it focused on the number of customers impacted and not the number of congested



cells. For example, NBN Co currently references 4% of cells being congested⁷, but in reality this is impacting 7% of Telstra's customers. There is also a risk that by reporting on cells rather than customers, NBN Co may focus on addressing those cells that require the least capital investment first, rather than those with the greatest number of impacted customers. Secondly Telstra does not have sufficient information about NBN serviceable addresses potentially impacted by congestion to allow for improved pre-sale checks on the viability of a fixed wireless service at that address.

In the case of cells (and services) with a busy hour throughput greater than 6 Mbps, it would be useful for NBN Co to either provide us with the actual throughput figure for each of these cells or within a range (e.g. 6-12, 12-25 Mbps etc.). Again, this is so we can set appropriate expectations for customers using services within these cells, including the level of improvement they can expect to receive immediately after a congested cell is upgraded.

We also note that the Estimated Time of Resolution (**ETR**) information provided by NBN Co for congested cells is often incomplete. Based on January 2019 reporting, typically only around 80% of the cells in this category have an ETR assigned to them. We require the ETR information to be completed for all congested cells so we can advise our customers accordingly.

There is also a discrepancy between NBN Co's labelling of speed tiers and the actual received experience for customer. For example, the new Fixed Wireless Plus (75/10) plan to be introduced in Q2 of 2019 is still subject to the same 6 Mbps typical busy hour design speed as lower speed tier plans. More transparency is required to identify the relative performance of different plans.

Automation of information transfers

The maximum attainable speed and FW network congestion information is not transferred via an automatic interface between NBN Co and RSP business systems. Rather, the data has to be manually downloaded from the NBN customer portal, often cross referenced with separate information and manipulated for loading into Telstra's systems. This manual handling of data is inefficient, introduces delays and risks data being accidentally amended or lost during the process. We are seeking a timely enhancement of the existing B2B interface, or the addition of a suitable API, to enable the automated transfer of this information between NBN Co and RSP systems, including the delivery of any impacted NBN Location ID (connected or currently unconnected) and the FW congested node reports. In Telstra's view, this information is going to be required for the foreseeable future because, even though NBN Co's current plans to remediate congested cells will deliver improvements, usage can be expected to continue increasing, so further upgrades will be needed in the future.

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.*

As set out in our response to Question 8, we believe the following enhancements are required to better set customer expectations:

- NBN Co trend forecasts for reducing FW network congestion (from 4% today to 1% in September 2019) should be based on the percentage of customers impacted rather than the number of congested cells.
- The provision of information on the speeds being experienced by customers in cells with an average busy hour downlink throughput speed of more than 6 Mbps.
- A clear ETR is required for all cells affected by congestion that also incorporates post-upgrade optimisation.

⁷ See <https://www.nbnco.com.au/nbn-customer-centre/ops-launchpad/wireless-performance-report>



- Automation of the transfer of information from NBN Co to RSPs through B2B systems and APIs, rather than the current manual download process.

Underperforming services

10. *What wholesale commitments should apply where service performance consistently falls below what is ordered or reasonably expected?*

Telstra's submission to the Initial Discussion Paper set out our concerns regarding the NBN Co expectation that RSPs pay AVC charges as per the list price, even when the service that a customer is receiving is slower and/or less stable than expected. NBN Co's WBA sets out a number of factors that can impact the speed and stability of an end-user's service⁸ and, while Telstra does not dispute that actual service performance can be impacted by all of these factors, we strongly believe that NBN Co should be appropriately incentivised to address factors that are within its control. As Telstra stated in its submission to the Initial Discussion Paper, if a RSP does not meet its commitments to an end user then it may be liable for compensation or other remedial action, yet this is not currently supported by the WBA.

Our submission to the Initial Discussion Paper identified a number of key areas where Telstra believes it would be appropriate for NBN Co to face appropriate incentives to address the poor performance of customers' services:

- **Co-existence:** can impact FTTB/N/C services and occurs when legacy services are being provided in an area and the presence of those legacy services impacts the speeds that can be achieved by the NBN services. Unless the speed of an FTTN customer's service is less than 12/1 Mbps (25/5 Mbps for FTTB/C), NBN Co will not investigate if a fault is raised.
- **Services placed in a Repair Profile:** impacts FTTB/N services and NBN Co explicitly acknowledges that such services may be restricted, limited or downgraded⁹ but states that it requires RSPs to continue to pay the applicable charges for the service.
- **Remediation:** where NBN Co determines that a service requires remediation in order to enable it to achieve the expected speed, it has a performance objective to complete remediation solutions two years from the date that a remediation case is opened. Aside from the fact that two years is an unacceptable timeframe for a customer who is experiencing serious issues with their service, NBN Co also requires RSPs to continue paying the applicable charges for services that require remediation for the two year period. As a result, NBN Co has no incentive to perform the required remediation in a timely manner.

