



TELSTRA CORPORATION LIMITED

Telstra submission to ACCC Inquiry into NBN Wholesale Service Standards

Public version

March 2018

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

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



EXECUTIVE SUMMARY

The ACCC Inquiry into NBN Wholesale Service Standards comes at a time when migration to the national broadband network (**NBN**) is significantly increasing in scale and scope. While the rollout is well advanced, NBN Co's forecasts show the number of premises ready for service will reach peak levels between 2018 and 2020. Regrettably, customer complaints about services delivered over the NBN – particularly with respect to migration, connection and fault rectification – continue to increase in line with the rollout.¹

At Telstra, we believe 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. Today this standard is not being achieved. Some of the service standards offered by NBN Co to Retail Service Providers (**RSPs**) fall short of that benchmark. Further, NBN Co's performance against those service standards does not always match established customer or RSP expectations.

Services and service levels delivered over legacy networks have been shaped over many years by a range of regulation including carrier licence conditions, service provider rules, industry standards, codes and guidelines. While much of existing regulation is imposed upon RSPs, they are only one link in the supply chain. All elements of the supply chain need to be appropriately incentivised to play their part in delivering the standard of service that customers expect.

While the NBN customer experience is impacted by a myriad of factors, the processes of migration, connection and fault rectification are key. Many of these processes are not adequately supported by appropriate incentives for NBN to meet the service level standards set out in its Wholesale Broadband Agreement (**WBA**), the standard form of agreement that sets out the terms and conditions under which it provides services to RSPs. The absence of clear accountability for resolving issues and sub-standard performance against service levels – together or separately – cause many of the customer complaints regarding the NBN. Customers expect migration and connection to the NBN to be hassle free and that when an issue does occur it will be dealt with quickly and efficiently by contacting their RSP.

While the service levels and associated incentives may have been accepted at the inception of the NBN, this is no longer the case. Commercial negotiations with NBN Co in relation to version 3 of the WBA (**WBA3**) did not succeed in securing changes that go far enough to achieve equivalence with today's customer service expectations or adequately address customer experience issues. Further, where NBN Co appears to be offering service standards similar to existing service standards, there is insufficient incentive for NBN Co to achieve those service standards. This is illustrated by Telstra's inability to successfully claim Customer Service Guarantee (**CSG**) compensation from NBN Co despite this appearing to be enabled by the contractual arrangements in the WBA. As a result Telstra considers that targeted regulatory intervention is necessary.

Commercially negotiated outcomes are generally more efficient and flexible in addressing the different concerns and requirements of access providers and access seekers than regulatory intervention, hence the existence of the statutory hierarchy in Part XIC of the *Competition and Consumer Act 2010* (Cth) (**CCA**). However, regulated terms and conditions have proven effective where they relate to issues of contention (or where commercial negotiations have been unsuccessful) or are necessary to address a particular competitive or consumer protection concern. Telstra therefore considers that the ACCC's approach should be to develop regulatory fall-back for specific NBN service standards, rather than all service standards.

¹ TIO Annual Report 2016-17 showed complaints related to the NBN increased by 159.3% between 2015/16 and 2016/17 - <https://annualreport.tio.com.au/#complaints/2>



There are a number of service standards that should be examined by the ACCC as part of its Inquiry. Some directly impact the customer experience in migrating to – and receiving service on – the NBN and require immediate attention. These include:

- Connection timeframes - particularly for Priority Assistance (**PA**) customers
- Commercial rebates and service levels - incorporating the two hour 'grace period' between fault ticket lodgement and acceptance
- CSG compensation levels - including the process for claiming reimbursement from NBN Co where they are wholly or partly responsible for CSG timeframes not being met

Telstra considers that these matters need to be addressed by 30 June 2018 given the NBN rollout will be hitting its peak and a number of other work streams are seeking to address NBN-related service issues at that time. Further, negotiations on the next phase of the WBA (**WBA4**) are likely to commence within the Inquiry's timeframe. This means that developing regulatory fall back positions for certain service standards currently contained within the WBA3 – as well as, for example, formalising existing aspirational operational targets as required to improve end-user experiences – would assist access seekers in their commercial negotiations with NBN Co in relation to WBA4 as well as future product developments.

While the ACCC appears to be considering regulating existing NBN wholesale service standards by reference to a set timeframe, such as the stage of the NBN rollout, Telstra does not consider that this is appropriate. This is because all service standards relate to the ongoing customer experience and there is no single point in time at which some service standards are no longer – or more – relevant to customers who are receiving an NBN service. This is not, however, to preclude additional concerns arising in the future that may need to be addressed through regulation. Telstra acknowledges that regulatory obligations can impose additional costs. However, given existing service standards have been established by NBN Co the costs of meeting those standards should be minimal and far outweighed by the benefits of doing so.

Details of our key concerns regarding service standards and associated incentives contained in the WBA3 are set out in this submission. However, at a high level Telstra considers that in many cases the customer experience of NBN services falls short of the service standard timeframes adopted by NBN Co due to the lack of incentive provided by NBN Co's performance objectives. The approach currently adopted by NBN Co in relation to service standards and compensation when it fails to meet those service standards provides no incentive for NBN Co to meet timeframes, with a resulting impact on RSP ability to consistently meet CSG and PA obligations. Further, the lack of incentive and current performance of NBN Co in relation to service standards means RSPs are not willing to incorporate service standards into their retail contracts.

As noted in the ACCC's Discussion Paper, there are several other related projects and inquiries examining issues relevant to this Inquiry. It is important that the interdependencies of these projects and inquiries are fully understood and acknowledged so as to avoid conflicting outcomes that would have the potential to detract from, rather than enhance, the customer experience and impose unnecessary cost or unduly onerous obligations on RSPs or NBN Co. To avoid this occurring, it is imperative that government and regulators work together to develop a cohesive approach to the supply of NBN services. When developing their approach, it will be important to recognise that much of the end-user experience is underpinned by appropriate wholesale service standards. This means that when retail service standards or obligations are imposed by regulation – e.g. the proposed ACMA industry standards on consumer information, continuity of voice and broadband services and complaint handling – NBN Co should be required to support these. Telstra therefore considers that the ACCC should explicitly take this into account when considering the need for regulatory fall back positions.



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 NBN supply chain and the legislative, regulatory and policy context in which the Inquiry is taking place
- Section 2 responds to the ACCC approach to examining NBN service levels
- Section 3 sets out Telstra's views on the scope of NBN wholesale service standards
- Section 4 provides Telstra's views on the service level timeframes and performance objectives set out in the WBA3
- Section 5 sets out Telstra's responses to the ACCC's questions on recourse and compensation
- Section 6 provides Telstra's position on other non-price matters
- Section 7 considers the impact of NBN wholesale service standards on retail service standards



1. NBN SUPPLY CHAIN AND THE REGULATORY, POLICY AND LEGISLATIVE CONTEXT

The Discussion Paper includes an overview of NBN services that comprise the supply chain, including relevant markets and the relevant commercial, regulatory and legislative arrangements. This section responds to the questions posed by the ACCC in relation to the NBN supply chain and the environment in which NBN services are being supplied.

Critically, the ACCC notes the Inquiry is being conducted in parallel with other projects and inquiries which are also examining NBN consumer experience issues. The importance of ensuring that these various streams of work are consistent cannot be understated. Telstra considers that the outcomes of this Inquiry are particularly important – in many instances wholesale service standards are the key determinant of the consumer experience.

While this is especially the case in relation to migration activities, wholesale service standards also underpin the ongoing consumer experience. At present wholesale service standards do not appropriately support access seekers who are focused on delivering the NBN experience that consumers expect. Improving the consumer experience requires a consistent and coordinated approach between government, regulators, NBN Co, access seekers and other stakeholders. Critically, where retail service standards are imposed on RSPs, NBN Co must be required to support these.

The NBN supply chain

1. *Are the key elements of the NBN supply chain as they relate to this inquiry captured in Diagram 1? Are there any additional aspects of the supply chain that should be considered as part of this inquiry?*

The ACCC sets out a high level view of the key elements of the NBN supply chain, across a continuum of wholesale and retail services. These services are subject to, and supported by, a number of regulatory and legislative requirements as well as commercial agreements. Telstra considers that the ACCC has appropriately captured key elements of the NBN supply chain as they relate to this Inquiry – that is, as they relate to the provision of NBN wholesale service standards. It is important to recognise that NBN service provision is supported by service delivery partners, of which Telstra is one. However, those service delivery partners are expected to support the standards determined by NBN Co and should therefore be captured within the NBN supply chain as set out in the Discussion Paper.

Further, Telstra does not believe that there are any additional aspects of the supply chain that should be considered as part of this Inquiry. As set out elsewhere in this submission, Telstra's position is that the Inquiry should be focused on specific wholesale service standards and that the intent should not be to broaden the scope of the Inquiry other than to capture aspects of NBN service provision where commercial negotiations have failed to reach agreement, or where there are specific competition or consumer protection concerns. It is also important to recognise that, as noted above, there are a number of other projects or inquiries that are seeking to address other aspects of the NBN experience. The ACCC Inquiry needs to be appropriately focused to reduce the risk of conflict with the intended outcomes of other streams of work.



NBN wholesale aggregation services

- 2. Are the non-price terms and conditions in NBN wholesale aggregation supply agreements the same, or similar, to those in the WBA? Is there a mechanism in these agreements to allow service level terms to be updated to reflect the relevant changes in WBA3? What are the implications, if any, where these terms and conditions are not the same?*

Telstra's NBN wholesale aggregation supply agreements form part of the Telstra Wholesale Agreement (**TWA**) or Customer Relationship Agreement (**CRA**). The non-price terms and conditions for NBN services in the TWA and CRA are not identical to those in the WBA. We also have some bespoke customer contracts (that is, contracts that are not necessarily identical to the template TWA or CRA terms).

The NBN Ethernet service supplied under the WBA is an input into our wholesale NBN services, but it is not the entire product. Accordingly, we approach our wholesale supply terms by focussing on our product offering and how to improve the customer and end user experience. If Telstra committed to higher standards than offered under the WBA, Telstra would take the 'gap risk' of being liable to our customers for failure to meet those standards, but not being able to recover our losses from NBN Co.

However, the WBA does effectively require Telstra to flow-down certain terms. For example, clauses that require Telstra to use reasonable endeavours to ensure downstream service providers and end users do, or refrain from doing, particular things effectively require Telstra to back-to-back those requirements in our NBN wholesale aggregation supply agreements. Where the WBA requires Telstra to flow down such rights or obligations, Telstra does so (though we generally endeavour to simplify the drafting). To this extent, there are similarities between the WBA and the TWA and CRA. If the WBA requires Telstra to flow down particular terms and conditions to the TWA and CRA, and Telstra has not done so, Telstra may be in breach of the WBA. This could lead to a claim for damages, or enforcement by NBN Co of other specific contractual rights under the WBA.

Generally, Telstra has rights to amend the TWA and CRA terms with notice to our customers. In addition to these general rights, the TWA and CRA allow Telstra to vary the agreement if a change to the NBN Co Terms of Supply (which includes the WBA) requires, in Telstra's reasonable opinion, a variation to the agreement.

Telstra is not obliged to flow through all changes to the WBA. However, Telstra's usual approach is to pass on the benefit of improvements in upstream supply terms to our customers. This is consistent with Telstra's goal of continuously improving customer and end user experience. We would therefore expect that, to the extent possible, we would pass on the benefit of improved service levels to our wholesale customers. Even if we had to negotiate an amendment to a customer's supply terms, we would not anticipate difficulty in passing on the benefit of improved WBA terms.

Additionally, certain provisions in the operational documents related to our NBN wholesale aggregation supply agreements note that Telstra's ability to achieve target response and restore timeframes may be affected by NBN Co's activities in addressing service issues within the NBN. If NBN Co were held to a higher standard, the potential impact of those provisions on customer experience would be reduced to the extent that NBN Co's activities would be undertaken or completed in a timelier manner.

We note that some of our customer contracts are bespoke and not necessarily identical to the template TWA or CRA terms. For the purposes of this response, we have not reviewed all of our NBN wholesale aggregation supply agreements to determine whether the variation rights above apply for all customers. In any event, even if we had to negotiate an amendment to a customer's supply terms, rather than using the mechanism described above, we would not anticipate difficulty in passing on the benefit of improved WBA terms.



Impact of regulated terms on commercial agreements

3. *If the ACCC was to make an IAD or FAD as a part of this inquiry, how would this impact the terms and conditions in the WBA and NBN wholesale aggregation service agreements?*

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

As discussed in our response to Question 2 of the Discussion Paper, generally, Telstra has rights to amend the TWA and CRA terms with notice to its customers. In addition to these general rights, the TWA and CRA allow Telstra to vary the agreement if a change to the NBN Co Terms of Supply (which includes the WBA3) requires, in Telstra's reasonable opinion, a variation to the agreement. Please refer to our response to Question 2 for further details.

Operation of the CSG

4. *Overall, how do stakeholders view the operation of the CSG standard in the context of the NBN, considering its origins as a measure for voice services provided by a vertically integrated service provider?*

As noted in the Discussion Paper, the CSG sets out performance standards in relation to the supply of standard telephone services, including voice grade services used to connect to the internet. The CSG does not apply to internet or broadband services, however the performance standards set out in the CSG are still relevant to the NBN to the extent that it is used to provide fixed line voice services. The ACCC also acknowledges that most RSPs seek to enter into arrangements with their customers to waive their CSG entitlements. This option is not available to Telstra where the service is supplied in fulfilment of the universal service obligation.

The CSG standard was designed to apply to all industry participants and provide an incentive to deliver improved quality of services in relation to voice services. It was introduced at a time when there were still significant delays in getting access to a fixed voice service, particularly in rural and remote areas. That is, the existing CSG was designed on the basis of a specific environment that cannot be directly applied to the NBN, where it is not clear that it will achieve the outcomes intended. Telstra's experience to date is 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, this is primarily because the CSG standard does not financially incentivise NBN Co to meet its wholesale service standards. This is because, despite the WBA2 and WBA3 setting out the process for RSPs to claim primary damages from NBN Co, the process is unworkable. In practice, therefore, there is no real scope for RSPs to recover the cost of the CSG when service standards are not met as a result of NBN Co not meeting timeframes.

While Telstra is committed to providing customers with the same levels of service that they experience today on legacy services, it is not necessarily the case that the CSG standard is the mechanism (or one of the mechanisms) to achieve this. However, pending a full review of telecommunications consumer safeguards, the CSG standard should be maintained in the NBN context and appropriately recognised in the WBA, including simple processes to enable RSPs to easily claim primary damages from NBN Co. In the absence of such processes, Telstra is proposing a simplified rebate structure for when NBN Co fails to achieve service levels.



2. ACCC APPROACH TO EXAMINING SERVICE LEVELS

The Discussion Paper sets out the ACCC's proposed approach to determining whether regulation of NBN wholesale service standards is required, the matters that must be taken into account in making any access determination or BROCC, and different approaches that may be considered in doing so.

The process for determining whether regulation of a service is required is well established. As noted by the ACCC, previous inquiries have confirmed the role of non-price terms and conditions in promoting the long term interests of end-users (**LTIE**). Critically, non-price terms and conditions relating to wholesale service standards that "...include meaningful and measurable commitments that are enforceable and include remedies or penalties..." underpin the delivery of retail services and ensure that RSPs have certainty that service standards will be met. Telstra does not consider that this principle is currently reflected in the WBA3.

In summary, Telstra considers that carefully targeted regulation of service levels and their associated incentives is what is required to promote the LTIE. Telstra shares the ACCC's concern that regulation should not impose excessive costs upon NBN Co, but we believe that an increase in NBN Co costs is not necessarily a foregone conclusion. The ACCC needs to balance the costs that may be imposed upon NBN Co, the costs that are already borne by RSPs and end users by the lack of appropriate services levels and associated incentives, and the quality of service that end users receive.