In addition to the factors that Telstra previously identified, interference can also impact the performance of a customer's service. While NBN Co has operational targets to investigate and mitigate interference, the date by which it must attempt to mitigate that interference is for NBN Co to determine and, similar to services that require remediation, RSPs must continue to pay the applicable charges until NBN Co completes the interference mitigation.

Telstra acknowledges that addressing each of the factors that can negatively impact the performance of a customer's service can be complex, although we note that co-existence is unlikely to be an ongoing issue as more and more legacy services are migrated to the NBN. Nevertheless, we do not consider it reasonable for NBN Co to continue to charge the list price for services that it acknowledges are not performing to the standard that is expected. RSPs may be able to reduce the charges payable in the

⁸https://www.nbnco.com.au/content/dam/nbnco2/2018/documents/sell/wba/SFAA_WBA_ProductDescription_nbnEthernetProductModule20180706.pdf

⁹

https://www.nbnco.com.au/content/dam/nbnco2/2018/documents/sell/wba/SFAA_WBA_ProductTerms_nbnEthernetProductModule20180803.pdf



case of remediation by a customer switching to a lower speed product (i.e. 25 Mbps to 12 Mbps). However, in this scenario, NBN Co might consider that remediation is no longer required as the service in question may now meet the expectations of the lower speed product. This outcome would be detrimental to the customer experience as they would not only be receiving a lower speed service than originally intended, but the ability of the service to deliver higher speeds would be indefinitely postponed.

In short, we consider that the current misalignment between the expectations placed on RSPs in regards to the delivery of services to customers and the expectations and incentives that are placed on NBN Co results in an inefficient outcome. This is because customers receive a poor quality service, RSPs pay compensation for that poor quality service despite having no control over what is provided and NBN Co faces no financial incentives to remedy the customer's service. Telstra believes that there is a simple solution to this problem – NBN Co should reduce the charges payable by RSPs for the timeframe that services are negatively impacted by the factors identified above. This reduction should be automatically applied by NBN Co and the onus should not be on RSPs to claim any compensation from NBN Co.

Notwithstanding their inability to fully control the customer experience on the NBN, RSPs have undertaken initiatives designed to improve customer outcomes. For example, Telstra – like other RSPs – has implemented failover solutions as part of our customer service offering. However, there are limitations to the failover solution and not all customers will receive the benefit of a failover. There are legitimate reasons – outside of a RSP's control – that the failover will not work in all circumstances and should therefore not be relied on as a solution to NBN Co failing to meet its service standards.¹⁰ Telstra has also introduced a 'nbn satisfaction guarantee' which allows customers to cancel their nbn service within 30 days of connecting if they are not satisfied with their service. Customers are refunded their first monthly plan fee and any hardware repayment costs, as well as any standard Telstra installation, connection or activation fees.¹¹ In addition, Belong recently introduced a 'no service, no fee' for NBN customers whereby they will not be charged if their NBN service is not working. These initiatives are all undertaken at RSP cost regardless of whether any compensation is received from NBN Co. Where an RSP is not at fault, Telstra strongly considers that NBN Co should face adequate incentives to rectify underperforming services including appropriate compensation.

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?

As the ACCC is aware, Telstra has already committed to providing remedies to our FW customers who have been impacted by congestion. Those remedies include providing credits to customers and giving them the option of a costless exit – the provision of credits alone is expected to cost Telstra in the region of [c-i-c] [c-i-c] in FY19.

By contrast (and as per our response to question 10 above), NBN Co expects RSPs to continue to pay the list price even when the service is impacted by congestion. Again, Telstra believes that the solution is simple – NBN Co should reduce the charges payable by RSPs for each service that is impacted by congestion. This reduction should be ongoing for the duration of the period that the service is negatively impacted.

¹⁰ For example, mobile coverage may not be adequate to provide a failover and failover solutions will necessarily impact mobile network capacity. In outage scenarios where customers are reliant on the back-up, there is no certainty that there will be sufficient capacity.

¹¹ Early termination fees are also waived. More information on the nbn satisfaction guarantee is available here: <https://www.telstra.com.au/broadband/nbn/guarantee>



3. RETAIL CONSUMER SAFEGUARDS

While RSPs have primary responsibility for the delivery of NBN services to their customers, much of the end user experience is underpinned by whether NBN Co meets its wholesale service standards. Telstra's submission to the Initial Discussion Paper set out our position that, when retail service standards or obligations are imposed by regulation, NBN Co should be required to support these. At the time, this position related to legacy regulations, such as priority assistance and the CSG, but noted other projects and inquiries that had the potential to introduce new standards or obligations on RSPs.

As acknowledged by the ACCC, recently introduced instruments by the ACMA to improve the NBN consumer experience include obligations on RSPs, some of which are underpinned by appropriate support at the wholesale level. Further, the Consumer Safeguards Review is considering a range of issues at the retail and wholesale level including service reliability, connections, faults and appointments. In the Discussion Paper the ACCC notes that the Consumer Safeguards Review is seeking feedback on proposals that would only commence after forecast completion of the NBN rollout. However, the revised timeframes of the ACCC Inquiry and delays in WBA4 negotiations suggest that this will also likely be the expected timeframe for implementation of any outcomes of the Inquiry.

Telstra's position is that it is critical that any retail obligations are appropriately and immediately supported at the wholesale level. This section sets out our response to ACCC questions relating to the need for wholesale service standards to support obligations relating to priority assistance, CSG and ACMA instruments.

Priority assistance

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

- The availability of PA connection and 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.

The Discussion Paper sets out the ACCC's view that PA is an important safeguard and should be supported by the WBA as far as possible. Telstra agrees with this view. Although the 24 and 48 hour connection and fault repair timeframes do not apply when Telstra has to rely on NBN infrastructure, our position is that customers migrating to the NBN should receive at least the same level of service as they receive today on the legacy network. This is critically important for medical PA customers.

The submission made by NBN Co to the Initial Discussion Paper sets out a view that Telstra's PA obligations do not apply where NBN services are used to supply a PA service. NBN Co states that:

...[e]ven when priority assistance services are required to be provided by Telstra, the performance standards applicable are specifically excluded if the priority assistance service is provided by means of a network other than one that Telstra is in a position to exercise control (nbn's network is specifically excluded under the Priority Assistance Policy).

It is correct that Telstra's carrier licence condition was changed in 2014. As set out in our submission to the Initial Discussion Paper, this ostensibly removes the obligation to meet PA timeframes in relation to services supplied over networks which Telstra does not control. The carrier licence condition now obliges Telstra to provide PA connections on the NBN with the highest level of service practicable.



The change to the carrier licence condition was made in recognition of the changes in responsibility for meeting PA timeframes with the advent of the NBN. Telstra's recollection is that the policy intent was to ensure that Telstra would not be held liable where existing timeframes were not met, given that the ability to meet those timeframes for customers on the NBN would be primarily out of Telstra's control.

Telstra does not, however, consider that the intent behind changing the carrier licence condition was to negate the obligation to provide PA to certain customers migrating to the NBN. While we may not be fully liable if the timeframes are not met, Telstra considers that the timeframes for PA customers should be supported by appropriate wholesale service standards. These timeframes are also supported by the registered PA Code, which effectively extend the requirements that apply to Telstra (i.e. the legacy network timeframes) to all suppliers who choose to offer PA. While the code does not override legislative obligations, Telstra's position is that it would offer PA consistent with the requirements of the code even if the carrier licence condition did not apply.

As noted by the ACCC, there is a gap between the service levels provided for certain categories of connection which means that there is no guarantee that we will be able to meet our PA commitments. Accordingly, Telstra considers that PA connection and fault rectification service levels should apply to all service class categories. We note the ACCC view that connection timeframes may be less of a concern where a legacy service is available and a connection can be made on the legacy network within PA timeframes. However, it is not difficult to envisage scenarios where there is no legacy service available, e.g. in Greenfield areas or if a PA customer moves into an area that is RFS and the previous legacy service has been disconnected. In the former scenario, Telstra would place an order for an Accelerated Connection, but the service levels for such connections are a minimum of 4 working days, outside the PA timeframes.

Where Telstra becomes aware that NBN Co is unlikely to meet service standards for PA customers, our policy is to provide an interim service to ensure PA customers have access to a communications service. The Discussion Paper sets out the WBA provision that allows for claims by RSPs for costs of interim services for both connection and fault rectification. However, as acknowledged by the ACCC, the ability to claim for interim services for connections is restricted to Service Class 3 connections only. The same restriction does not apply for fault rectification.

In any case, Telstra has never claimed interim service costs from NBN Co. This is because, as noted in the Discussion Paper, the process for claiming the cost of interim services is difficult to apply in practice. Module 7 of the Operations Manual sets out the process as follows:

Prior to any claim for an Interim Service Amount in respect of a Downstream Priority Assistance Service being made by your organisation:

- *Your organisation must provide nbn with full particulars of the proposed supply of the interim service at the Premises including the expected period for providing the interim service; and*
- *Based on the information supplied by your organisation, your organisation and nbn will agree on the Interim Service Amount, and the period for which the Interim Service Amount will apply.*

If your organisation and nbn fail to agree on both the amount and the period within 20 Business Days, your organisation may raise a Billing Dispute.

The requirement to agree with NBN Co the amount and duration of interim service is impractical. It is extremely unlikely that we will know the final cost of an interim service prior to it being supplied, generally because the duration is not within our immediate control. That aside, if the interim service is going to be of any value to a PA customer, it is imperative that it is provided to them as soon as we are aware that NBN Co is not able to connect or rectify their service. The requirement to seek prior approval, which is likely to be time consuming, therefore does not align with the desired consumer outcome. The process for claiming interim service costs should be revised to provide for costs to be reimbursed automatically



once the service has been connected or repaired by NBN Co. For connection, this should also apply to all Service Classes, not just Service Class 3.