Other matters that should be considered

5. *Are there any 'other matters' that should be considered in making an access determination or BROCC in relation to non-price terms and conditions relating to NBN Co's service standards?*

We anticipate negotiations on WBA4 (the next phase of the WBA) will commence within the Inquiry's timeframe. This means that developing regulatory fall back positions for certain service standards currently contained within the WBA3 – as well as, for example, formalising existing aspirational operational targets as required to improve end-user experiences – would assist access seekers in their commercial negotiations with NBN Co in relation to WBA4 as well as ongoing commercial negotiations in relation to matters such as future product developments.

This matter is also relevant to Telstra's position that there are some issues which the ACCC needs to address more urgently, with a view to developing a set of regulated fall back standards by 30 June 2018. This is discussed in more detail in our response to Question 9 below.

Effectiveness of commercial negotiations

6. *Have commercial negotiations about the NBN service standards been effective in obtaining competitive and efficient outcomes in the relevant markets? Please explain the reasons why these negotiations have or have not been successful and the main factors that have influenced the outcome of these negotiations.*

Telstra does not consider that commercial negotiations about NBN service standards have been effective in obtaining competitive and efficient outcomes in the relevant markets. In one sense the WBA does create a level playing field because the same WBA is available to all RSPs. However, as the ACCC notes in its Discussion Paper, most RSPs ask their customers to waive their rights to CSG. Those who do choose to offer CSG (or are required to do so) are left with the cost of compensating customers when the expected service levels are not met. This creates an imbalance between those RSPs who choose to offer CSG and those who do not.



With respect to the efficiency of outcomes, Telstra considers that the outcomes are far from efficient for both RSPs and their customers. As noted elsewhere in this submission, WBA3 does not contain adequate incentives for NBN Co to meet the expected service levels, nor, in some cases do those service levels match those that have been established over a number of years. The result is that end-users are receiving a poorer quality of service than they have a right to expect and RSPs generally bear the majority of the costs associated with that. In other words, there is a misalignment of incentives – RSPs bear the cost of delays in connections or fault rectification, e.g. through the provision of interim services and/or the payment of CSG compensation, yet they are not in a position to control NBN Co's actions to connect a service or rectify a fault. This is not to say that RSPs should never be held accountable for delays because they are also a key part of the supply chain, however the burden for failures to deliver the expected service levels should be apportioned fairly between the responsible parties. As Telstra explains in this submission, this apportionment does not occur today, therefore the outcomes that are delivered to end-users cannot be efficient; nor can the share of costs between RSPs and NBN Co be expected to lead to efficient outcomes.

NBN Co is aware of Telstra's concerns regarding the misalignment of incentives and that the WBA does not contain appropriate mechanisms for RSPs such as Telstra to claim compensation from NBN Co for failures to deliver to service levels. These concerns are long-standing, yet NBN Co does not appear to be willing to implement step changes in the WBA. Telstra considers that it is for NBN Co to explain why it is reluctant to make such step changes, [c-i-c] [c-i-c] Telstra agrees that pressure from RSPs and public perception can act as an incentive on NBN Co, but strongly believes that these intangible incentives need to be bolstered by meaningful, contractual incentives. For instance, Telstra queries whether NBN Co would have allowed the number of aged orders to increase to a peak of [c-i-c] [c-i-c] in August 2017 with an average of [c-i-c] [c-i-c] if it had faced real, financial penalties for not providing an adequate level of service.

Regulated fall-back service standards are required to address specific concerns

7. *Do you consider regulated fall-back service standards are required for NBN service standards? If so, should they cover all service standards, specific standards only or broad principles for negotiating service standards? Please provide reasons for your answers and in doing so describe your relevant experiences in negotiating NBN service standards and how those experiences inform your preferred approach.*

As noted above, in the context of the WBA, Telstra's commercial negotiations with NBN Co have not resulted in agreement on a number of key wholesale service standards. Further, Telstra considers that the current service standards schedule does not give NBN Co sufficient incentive to meet those service standards. In this regard, Telstra notes that NBN Co made a submission to the ACCC Communications Market Study setting out its position that NBN Co has every incentive to improve end user experiences relating to the NBN and that these incentives are playing out in practice. The submission included a number of examples of ways in which NBN Co has responded to these incentives and stated that NBN Co has, and continues to, expend significant effort on improving service delivery. Telstra acknowledges that NBN Co has introduced several initiatives designed to improve service delivery. However, it is clear that these initiatives have not delivered the service that consumers expect, with NBN-related complaints continuing to increase. While in a complex migration to a new network there are a range of factors at play, Telstra considers that regulated fall-back service standards are required for some NBN wholesale service standards. Further, given that existing service standards have been established by NBN Co the impact of meeting those standards if regulated should be minimal.

In the Discussion Paper, the ACCC sets out a number of possible approaches that may be put in place where it is considered that an access determination or BROCC is required. These include:

- Developing overarching principles to guide commercial negotiations;



- Specifying service standards that would promote the LTIE but are unlikely to be agreed through commercial negotiation; or
- Specifying all-encompassing service standards.

The Discussion Paper acknowledges that overarching principles to guide commercial negotiations “may not be effective” in the context of the WBA. Telstra agrees with this, particularly given that commercial negotiations have not proved effective to date in resolving specific concerns raised by access seekers. It is unlikely that overarching principles will result in improved outcomes at this point.

Telstra's position is that commercially negotiated outcomes are generally more efficient and flexible in addressing the different concerns and requirements of access providers and access seekers than regulatory intervention. The statutory hierarchy in Part XIC of the CCA recognises this in giving precedence to access agreements or negotiated commercial contracts between an access provider and access seeker.

However, while Telstra has consistently supported upholding the statutory hierarchy and considers that commercial negotiations are more likely to lead to optimal outcomes, there are circumstances in which regulated terms and conditions may be required. Specifically, regulated terms and conditions have proven effective where they relate to issues of contention (or where commercial negotiations have been unsuccessful) or are necessary to address a particular competitive or consumer protection concern.

Telstra's position is that, in order to avoid the risks and inefficiencies associated with over-regulation, access determinations (or similar) should only include regulated terms where an issue has proved particularly contentious on an industry level. Telstra also considers that this approach will give effect to the clear intention in Part XIC of the CCA and ensure (and protect) the primacy of commercially negotiated bilateral outcomes.

The ACCC should therefore adopt an approach of developing targeted regulatory fall-back for specific NBN wholesale service standards, rather than all service standards.

Service standards that should be covered

8. *What NBN service standards do you consider should be covered by an access determination or BROCC? Please provide reasons.*

As set out above, Telstra's position is that the ACCC should consider regulated fall-back terms for those NBN wholesale service standards which are contentious or where commercial negotiations have been unsuccessful. In the context of the most recent WBA negotiations, [c-i-c] [c-i-c]

This section sets out the high level service standards which Telstra considers should be covered by an access determination or BROCC. [c-i-c] [c-i-c] However, Telstra's overall position is that certain NBN wholesale service standards require a regulated fall back as the current service standards and performance objectives in the WBA3 do not support a customer experience at least as good as current expectations. Specifically, the recourse and compensation payable by NBN Co when they do not meet service levels and performance objectives provide no incentive for NBN Co to meet those service levels. As a result, consumers are experiencing poor service outcomes and access seekers bear the cost of compensating customers and providing mitigation options, such as interim services.

The service standards included in this section as those requiring regulatory intervention are those based on Telstra's experience [c-i-c] [c-i-c]. As such, there may be additional service standards where other access seekers have failed to reach agreement with NBN Co or where the agreement reached is not in the best interests of the access seeker or its customers. In this regard Telstra does not seek to limit the ACCC consideration of service standards that should be covered by an access determination or BROCC.



Further, the ACCC Discussion Paper refers to a number of NBN service standards that are not included in the WBA, notably those relating to operational targets. Telstra's views on whether these should have regulated fall-back positions are set out in the relevant sections of this submission.