As noted by the ACCC, 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. Telstra's view is that rebates should apply to PA connection whether an interim service is supplied or not. This is due to a concern that, once an interim service is in place, NBN Co has little incentive to ensure that the NBN service is connected or repaired in an expedient way. Although it could be argued that the ability to claim reimbursement of interim service costs is an incentive on NBN Co (leaving aside the current difficulty in claiming those costs), experience to date suggests otherwise. This also ignores the intent of the interim service – to ensure that PA customers have reliable access to a communications service – versus the rebate – to place an incentive on NBN Co to connect or repair a service. This suggests that one should not replace the other and that rebates should apply to PA connections and faults.

While Telstra remains committed to the provision of PA for eligible customers, we believe that there is scope for review of the policy objective and eligibility criteria for PA. Our views on this are set out in Telstra's submission to the Consumer Safeguards Review – Part B¹². However, subject to such a review, we consider that NBN should make PA timeframes available to all RSPs for their customers that meet the criteria. Those eligible for PA should be able to choose their provider and not be required to obtain their services from Telstra.

Customer Service Guarantee

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

In the Discussion Paper the ACCC sets out concerns that the arrangements in place under the current WBA in relation to the CSG are overly complex, do not result in NBN Co compensating an amount that reflects its contribution to RSP failures to meet CSG timeframes, and are not reflective of arrangements that appropriately support the obligation on RSPs. Telstra agrees with these concerns, which are supported by the fact that Telstra has never successfully claimed CSG compensation from NBN Co. Our response to the Initial Discussion Paper set out Telstra's view that the attempted application of the CSG standard to the NBN as part of the WBA process has failed to drive appropriate improvements in service delivery timeframes.

However, Telstra acknowledges that the operation of the CSG in the context of the NBN is problematic. While Telstra is committed to providing customers with the same level of service they experience today on legacy services, it is not necessarily the case that the CSG standard is the appropriate mechanism (or one of the mechanisms) to achieve this. Telstra's submission to the Consumer Safeguards Review – Part B advocates for the replacement of legacy regulation, such as the CSG, with simplified consumer protections. However, pending finalisation of any review, the CSG standard should be supported in the NBN context and appropriately recognised in the WBA (albeit separate from the NBN rebate structure). This aligns with Telstra's view that the service standards in the WBA must support the regulated obligations faced by RSPs.

At present the CSG standard does not financially incentivise NBN Co to meet its wholesale service standards. This is due to the fact that the process for RSPs to claim primary damages from NBN Co is unworkable – the onus is on RSPs to analyse CSG damages that have been paid and apportion those

¹² Ibid.



damages between NBN Co and the RSP. This process is onerous for RSPs and practically ensures that they will not make any claims for CSG compensation.

By contrast, Telstra considers the process followed by Telstra Wholesale (**TW**) provides an accepted and demonstrated template. Under TW's CSG compensation policy, a wholesale customer raises a claim with TW identifying the service details (i.e. when the service was meant to be connected/rectified and when it was actually connected/rectified) and the CSG amount paid to the end user. TW then assesses what portion of the delay can be attributed to TW by interrogating our systems (i.e. we check when the order/fault ticket was made, when it was actioned, what was the requested date, talk to the technician, etc.). Based on this assessment, an appropriately apportioned CSG compensation payment is made to the wholesale customer (which they can challenge if they do not agree with the payment amount).

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

Telstra also considers that the application of the CSG should be extended to those activities currently limited by NBN Co. Specifically:

- Migration connections;
- Standard connections; and
- Services supplied using the Fixed Wireless Network or Satellite Network

It is also important to note that Telstra concerns in relation to the level and applicability of rebates, timeframes (i.e. NBN Co does not meet CSG timeframes for all service classes) and provision of interim services also apply in the context of CSG payments. Where CSG compensation is able to be claimed and a commercial rebate amount also applies, NBN Co will net off the rebate from the CSG amount in order to prevent 'double recovery'. As set out in our response to the Initial Discussion Paper, and elsewhere in this submission, this does not reflect the intent of CSG compensation versus the NBN Co rebate. It is also an approach that disadvantages RSPs who provide CSG compensation to their customers and are effectively not reimbursed for costs incurred when NBN Co fails to meet its service levels.

Telstra's submission to the Consumer Safeguards Review – Part B sets out a view that a key objective of the Review should be to repeal and replace dated legacy regulation such as the CSG, which places compensation obligations on RSPs, to allow for flexibility for RSPs to differentiate on service or to provide an alternative remedy or rebate. Rather regulatory incentives need to be targeted at NBN Co to ensure it delivered on its commitments (consistent with the views set out in the submission). However the outcomes of the Consumer Safeguards Review are still to be finalised and the CSG remains in place. Telstra considers that it would be appropriate for the WBA to appropriately recognise potential changes to the CSG with a clause that removes obligations on NBN Co to support CSG standards if they are removed.