Commercial rebates

The WBA3 provides for commercial rebates to be made in relation to a number of NBN service standards – most notably end-user connections and service fault rectification. In these cases, commercial rebates are applied where NBN Co does not meet the relevant performance objective. For both of these service standards NBN Co aims to achieve a performance objective of 90 percent with a rebate of \$25 applied per connection or per end-user fault (for standard connections or service faults) where performance falls below that 90 percent threshold. In practice:

- Rebates are only applied where NBN Co fails to meet its 90 percent performance objective – if NBN Co meets its performance objectives, rebates are not payable for those customers in the (up to) 10% where NBN Co did not achieve its service standards.
- Where NBN Co fails to meet its performance objective, the rebate will apply to the difference between the proportion of the connections or service faults performed in a relevant month and the 90 percent performance target – for example, if NBN Co performance is 77.5 percent of connections then the rebate will apply to 12.5 percent of all connections (i.e. 90 percent minus 77.5 percent) rather than the 22.5 percent of connections actually missed.
- The rebate is a one-off payment of \$25 regardless of the time taken to connect or repair a service fault – it applies once only and does not increase with the age of the order or trouble ticket meaning that NBN Co effectively has no incentive to prioritise connections or service faults with longer timeframes missed. The lack of incentives for NBN Co to address aged orders or trouble tickets is an area of particular concern for Telstra.

These elements of the service standards framework are not in the best interests of consumers who may experience long delays in connection or repair of service faults, as well as non-payment (or reduced payment) where connection or service fault timeframes are not met. In the case of the CSG, this also means that RSPs bear the cost of compensating customers and/or providing an interim service. This is discussed in more detail below.

CSG Compensation

As discussed elsewhere in this submission, Telstra has been unable to successfully claim CSG compensation from NBN Co even when NBN Co has been wholly responsible for delays in connecting a service or rectifying a fault.

In addition to the concerns with commercial rebates outlined above, there are further concerns that relate to CSG compensation:

- It is expected that, where Telstra is aware that a connection or fault repair is likely to take a long time, Telstra will take steps to mitigate CSG liability through, for example, the supply of an interim service. NBN Co does not reimburse Telstra for the cost of providing the interim service.² The impact of this is that Telstra bears the full cost of the interim service and NBN Co faces no incentive to fix faults or connect quickly.
- 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

² There are very limited exceptions where NBN Co will reimburse an Interim Service Amount where the interim service has been provided to a PA customer. However, in practice the amount that Telstra can claim from NBN Co even in these very limited exceptions is outweighed by the cost of making the claim.



recovery'. However, the purpose of CSG compensation is to compensate customers for poor levels of service and to incentivise RSPs to deliver services in a timely manner. A once-off rebate of \$25 does not do this [c-i-c] [c-i-c]. Those costs arise, for example, from RSPs contacting customers to reschedule an appointment; in other words, the costs are likely to arise from customer facing activities. All RSPs incur these costs, but RSPs like Telstra who provide CSG services also pay compensation to customers for service delays. If NBN Co nets off the connection and/or assurance rebate from any CSG compensation, this effectively means that Telstra (and other CSG providers) is not being compensated for the customer facing costs that it incurs. Telstra is clearly disadvantaged by this approach.

NBN Co has made changes in WBA3 that it states are designed to make CSG compensation claims easier for RSPs to make and NBN Co to pay, however we do not believe the changes are workable and as such they will not incentivise NBN Co to meet the service levels expected by customers. This is because stop the clock reporting is complex and unworkable and there is no incentive to address aged orders or trouble tickets.

Priority Assistance Connections

Telstra is particularly concerned about the connection timeframes for PA customers.

As the ACCC acknowledges in its Discussion Paper, Telstra is required to provide PA services to customers with life threatening medical conditions. However, on networks over which Telstra does not exercise control it is not obliged to adhere to the PA timeframes, although we must still provide PA customers with the highest level of service practicably available. As set out in this submission, Telstra's primary concern is that customers migrating to the NBN should receive at least the same service as they receive today on the legacy network and this is particularly of critical importance for medical PA customers. Accordingly, Telstra does not differentiate between networks – its own or NBN Co's – in our provision of PA to vulnerable customers.

The fault rectification timeframes for PA customers in the WBA 3 mirror the expectations that are placed upon Telstra as a RSP. However, Telstra remains concerned that the majority of the connection timeframes within the WBA3 do not support the PA connection timeframes expected by Telstra's customers. PA connection orders can only be placed for premises that are Service Class 3, 13 or 24; for all other Service Classes connection orders need to be placed as either Accelerated Connections or Standard Connections.³ Even with Accelerated Connections, the fastest service level is 4 business days in Urban areas; this is extended out to 14 business days in Minor Rural areas. It is relatively easy to envisage a scenario whereby a PA customer moves into an area that is NBN Ready for Service, requires a new NBN connection and needs to wait a minimum of 4 business days for their NBN service to be connected. In this scenario, NBN Co would be likely to expect the customer's RSP to provide an interim service, but the point remains that the PA customer is not being connected to their fixed line service in the same timeframes as would be provided today.

While Telstra accepts that in the early days of the NBN rollout it may have been difficult for NBN Co to commit to supporting PA timeframes, it should now be in a position to leverage its experience to better support those timeframes. Telstra believes this gap in connection timeframes for PA customers needs to be addressed within the WBA3. This is a clear example of the service levels on the NBN being inferior to those offered on legacy networks and it is unacceptable that the most vulnerable customers are losing out in this way.

Telstra does agree with the operational changes made by NBN Co in the WBA3 to include specific PA service levels for Service Class 3, 13 and 24 connection orders and fault rectification. There is no longer

³ The WBA prevents RSPs from using Fixed Wireless and Satellite services as inputs to PA (and CSG) services. As such, this reference is to the remaining service classes within the nbn fixed line footprint.



any need for a two-stage process of placing an order or raising a trouble ticket and then modifying it to reflect its PA status. This undoubtedly has operational benefits for both Telstra and NBN Co as well as customers, but the key issue of gaps in the availability of PA connection service levels remains.

Service fault rectification

In WBA3 NBN Co introduced a new operational process and a corresponding Service Level 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'.⁴ Measurement of NBN Co's performance against fault rectification service levels then begins when the trouble ticket is accepted. This is a 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.

As NBN Co's operational hours are 8am to 5pm Monday to Friday, this means that when faults are lodged after 3pm they may not be accepted until the next working day. The effect of this is best illustrated with an example:

- If an RSP submits a trouble ticket for an end user in an urban area at 3.30pm on Wednesday, the trouble ticket will be acknowledged almost immediately. Under the WBA2, the clock started on NBN Co's service level at the time of acknowledgement, i.e. around 3.30pm. NBN Co was then expected to rectify the end user's fault by 5pm the following day, i.e. Thursday, and if it failed to do so the RSP would be able to claim reimbursement of the CSG compensation that it paid to the end-user.
- Under WBA3, the same trouble ticket may not be accepted by NBN Co until 8.30am on Thursday, which is the time the clock starts for NBN Co's service level. This means that NBN Co is expected to rectify the end-user's fault by 5pm the following day, which is now Friday - a whole day later than under WBA2.
- If NBN Co does rectify the end-user's fault on Friday it will appear to have met its service level, yet the end-user has received a worse experience through delayed fault rectification and the RSP may be liable to the end-user for CSG compensation because NBN Co's service level measurement does not support the expected CSG timeframes.
- Further, by meeting its service level, NBN Co boosts its overall performance against its performance objective of 90 percent, reducing the amount of assurance rebate that will be payable to a RSP.

For the avoidance of doubt, we note Telstra supports the principles behind the service levels for trouble ticket management set out in section 7.1 of the WBA 3 Service Levels Schedule, i.e. that NBN Co will aim to revert to RSPs within two hours of receipt of the trouble ticket, updates to the trouble ticket etc. This will assist the rapid turnaround of trouble tickets and should lead to faster resolution for end users. However, we do not agree that the two-hour service level should mean that measurement of NBN Co's performance is delayed. As illustrated by the example above, the effect of the two-hour service level is to worsen the experience of the end user and conversely reduce the amount of assurance rebate and CSG compensation that NBN Co will be liable to pay. This outcome is clearly not in the best interests of customers.

In the context of the two-hour service level, Telstra understands that one of the rationales for its introduction was to reduce the number of trouble tickets that are submitted with missing or incorrect information. Such trouble tickets need to be returned to the RSP and go into a pending status, which results in delays in rectifying the fault. Telstra recognises this concern and agrees that industry needs to reduce the number of tickets in pending. [c-i-c] [c-i-c]

⁴ Wholesale Broadband Agreement, nbn Ethernet Product Module, Service Levels Schedule, section 7.1.



Telstra believes that NBN Co needs to work with industry to identify the relevant fields for trouble tickets and make these fields mandatory. In addition, if a RSP has completed NBN Co's Test and Diagnostic checklist correctly and then submitted a trouble ticket, NBN Co should not be able to send back a trouble ticket asking for more information – the onus is on NBN Co to ensure that RSPs have the correct tools at their disposal to correctly diagnose faults and submit trouble tickets. Where a RSP has followed the correct procedures as set out by NBN Co, the measurement of NBN Co's performance against the service level should begin from the time that the trouble ticket is submitted and acknowledged. Again, this is an area where Telstra believes that NBN Co needs to do further work with industry to improve the utility of its Test and Diagnostic tools.

Material Service Failure

NBN Co has included a new material service failure (**MSF**) regime in WBA3. This is an improvement to WBA2 which expressly limited NBN Co's liability for service failures to any applicable commercial rebates and CSG compensation. Telstra was concerned that NBN Co was effectively limiting its liability for any serious failures to deliver services to customers and, given that commercial rebates and CSG compensation can only be claimed against a limited number of service levels, NBN Co did not face appropriate levels of incentives.

As noted by the ACCC, it is unclear whether the provisions in the WBA 3 '*...provide appropriate protections for consumers or opportunities for recourse in the event of significant network outages, or whether the provisions provide appropriate incentives for NBN Co.*' In line with this, Telstra considers that the regime is deficient and could lead to significant issues for access seekers and end customers in the event of a serious service failure. This is because:

- The threshold for a customer impacting incident to be classed as a MSF is too high – there must be a failure of 90% of affected services which is too high to act as incentive to NBN Co to either remedy events or invest to prevent such events occurring.
- The period to remedy an MSF before any financial penalty attaches is far too long – depending on the type of event, either 3 or 20 business days. Coupled with inadequate compensation, the customer experience will be unacceptably poor.
- The compensation that NBN Co will pay to impacted customers (via their RSPs) is limited to the amount of charges paid for the affected service while it is subject to the MSF and is not paid automatically, leaving access seekers to sue NBN Co to receive compensation in the event of a MSF.
- The regime is subject to an annual cap of \$25m in the first year of the WBA3 and \$50m in the second year.
- Where RSPs align their position with that under the WBA3, it will be difficult for customers to claim full or part-reimbursement for serious NBN service failures.

The deficiencies in the MSF regime included in the WBA3 are best illustrated with an example.

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.

As set out in the table below, the compensation scheme resulted in a total payout of approximately [C-I] [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.

Case Study: Warrnambool Exchange fire

	Telstra	NBN
Payment Amount	[c-i-c] [c-i-c]	<p>No Payment.</p> <ol style="list-style-type: none"> 1. In order for NBN to make a payment at least 90% of services at a POI must fail; and 2. NBN will only make a payment if services outage is greater than 20 business days where the service outage results from asset destruction, like in this scenario. If 90% or a substantial proportion of the impacted services have been restored within 20 business days, then the event will not be classed as a MSF.

Third party claim indemnity

The WBA3 includes provisions that require RSPs to flow down 'model terms' to all their downstream customer contracts, effectively barring end customers from bringing a claim against NBN Co. If RSPs do not flow down these model terms, then they effectively indemnify NBN Co for claims made against it. In practice, this means that if an RSP cannot flow down such drafting 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 suffered by NBN Co for a claim brought against NBN Co by an end customer. As noted by the ACCC in the Discussion Paper, this effectively transfers the risk of certain matters within NBN Co's areas of responsibility to either customers or RSPs.

Telstra does not consider that it is appropriate for NBN Co to shift its potential liability onto its customers, particularly where costs have been incurred due to a failure by NBN Co (where they are fully or partially responsible). Telstra agrees with the ACCC that the third party claim regime in the WBA3 "...reduces or removes...the potential financial consequences of poor performance." Telstra understands NBN Co's position to be that the RSP is in the best position to manage the risk of a customer bringing a claim against NBN Co because it is the RSP that has a direct relationship with the customer. This is true, but it neglects the fact that the RSP is not in the best position to manage the risks associated with NBN Co's network – that responsibility lies with NBN Co and the terms in the WBA3 do not allow for an appropriate sharing of responsibility.

Liability cap

In the WBA3 NBN Co has retained its overall liability cap of \$200m per annum, with a per event cap of \$100m in the first year and the per event cap being removed in the second year of the WBA 3.

Telstra's position is that the annual cap of \$200m is insufficient to incentivise NBN Co to manage its risks appropriately, particularly given the scale of the NBN rollout and [c-i-c] [c-i-c] which is often used as the liability cap in commercial contracts. It is also the same cap that exists in the WBA2 despite the scale of the NBN rollout being significantly greater under the WBA3.

Again, we believe this is insufficient and does not provide incentives for NBN Co to invest in and maintain its underlying infrastructure in order to avoid risk and liability issues. In the long-run this will have a detrimental impact on the NBN and services provided to customers.



Those requiring immediate attention

9. Are there specific NBN service standards that we should examine as a matter of urgency or for more immediate regulatory intervention? Please provide reasons.

Given the focus on the consumer experience, particularly in terms of migration to the NBN, Telstra considers that there are a number of service standards that should be examined as a matter of urgency with a view to the ACCC taking more immediate action. Specifically, Telstra's view is that there is a requirement for the ACCC to determine a set of regulated fall back terms before the end of June 2018.

There are a number of reasons for this urgency:

- The NBN rollout is forecast to meet its peak between 30 June 2018 and 30 June 2020. This means that more consumers will be exposed to the lack of incentives faced by NBN Co to meet its service standards as well as the risk that they will receive no, or limited, compensation in the event that NBN Co does not meet its service standards. That is, the potential scale of consumer detriment will reach its highest commensurate with peak rollout and the number of customers on the NBN increasing significantly.
- It is expected that HFC deployment will recommence in mid-2018 after being paused in November 2017. The experience of HFC customers to date suggests that a strengthened wholesale services standards regime is needed to ensure that NBN Co has incentives to meet service standards, with appropriate recourse where this does not happen.
- As noted elsewhere in this submission, there are a number of activities and inquiries being undertaken to address the consumer experience on the NBN. Some of these, such as the work being undertaken by the ACMA to determine industry standards by no later than 23 June 2018, rely upon effective wholesale service standards to improve the consumer experience. Telstra's view is that some of the issues being considered by, for example, the ACMA and the Ministers Round Table could be significantly mitigated by improved wholesale service standards particularly in relation to connection and fault rectification.
- Negotiations on the next phase of the WBA will commence within the ACCC's timeframe for this Inquiry. This means that developing regulatory fall back positions for certain service standards currently contained within the WBA3 – as well as, for example, formalising existing aspirational operational targets as required to improve end-user experiences – would assist access seekers in their commercial negotiations with NBN in relation to WBA4 and ongoing commercial negotiations in relation to future product developments.

The service standards that Telstra believes should be examined as a matter of urgency are those that have a direct and immediate impact on the consumer experience, specifically those that relate to:

- **Commercial rebates** – those that apply to end user connections and fault rectification currently provide no incentive for NBN Co to meet the related service standards (see Question 8 for further detail).
- **CSG compensation levels and claims process** – the requirement to provide an interim service (at RSP cost) removes the incentive for NBN Co to connect or fix the fault quickly. It is also unclear whether the amended CSG claims process can be made workable and in any case, it does not provide an incentive to address aged orders or trouble tickets. As set out in this submission, it may be that a simplified approach to CSG would be more appropriate absent a separate review.
- **PA connection timeframes** – NBN Co only applies PA connection timeframes to services that can be remotely provisioned, which is unacceptable for this group of customers. Further detail on this is provided in our response to Questions 8 and 23.