ACMA instruments

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

The ACMA service standards (Service Continuity, Consumer Information, Complaint Handling and Line Testing) set out a range of obligations that apply to industry participants either before, during or after the migration to the NBN. These obligations aim to improve the customer experience of NBN migration, and address a range of issues that have been identified in the first few years of the NBN rollout. The majority of the obligations contained within these standards address issues that arise between the consumer and



their RSP, in particular obligations relating to the provision of information or the processes for handling complaints.

In the case of Service Continuity and Line Testing, there are obligations within the standards which require other parties involved in the migration to provide reasonable assistance to allow for compliance, with NBN Co being identified explicitly as a potential assisting party. It is, however, too early to provide feedback on whether or not this reasonable assistance has been provided as the standards have been in place for a very short amount of time with few, if any, instances having arisen that required significant coordination with NBN Co.

Telstra considers that some of the other topics covered in the ACCC Discussion Paper, and related proposals made by Telstra in this submission, will lead to a reduction in the need for / applicability of these service standards. For example, if NBN Co were to improve the pre-sales information provided to RSPs about maximum attainable speeds, it logically follows that there would be fewer instances of delivered speeds not living up to consumer expectations, in turn resulting in fewer RSP rectification actions required under the Line Testing determination.

Likewise, if NBN Co were financially incentivised to improve service delivery performance through appropriately targeted rebates, it follows that there would be fewer cases that result in premature legacy disconnection and therefore fewer RSP actions required under the service continuity standard. That said, given Telstra's position that NBN Co should be obliged to support retail obligations where appropriate, it would be appropriate for a service standard committing NBN Co to do so. That is, the WBA should include a general obligation to support any retail obligations imposed on RSPs. This would also ensure that wholesale support will be provided for any new obligations rather than being tied to any which may be time-limited.



4. MEASUREMENT AND REPORTING OF OPERATIONAL OUTCOMES

As set out elsewhere in this submission, RSPs are directly responsible for the experience of their customers on the NBN. However this is, in many areas, dependent on the wholesale service provided by NBN Co. This includes the provision of operational information. Such information enables RSPs to understand NBN performance and, as noted by the ACCC, manage consumer expectations.

The ACCC is 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 operational information that RSPs require to manage end users' experiences on the NBN. This section sets out Telstra's position on these issues, including proposed changes to improve the provision of information to RSPs and, ultimately, the consumer experience.

Measurement of service levels

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

In the Discussion Paper, the ACCC sets out concerns that the categorisation of "new service never worked" installations has the potential to distort the measurement of NBN Co's performance against its service levels and subsequent outcomes under the WBA. Specifically, the ACCC describes a situation where 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, these cases are categorised as successful connections, with a fault recorded shortly after. In these cases, RSPs must begin paying NBN Co for the service from receipt of completion advice, while RSPs are unable to charge an end user for a service until it has been successfully connected.

Telstra shares the ACCC concerns about the categorisations of "new service never worked" installations. Indeed concerns about the categorisation ultimately led to the development of data flow detection when FTTC was introduced to ensure that a service was working before an order could be considered as completed. This has limited the scope for installations being categorised as "new service never worked" for FTTC but the scenario continues to be a concern for the other technology types, particularly FTTN. The ability for NBN Co to categorise installations in this way is problematic for a number of reasons, including performance measurement and charging, but ultimately the impact on the end user who doesn't have a working service in place despite an apparent successful installation.

Telstra would welcome the opportunity to continue to work with NBN Co to develop a solution to ensure services are working before the order is completed. Further, as set out elsewhere in this submission, where NBN Co is at fault, they should not charge RSPs for services that are not working as expected.

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?

Telstra's response to the Initial Discussion Paper set out our concern regarding a new operational process and corresponding service level in WBA3 that gives NBN Co two hours between when a trouble ticket is lodged and when NBN Co is either required to accept it or place it in 'pending'. Measurement of NBN Co's performance against fault rectification service levels then begins when the trouble ticket is accepted. This is in contrast to the process under WBA2 whereby measurement of NBN Co's performance began when the trouble ticket was acknowledged by NBN Co, which usually happens within seconds of a trouble ticket being submitted by a RSP. The new process means that NBN Co



service levels may be extended by an additional working day without penalty while end users receive a worse experience.

Telstra agrees with the ACCC that it is not reasonable to begin measurement of end user faults at trouble ticket acceptance rather than acknowledgment. NBN Co submitted that the delay in measurement is reasonable as it enables NBN Co to assess whether the RSP has correctly submitted all the information required for it to begin rectifying the fault. Telstra acknowledged this rationale in our initial submission but also noted that [c-i-c] [c-i-c]. This would reduce the risk of incomplete or inaccurate trouble tickets delaying the resolution of end user faults and ensure that measurement of those faults aligns with the end-user experience.

Reporting of service level performance

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

As stated in our response to the Initial Discussion Paper, following the transition to WBA 3 NBN Co reduced the granularity of the service level reporting that it provides to RSPs. This reduction was introduced without consultation with RSPs and Telstra's strong preference is to revert to the level of granularity that was previously provided; that is, NBN Co should report its performance by access technology, location (urban, minor rural etc.) and service class. Since December 2018¹³, NBN Co has begun providing a supplementary report that sets out the more granular level of performance reporting that Telstra had been requesting. This is a welcome development and it is important that this more detailed level of reporting continues because overall performance metrics could mask systemic issues with one technology, or service class etc.: [c-i-c] [c-i-c] and it is helpful to see this impact broken out in the reporting (notwithstanding that NBN Co is working on a plan to address the issue).

Telstra also considers that NBN Co should be required to provide aggregate reporting to the appropriate regulator. It is appropriate that NBN Co reports to each RSP on its performance in relation to that RSP, but this means that there is a gap in terms of oversight of NBN Co's overall performance.

Availability of operational information

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?

Operational information is critical for RSPs to communicate effectively with their customers regarding service status and other service-related activities. As noted by the ACCC, this is reflective of RSP responsibility in managing the customer experience. In many instances, the flow of information from NBN Co to RSPs limits Telstra's ability to communicate effectively with our customers. This is particularly the case in relation to missed appointments and the information provided by NBN Co regarding the status of a fault or service.

On missing appointments, NBN Co often do not advise when an appointment is going to be missed which can leave an end-user waiting for over 4 hours. Telstra's experience is that this occurs up to 50% of the time. This appears consistent with the views submitted by Optus and the CCC which 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. Prior to the implementation of the Undertaking, NBN Co did not offer a rebate for missed appointments, although end users are charged a fee if they do not attend a scheduled appointment.

The information provided by NBN Co in relation to service status can also significantly impact our ability to communicate effectively with our customers. The information provided to NBN Co by a technician is

¹³ The December 2018 performance reports relate to November 2018 performance.



passed on to RSPs in abridged form that often does not include critical detail required. For example, Telstra has experienced situations where a technician has advised NBN Co that a lead-in trench is required to be provided by an end-user whereas an RSP is advised that the lead-in is faulty. This not only has a detrimental impact on the rectification of the fault but also the customer experience with their RSP.

As a result Telstra supports a requirement on NBN Co to provide near-real-time updates in relation to time-sensitive activities and the provision of more detailed information regarding the status of services.



5. LIABILITY FRAMEWORK

As set out in the ACCC's Discussion Paper, the WBA3 contains risk management terms including, amongst other things, provisions pertaining to liability and indemnity. Submissions to the Initial Discussion Paper, including Telstra's, raised concerns regarding these liability and indemnity arrangements. As a result, the ACCC is seeking to understand whether the provisions included in the WBA3 are consistent with standard commercial practices.

Liability caps and material service failures

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

Telstra's current wholesale supply agreement, the Telstra Wholesale Agreement (**TWA**) contains Telstra Wholesale's standard contractual risk and liability positions. Unlike those in the WBA3, Telstra does, as a matter of course, negotiate those standard positions with its customers on a case by case basis. Telstra's risk and liability positions therefore vary slightly from customer to customer, unlike those in the WBA3 which, to our knowledge, NBN Co does not negotiate. The only variation between customers WBA3 agreements is the value of the liability cap which is based on annual spend, up to a capped amount. However NBN Co's liability cap tops out at \$200 million which puts RSPs, such as Telstra, spending well in excess of that amount on an annual basis in a different risk position to those spending less (i.e. they bear a greater risk as their potential losses are not fully covered by NBN Co's liability cap). Telstra is of the view that this is potentially discriminatory, as it forces larger RSPs to bear more risk than smaller RSPs, and is inconsistent with NBN Co's non-discrimination obligations.

Both the TWA and the WBA3 seek to apportion risk and limit liability based on accepted contractual norms. However, there are also some material differences between the two wholesale supply agreements, with the WBA3 including provisions that apportion risk in ways that have no equivalent in the TWA.

In terms of similarities, both the WBA3 and the TWA seek to apportion risk by incorporating standard limitations on liability, including the following:

Liability Caps

Both the TWA and WBA3 agreements limit aggregate liability in each year of the term (i.e. an annual liability cap). Under the WBA3, the value of the annual cap on liability is fixed and determined by the level of spend under the agreement, though ultimately capped at \$200 million regardless of an RSPs yearly spend above this amount. In comparison, Telstra negotiates liability caps with its larger Wholesale customers on a case by case basis.

The ACCC's own Model Terms¹⁴ outline a liability cap limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Services provided by Access Provider in the relevant 12 month period.

Exceptions to the Liability Cap

Additionally, both the TWA and the WBA3 agreements specify exceptions to the aggregate liability cap (that is, liability that is uncapped), though the particular scope and extent of the carve-outs vary between the two agreements.