- **Service fault rectification** – as set out in our response to Question 8, NBN Co have introduced a two hour period between trouble ticket lodgement and acceptance. This may mean that a trouble ticket is not accepted to the next business days with implications for actual (rather than recorded) service levels received and compensation payments.

While there are other aspects of the WBA3 that Telstra has concerns with, as outlined elsewhere in this submission, the above are those that directly impact on the consumer experience connecting to and on the NBN and require urgent attention.

Timeframes of NBN rollout

10. Do the timeframes for the rollout of the NBN impact on any decision to make an access determination or BROC? If so, how should these timeframes be assessed in any decision to make an access determination?

In the Discussion Paper, the ACCC proposes to examine the timeframes for which any access determination or BROC for NBN service standards are considered, taking account of NBN Co's rollout forecasts. The ACCC considers that timeframes have implications for the nature and scope of any regulatory intervention. Specifically, the ACCC sets out the following timeframes for which an access determination or BROC could be considered:

- Short term – aligned to peak rollout over 2018 and 2019
- Medium term – prior to full network deployment i.e. 2020 and 2021
- Long term – post rollout of the NBN

The logic for the timeframes is that particular service standards are likely to be more of an issue in the short term (i.e. service activation) compared to the long-term focus on the ongoing consumer experience. While Telstra understands the logic of such an approach, it does not adequately take into account the staggered nature of the rollout and the fact that groups of consumers are already (and will continue to be) at different stages of the NBN 'lifecycle'. That is, there are groups of consumers who are already focused on the ongoing consumer experience as they have been connected to the NBN for several years while other customers will not be connected to the NBN for several years. It is also important that, once customers are connected to NBN, there are appropriate service standards in place to ensure an ongoing positive experience. Further, a clear regulatory intent in relation to NBN service standards will assist commercial negotiations by establishing a regulatory fall back for specific service standards if required.

The timeframes for the rollout of the NBN impact on any decision to make an access determination or BROC to the extent they indicate that regulatory intervention at this point in time is critical. The scale of the rollout is about to reach its peak and the impact on the consumer experience will be most significant over the next two years. While it may be appropriate to take immediate action in relation to those areas where the impact on customers is most significant i.e. connection and fault rectification (as set out in our response to Question 9 above), there should not be any separation of the timing of regulatory obligations beyond that. This is not, however, to preclude additional service standards being required as the rollout continues, or post-rollout, as issues may emerge or change in focus.



3. SCOPE OF NBN CO'S SERVICE STANDARDS

The ACCC considers that NBN Co's full life-cycle approach is a sensible way to recognise and implement appropriate service standards. The Discussion Paper sets out the ACCC's position that the service levels in the WBA3 appear to cover key aspects of service delivery by NBN Co, although there may be other aspects that are not covered by service levels. Further, the ACCC concludes that "...any poor customer experiences that can be traced back to NBN Co's service level commitments are more likely to result from the specific details of the commitments rather than from a lack of scope with the service levels." At a high level, Telstra agrees with this conclusion – it is not the scope of the service levels within the WBA3 that is the concern, but rather the framework applied to those service levels which places no incentive on NBN Co to meet them. This is discussed in more detail below.

Service levels schedule coverage

11. Does the service levels schedule appropriately cover the most important aspects of the end-user life cycle? If not, what matters have been excluded from the service levels schedule? Are there areas in the service levels schedule where the scope of service standards should be extended?

As noted by the ACCC, NBN Co's service levels and related arrangements are specified in the service levels schedule of WBA3. The service levels schedule sets out the service levels that apply to NBN Co, performance objectives for certain service levels and, in some circumstances, obligations to take corrective action or provide rebates where NBN Co does not achieve a service level or performance objective. The schedule also includes operational targets which are, in NBN Co's own words 'aspirational' and therefore have no associated corrective action, CSG compensation or rebates.

As the service levels schedule is currently set out, it seeks to address all aspects of the NBN lifecycle with service levels for connections, appointments, activations, fault rectification, modifications and disconnections. As set out elsewhere in this submission, the main concern Telstra has with the service levels schedule is not what it covers but that the service levels and performance objectives themselves are inadequate. However, there are key aspects of NBN service delivery that are not appropriately covered by the service levels, nor does NBN Co face appropriate incentives to address any issues that arise.

One example noted by the ACCC is around co-existence. Co-existence impacts NBN FTTB and FTTN 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. In these circumstances, unless the speed of an FTTN customer's service is less than 12/1 Mbps (25/5 Mbps for FTTB), NBN Co will not investigate if a fault is raised. However, NBN Co expects the RSP to continue to pay the AVC charges as per the price list, even though the customer is receiving a service that is slower than they would expect. We are not necessarily advocating for new or additional service levels to apply to services that are impacted by co-existence, but where NBN Co is aware that a service is detrimentally impacted then it could acknowledge this through lower AVC charges for the duration of the impact.

A similar point applies to FTTB and FTTN services that are placed in a Repair Profile. NBN Co explicitly acknowledges that such services may be restricted, limited or downgraded⁵ but states that it requires RSPs to continue to pay the applicable charges for the service. This does not in any way incentivise NBN Co to address the issues that caused the service to be placed in a Repair Profile.

The same applies to remediation – after investigating a fault, NBN Co may determine that a customer's service requires remediation in order to enable it to achieve the expected speed. In the WBA3, NBN Co

⁵ Wholesale Broadband Agreement, nbn Ethernet Product Module, Product Terms, p8.



introduced a performance objective to complete remediation solutions two years from the date that a remediation case was opened. First, two years is unlikely to be an acceptable timeframe for a customer who is experiencing serious issues with their service and second, requiring RSPs to continue paying the applicable charges for services that require remediation for that two year period does not incentivise NBN Co to perform the required remediation in a timely manner. Telstra accepts that remediation is likely to be sometimes complex; nevertheless, RSPs should not be required to continue to pay charges for a service that NBN Co acknowledges is not performing as expected.

In each of these cases, the expectations that are placed on RSPs are not backed up by the expectations and incentives that are placed on NBN Co. As the ACCC states in its Discussion Paper, if a RSP does not meet its commitments to a customer then it may be liable for compensation or other remedial action. Such measures are appropriate to safeguard consumers, but in each of the instances set out above the RSP may be liable to its customers for poorly performing services, but it is unable to obtain redress from NBN Co. As noted, NBN Co does not waive part or all of the recurring charges paid by RSPs in relation to services that NBN Co agrees are not performing. Further, NBN Co expressly limits its liability for any error or defect in the supply of an ordered product to the applicable CSG compensation or commercial rebates (if any). Since NBN Co will reject a fault raised in relation to a service that is impacted by co-existence, is placed in a Repair Profile or requires remediation, no CSG compensation or commercial rebates will apply. The outcome in these scenarios is clearly inefficient – 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.

Commercial rebates to improve end-user experience

12. Are there any service standards where commercial rebates for not meeting performance objectives are likely to improve end-user experiences?

As noted elsewhere in this submission, Telstra has never been able to successfully claim reimbursement of CSG compensation from NBN Co. In the absence of changes to the processes that enable RSPs to claim CSG compensation to become simple and easy to work with, Telstra believes that CSG compensation could be replaced by commercial rebates. Telstra is not suggesting that retail obligations to pay CSG compensation be changed, merely that the payment structure be simplified. Telstra has set out the detail of its proposal for a potential commercial rebate structure for connections and assurance elsewhere in this submission, but crucially the proposal has the following key properties:

- A simple, flat rate daily payment for each service level agreement (SLA) miss;
- The daily payment rate should increase after five working days, i.e. a lower daily rate applies for the first five days of a service level miss, followed by a higher daily rate for longer service level misses – this structure mirrors that of CSG compensation and provides an incentive for NBN Co to address aged connection orders/trouble tickets; and
- The rebates should be payable for every service level miss, not just those below the 90 percent performance objective threshold. Again, this mirrors CSG compensation today where although Telstra is expected to meet the 90 percent performance standard, it pays CSG compensation on all eligible service level misses. This structure would address a current gap in the commercial rebates structure that NBN Co has put in place.