¹⁴ See clause 8.1 of Schedule 8 of Appendix A of the Fixed Line FAD 2013 Final Report



Exclusions of Liability

Each of the TWA and WBA3 exclude liability for indirect and consequential losses on a mutual basis and both agreements also expressly exclude (to the extent permitted by law) the application of any warranties, conditions or guarantees implied or imposed by law. To the extent that they can't be excluded but can be limited, both agreements limit the remedy to the resupply, replacement, repair or cost of re-supplying the applicable goods or services.

The WBA3 differs to the TWA in a number of material respects, with NBN Co seeking to limit liability for loss and apportion risk under WBA3 in ways that have no equivalent in Telstra's TWA. These positions include:

Per Event Cap

NBN Co further seek to limit their annual liability during the first year of the term of WBA3 by including a 'per event' cap which applied in addition to the annual cap. The 'per event' cap limited each party's liability in respect of any one event (or series of related events) giving rise to liability to 50% of the annual liability cap. Neither the TWA or the ACCC's model terms specify any equivalent 'per event' cap.

Material Service Failures (MSF)

NBN Co limits its liability for any delay in supplying, failure to supply or an error or defect in the supply of an Ordered Product to Commercial Rebates or CSG payments, except where the Ordered Product is affected by a Material Service Failure. While the TWA excludes (to the extent permitted by law) all representations conditions, warranties or guaranties implied or imposed by law (e.g. guarantees that the service will be continuous or fault free), the MSF concept doesn't exist in the TWA. However the WBA3 specifies that if a Product is affected by a MSF (defined on a product by product basis), then NBN Co's liability for any and all losses resulting from the MSF is limited to the amount of charges paid by the customer (pro-rated daily) for the period from the occurrence of the event giving rise to the MSF until the resolution of the MSF (as determined by NBN Co acting reasonably). This limited liability is subject to a further sub-cap known as the 'Material Service Failure Cap' which, in the first year of the term of the WBA3, limits NBN Co's liability to 12.5% of the Nominated Billings Amount for that year up to a maximum of \$25 million, and for each subsequent year of the term to a maximum of 25% of the Nominated Billings Amount up to a maximum of \$50 million. Effectively, if a customer is affected by a Material Service Failure (which by definition has a significant effect on their service), the customer is entitled to be refunded the amount paid for the service during the relevant period the service was affected. There is no "compensation" for the loss of the service; simply that the customer does not have to pay for the service for the relevant period.

Given that NBN Co's greatest risk of incurring liability under the WBA3 relates to an event caused by an MSF, the effect of this provision is to effectively cap NBN Co's liability to its customers at \$25 million in year 1 of the WBA3 term and in each subsequent year of the term at \$50 million (notwithstanding that the notional annual liability cap is set at \$200 million for RSP's spending >\$200 million annually, or half that under the 'per event' cap for a single or related series of events in the first year of the term of WBA3). Telstra considers that this cap is manifestly inadequate in circumstances where caps on liability normally reflect at least the annual spend under an agreement (for example as specified by the ACCC in its Model Terms). In Telstra's case, spend under the WBA3 is forecast to be [c-i-c] [c-i-c] so the MSF cap in years 2 and 3 of the term (i.e. \$50 million) represents just [c-i-c] [c-i-c] of Telstra's annual spend under the WBA3. It's worth noting that this percentage will also decrease over time as Telstra's annual spend increases.



Third party claims against NBN Co

As outlined in Telstra's response to the First Discussion Paper, the WBA3 includes provisions that effectively require RSPs to flow down NBN Co's 'model terms' to all their downstream customer contracts. This has the effect of barring end customers from bringing a claim against NBN Co. If RSPs do not flow down these model terms, then they must indemnify NBN Co for any third party claims made against it. In practice, this means that if an RSP cannot flow-down the model terms for whatever reason (such as agreements that are already on foot and cannot be reopened, or negotiated agreements with larger enterprise and government customers), the RSP gives NBN Co an uncapped indemnity for all losses (including Indirect Losses) suffered by NBN Co for a claim brought against NBN Co by an end customer. As noted by the ACCC in the First Discussion Paper, this effectively transfers the risk of certain matters within NBN Co's areas of responsibility to either customers or RSPs and clearly does not seek to compensate customers for loss as a result of serious service interruption.

The inclusion of this provision in the WBA has no equivalent in the Telstra TWA, and in fact directly contradicts the approach taken by Telstra when dealing with end user claims, as illustrated by the Warrnambool Exchange example discussed in Telstra's response to the First Discussion Paper and summarised below.

On 22 November 2012, a fire at Telstra's Warrnambool Exchange impacted over 100,000 customers in Warrnambool and surrounding Shires. In total, 135 exchange service areas were impacted covering over 26,000 square kilometres. The telephone exchange facilities and services were restored progressively over a 20 business day period following the fire, with full restoration achieved on Wednesday 19 December 2012.

Although services were restored in less than 20 business days, Telstra made compensation payments to both Telstra Retail and Telstra Wholesale customers. A claims process was established which effectively provided compensation where customers were able to provide evidence of loss due to the outage. Customers were not restricted to claiming direct losses. The compensation scheme resulted in a total payout of approximately [c-i-c][c-i-c] to customers impacted by the fire. In contrast, the WBA3 MSF regime would result in no payment to customers because, despite the scale of the outages, those outages lasted less than 20 business days.

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

For the most part, improved commercial rebates for customers would not address RSP's concerns about the general liability framework, as the two address different issues. Commercial rebates serve multiple purposes as outlined elsewhere in this submission, including to compensate customers for NBN Co's failure to meet agreed service standards, whereas the liability framework in the WBA is designed to apportion risk and liability between NBN Co and the RSP.

Commercial rebates are designed to address *individual* failings of agreed service standards, notably end-user connections and service fault rectification. In these cases, commercial rebates are applied where NBN Co does not meet the relevant performance standard. As Telstra has submitted, improving commercial rebates would assist RSP's to adequately compensate end-users and also incentivise NBN Co to improve its performance against its specified service standards.

However in cases of material service failure or other material breach of contract by NBN Co, commercial rebates are inappropriate as they do not address risk and liability apportionment as between NBN Co and the RSP. For example, improved commercial rebates provide no protection or comfort to Telstra in circumstances where Telstra is forced to indemnify NBN Co in the event of a third party claim against NBN Co in circumstances where Telstra has been unable to flow down NBN Co's 'Model Undertaking' provisions (which act as a bar on third parties bringing claims against NBN Co). This leaves Telstra (and all RSP's) in the unenviable position of bearing unlimited liability to NBN Co for NBN Co's breach.



With the roll out of Enterprise Ethernet and other business grade products, the level of risk that Telstra (and all RSP's) must bear as a result of this requirement to "protect" NBN Co continues to increase, as more Enterprise and Government customers migrate to the NBN. Where Telstra can't flow NBN Co's Model Undertaking terms into its Enterprise and Government agreements (e.g. because the customer refuses to include NBN Co's Model Undertaking provisions in their service contracts), the result is that Telstra bears uncapped liability to NBN Co in the event of a claim (most likely as a result of an MSF) by any of those customers against NBN Co. Telstra is of the view that a mature industry operator such as NBN Co should not be placing this type of limitation on end user claims, but rather dealing with serious network failures in the same way as Telstra dealt with the claims arising from the Warrnambool exchange fire.

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

Telstra continues to be of the view that the bar on third parties bringing claims against NBN Co where the RSP is unable to pass through the "Model Undertaking" to end user customers is unreasonable, particularly as it forces RSP's to bear unlimited liability for NBN Co's breach (across a growing customer base), and/or for the end user customers to bear the losses they incur that are associated with NBN Co's breach.



6. OTHER ISSUES

The ACCC is interested in views on whether any other changes, in addition to those included in the Discussion Paper, are required to wholesale service level terms to further support positive consumer experience. This section sets out Telstra's views on whether there are additional wholesale service terms that should be implemented.

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

Telstra considers that the Discussion Paper captures the majority of issues raised by stakeholders during the consultation process for the Inquiry. However, most of these issues are those that have been experienced by stakeholders to date within the current regulatory environment and during a time focused primarily on NBN migration. There are also several processes underway that may result in a change to the regulatory environment – such as the Consumer Safeguards Review – or that are untested in their effectiveness – such as the ACMA standards. There is therefore a risk that new issues may be raised that do not form part of this Inquiry. As a result, Telstra considers that it would be beneficial for a 'regulatory events clause'; regulated term that provides for the inclusion of new terms or amendments to existing terms in response to changes in the regulatory environment is required. This would ensure that, where any retail obligations are imposed, RSPs continue to be appropriately supported by NBN Co.

Further, as the ACCC is no doubt aware, on 7 December 2018 NBN Co wrote to industry offering to extend the term of the WBA 3 by approximately 12 months. The WBA3 had been due to expire on 16 November 2019, but negotiations between NBN Co and industry regarding the WBA4 have not yet commenced. Telstra understands that NBN Co's rationale for offering the extension is to allow time to negotiate and develop the right agreement for all parties and enable a smooth transition from the WBA3 to WBA4. To that end, NBN Co has proposed extending the WBA3 to 30 November 2020.

Telstra agrees with NBN Co that time is required to allow all parties to properly participate in the development of and transition to the WBA4, but we are concerned at the potential 12-month gap between the conclusion of the current Inquiry and the commencement of the WBA4. As it stands, the current Inquiry is expected to conclude in October 2019, yet any regulatory determination may not be incorporated into the WBA until the commencement of the WBA4. This is a result of the statutory hierarchy, whereby an access agreement – in this case, the WBA 3 – trumps any regulatory determination. Telstra does not think it acceptable that industry should be required to wait for over 12 months to take advantage of any regulated terms and we strongly recommend that the ACCC explore all avenues to ensure that the benefit is passed on at the earliest opportunity. This would also benefit end users, because the earlier the benefits of regulated terms are made available to RSPs, the earlier they will be able to share those benefits with end users.