Ideally, Telstra would also like to see the process for claiming commercial rebates vastly simplified; it should not rely on RSPs having to request reporting for every single individual connection order and trouble ticket and then analyse each one to apportion responsibility for delays. If NBN Co has been responsible for missing a service level, then it should automatically pay the rebate that is due to the RSP. This would be a far more efficient outcome for RSPs and, combined with the incentive properties of the rebate structure, would incentivise NBN Co to achieve service levels, hence improving outcomes for customers.



Additional service level commitments

13. Are there any additional service level commitments that would be desirable during the rollout phase?

Telstra assumes that the ACCC is specifically canvassing views on whether additional connection service level commitments should be imposed during the rollout period. As noted elsewhere, Telstra believes that tighter service level commitments should apply to the connection of PA customers, but these commitments should not be short lived and tied to the rollout phase of the NBN.

As set out in our response to Question 1, Telstra considers that NBN Co's service level commitments already cover the key elements of the customer life cycle and we do not believe it is appropriate to impose additional service level commitments at different stages of the NBN rollout. Customers will always require connection, service assurance and appropriately targeted service levels for specific aspects of their service, so any additional service level commitments should not be short lived (i.e. tied to the rollout timeframe). That said, Telstra does consider obligations that are imposed upon RSPs should be supported by commitments from NBN Co and that any gaps need to be addressed. This includes any incentives to achieve those service levels, i.e. if RSPs face costs for failing to achieve service levels, then NBN Co should face similar penalties as an incentive to support the delivery of the service that RSPs are expected to provide.

14. Are there any additional service level commitments that should be applied for post-rollout?

As noted above, Telstra does not believe it is necessarily appropriate for service level commitments to be tied to particular timeframes. Nor do we necessarily believe that all aspects of the service that NBN Co provides should be subject to service level commitments and rebates for failure to meet those service level commitments. However, all aspects of NBN Co's service will ultimately impact upon the service that is delivered to customers, for example, if NBN Co delays providing additional NNI or CVC capacity for a RSP, this could impact customers who may experience congestion on their service. As such, it is important that NBN Co includes all relevant aspects of its service delivery in the service levels schedule of the WBA and that it provides ongoing reporting to RSPs to allow them to monitor NBN Co's performance. Such ongoing monitoring at an appropriate level of detail is of vital importance to RSPs because it enables them to put pressure on NBN Co to take action where performance is lagging.

Related to this, Telstra believes that RSPs should be able to request NBN Co to take corrective action when there are issues with NBN Co's performance. Such a right used to be incorporated in the WBA, but it was wound back (against Telstra's objections) in November 2016. Requests for corrective action can and should be limited to issues where there are ongoing, overall performance issues and if the commercial rebate structure is appropriately structured then there would be no need for them to apply to individual service level misses.



4. SERVICE LEVEL TIMEFRAMES AND PERFORMANCE OBJECTIVES

The service level timeframes and performance objectives set out in the WBA3 are aligned to NBN Co's view of the end-user lifecycle experience. As set out in this submission, Telstra considers that the scope of the WBA service schedule at this point in the rollout of the NBN is appropriate, but that the timeframes and performance objectives attached to NBN wholesale service standards are not. They do not meet consumer expectations nor do they support the provision of a positive end-user experience. In the Discussion Paper the ACCC considers how this might be improved, whether existing frameworks are appropriate benchmarks against which NBN service standards should be assessed, and how to balance the desire for improvements in the consumer experience against the potential cost implications for NBN Co. Telstra's position on these issues is set out below.

Customer service guarantee

15. Does the CSG framework provide an appropriate benchmark for assessing the WBA service levels and performance objectives? If not, are there other benchmarks that should be considered?

As set out elsewhere in this submission, the original intent and construct of the CSG suggest that its operation in the context of the NBN is problematic. Further the attempted application of the standard to the NBN has been largely ineffectual in terms of improving service delivery. As noted by the ACCC, the vast majority of RSPs have entered into waiver arrangements with their customers which negates the effectiveness of the CSG.

The CSG standard places emphasis on connection timeframes. This suggests that, while it may be an appropriate benchmark at this point in the NBN rollout, this will no longer be the case once rollout is complete. In the post-rollout environment the types of benchmarks that will be important for both industry and consumers will be those largely related to timely fault rectification with specific emphasis on attention to multiple faults on the same service. Telstra considers that consumers will also benefit from benchmarks that focus on the overall Network Reliability of the NBN with regard to planned and unplanned outages. Benchmarking around timely and effective complaint handling between RSPs and NBN will also be important as well as improved customer information.

However, pending a full review of telecommunications consumer safeguards, Telstra considers the CSG standard should be maintained in the NBN context and appropriately recognised in the WBA, including simple processes to enable RSPs to easily claim primary damages from NBN Co. In the absence of such processes, Telstra is open to considering a simplified rebate structure for when NBN Co fails to achieve service levels.

Reducing service level timeframes or improving performance objectives

16. Do you consider that reducing service level timeframes or improving performance objectives for particular service levels would have the effect of improving end-user experience? If so, how?

Telstra's position is that customers should be no worse off on the NBN than they are today on the legacy network – for this to be the case, NBN service level performance needs to improve and, where service levels are not met, appropriate rebates need to be paid. As stated elsewhere in this submission and noted by the ACCC, many of the service level standards set by NBN Co are not significantly (if at all) out



of line with current service standards and with the exception of PA connection timeframes, we do not consider that reducing service level timeframes is required at this point in time.

However, NBN Co's current performance objectives, rebate payments and CSG compensation claim processes are ineffective as incentives for NBN Co to meet its service standards. As such, Telstra believes that both the structure of the commercial rebates and the CSG compensation processes need to be improved to act as an appropriate incentive upon NBN Co.

Other incentive mechanisms

17. What other mechanisms could provide incentives to NBN Co to improve service standards and consumer experiences if shortened timeframes or improved performance objectives are not possible?

Telstra considers the service standards mechanism is appropriate and, when accompanied by improved performance objectives, will support the delivery of a positive consumer experience on the NBN.

There are, however, a number of areas where shortening timeframes or improving performance objectives will not address the key concerns with the NBN experience. These include the process for claiming CSG payments, the introduction of the two hour acceptance timeframe for trouble tickets, the MSF regime and connections for PA customers. Telstra welcomes further engagement with the ACCC on how these can be addressed.

Cost implications

18. How should the cost implications on NBN of reduced service level timeframes or increased performance objectives be weighed against the potential for better consumer experience outcomes?

The cost implications of regulatory obligations are an important and relevant consideration. Telstra's general position is that the cost of regulation should not outweigh the benefits. In this instance, given the importance of the NBN – and the fact that it impacts the majority of Australians – it would be reasonable to expect that the benefits of regulation aimed at improving the overall consumer experience would outweigh the costs to NBN Co of improving performance.

Telstra expects the benefits that would arise from an improved service standards framework for NBN Co would include, but not be limited to:

- Benefits from fewer complaints – which would accrue to consumers and industry, as well as government, regulatory and consumer bodies and NBN Co itself.
- Benefits from improved NBN services – including social and economic benefits associated with high speed broadband services.
- Benefits from improvements in competition – specifically, RSPs' ability to compete on non-price aspects of NBN services due to improved confidence in service delivery.

In its submission to the ACCC Communications Market Study, NBN Co stated that it had every incentive to improve end-user experiences relating to the NBN and that those incentives are playing out in practice. Telstra assumes that the initiatives NBN Co describes in its submission are aimed at ensuring that NBN Co meets its existing service level standards. If that is the case, formally improving the performance objectives associated with those standards should have no significant impact on NBN Co, either financially or operationally.

In general (with a few exceptions, such as PA connections) Telstra is advocating for the strengthening of the performance incentives associated with existing service standards rather than reducing service level timeframes at this point in time. The purpose of this is to improve incentives for NBN Co to meet its



existing service standards and improve the customer experience on NBN. Where this may result in additional costs for NBN Co is where:

- NBN Co incurs additional costs to improve performance in order to meet its service standards (and avoid paying a rebate or other form of compensation); or
- NBN Co fails to meet its service standards and is obliged to pay a rebate or other form of compensation.

On the first point, Telstra considers that these costs – the costs of meeting existing service standards – should already be incorporated into NBN Co's operational costs. Further, if NBN Co does incur additional costs, then the cost recovery mechanism in the SAU provides for these costs to be included in the long term revenue constraint methodology (**LTRCM**) which should minimise any impact on pricing. On the second point, NBN Co should be in a position to avoid significant increases in the amount of rebates or compensation paid given they are associated with its established service standards. As set out above, Telstra considers should NBN Co incur any additional costs then these would be outweighed by the benefits of improved performance objectives or service levels that align with consumer expectations.

Network availability and utilisation management

19. Are the service levels and performance objectives for network availability and utilisation management adequate to provide certainty that NBN Co is effectively managing network capacity across its network, particularly during busy hours of service?

NBN Co's performance objectives for network availability and utilisation management are set out in section 14 of the Service Levels Schedule. With respect to the performance objectives for network availability, Telstra has no objections to the 99.90% target,⁶ however, concerns can arise from the actual calculation of network availability. This is because there are a number of exclusions that apply to the calculation that could lead to the network availability being overstated.

Further, Telstra believes that NBN Co should provide network availability reporting by technology type. NBN Co has an operational target to achieve network availability of 99.80% for FTTN, but it would be helpful for NBN Co to report network availability at a more granular level. This would enable RSPs to identify any systemic differences between technology types and they could work with NBN Co to address any issues.

Telstra acknowledges that in the WBA3, NBN Co has increased the average busy hour throughput from 150kbps to 350kbps per AVC TC-4. This is a significant improvement, but Telstra had in fact requested that the increase be even greater. This is a key input to the customer experience and is likely to need to increase even further as customer demand continues to grow. Telstra considers that NBN Co should be required to report to RSPs on the utilisation of its shared network resources. Such increased transparency would enable RSPs and NBN Co to better understand the source of any issues being experienced by customers – such as congestion – and work together to address those issues in a timely manner.

Telstra notes that the 350kbps figure is significantly less than the average TC-4 CVC capacity purchased by RSPs – the latest ACCC quarterly market indicators report suggests that the industry average is in excess of 1.5Mbps. At face value, this disconnect between the commitment from NBN Co and the CVC capacity purchased by RSPs is surprising. It may be that NBN Co is providing a greater level of shared network resources than is reflected in its commitments in the WBA3, but in that case NBN Co should increase its level of transparency to enable a shared understanding between RSPs and NBN Co. In any

⁶ The target for satellite is 99.70%.



event, NBN Co should commit to supporting the level of dimensioning that RSPs purchase and if they fail to do so, then they should compensate RSPs appropriately.

Binding commitments for operational targets

20. Would it be feasible to introduce more binding commitments for matters currently covered by operational targets? If so, over what timeframes?

It may be feasible to introduce more binding commitments for matters currently covered by operational targets, however, Telstra recommends that NBN Co work with industry to identify those operational targets that would have the most impact upon improving the customer experience. In any case, making operational targets into service levels would not necessarily lead to improved performance. In order to achieve improvements in performance NBN Co would need to face consequences for any failures to meet service levels. Telstra does not necessarily agree that every single service level in the WBA3 should carry a financial penalty in the form of rebates for failure to achieve the expected standards. This is unnecessary and would likely impose an unreasonable level of additional costs upon NBN Co.



5. RECOURSE AND COMPENSATION

As set out in the ACCC's Discussion Paper, NBN Co is at times liable to provide financial compensation to RSPs in cases where certain performance objectives or levels of service are not met. This submission has set out Telstra's position that NBN Co's performance objectives and associated rebate structure do not provide incentive for NBN Co to meet its service standards. Our views on recourse and compensation that NBN Co may be required to pay are discussed below.

Level of connection and fault rebates

21. *Does the level of connection and fault rebates and their structure provide appropriate incentives for NBN Co to connect premises and rectify faults in a timely manner?*
22. *Does the level of connection and fault rebates and their structure provide appropriate incentives for NBN Co to address individual cases of poor performance regarding connections and service faults?*

As set out in this submission, Telstra does not consider that the current level of connection and fault rebates, nor their structure, provide appropriate incentives for NBN Co to connect premises and rectify faults in a timely manner. This applies in general and to individual cases of poor performance.

Telstra's strong preference would be for NBN Co to implement a simple commercial rebate structure for instances when it misses its service levels. An example of such a rebate structure could be a rate of \$25 per day for the first five business days of a service level miss, rising to \$50 per day thereafter. Such a structure has the benefit of including a time element, which would incentivise NBN Co to address aged orders and trouble tickets. It would also apply to all service level misses, meaning that NBN Co would be incentivised to outperform the 90% performance objective that is currently in the WBA 3.

This commercial rebate structure could replace both the current CSG compensation claim regime and the current one-off \$25 connection and assurance rebates, thus simplifying any rebate claims and payments. As the ACCC notes in its Discussion Paper, the WBA 3 allows NBN Co to net off the amount of any connection or assurance rebate payments from CSG claims for the same service. While Telstra understands that NBN Co does not want to pay compensation twice for the same service, it is unclear exactly how this would work in practice and, in any case, such netting off introduces unnecessary complexity to the claims process. Telstra believes that a streamlined commercial rebate structure would be more efficient for NBN Co as well as RSPs.

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

Further, by implementing a two-tier commercial rebate structure, NBN Co would in effect be facilitating competition between RSPs on the grounds of levels of service. As noted above, RSPs could choose to offer CSG services and this would be a point of differentiation between RSPs.

CSG and priority assistance obligations

23. *Do the specific service levels for connections allow retail service providers to meet their CSG and priority assistance obligations (as opposed to the availability of compensation or rebates from NBN Co under the WBA)?*

As set out elsewhere in this submission, RSPs cannot, with confidence, meet their CSG and PA obligations. On the latter point, the Government recently amended Telstra's Carrier Licence conditions in relation to PA timeframes to remove any obligation in relation to services supplied over networks which Telstra does not control. For PA connections on the NBN Telstra is obliged to provide PA customers



with the highest level of service practicably available. However, Telstra's 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 and this is critically important for medical PA customers. On that basis, NBN service levels for PA connections do not allow Telstra to meet our PA commitments.

Telstra currently provides one business day (urban and rural) and two business days (remote) timeframes for PA connections. These timeframes are matched by NBN Co for premises in Service Class 3, 13 and 24. These are premises where all NBN connections are already in place and it is a logical-only connection on the NBN side (i.e. via IT changes). However, for PA customers in other Service Classes, the timeframes are significantly different. Under the WBA, there are effectively three categories of PA customers:

1. Those in Service Class 3, 13 and 24 – where current PA timeframes are matched by NBN Co. As noted above, this is where NBN connections are already in place.
2. Those who do not currently have a STS/PSTN service – accelerated connection timeframes apply, although these timeframes exceed current PA timeframes in all circumstance (e.g. four business days versus one business day for urban customers and 14 business days versus one business day for minor rural).
3. Those who do have a STS/PSTN service – standard connection timeframes apply. Again, these timeframes also exceed current PA timeframes, depending on the Service Class of the premise (e.g. nine business days versus one business day for Service Class 2 customers in urban areas, 19 business days versus two business days for Service Class 2 customers in remote areas).

This is illustrated in the table below.

	Standard Connection SLA (business days)			Accelerated Connection SLA (business days)
	Service Class 3, 13 and 24	Service Class 2, 12, 22 and 23	Service Class 1, 11 and 21	Service Class 1, 2, 11, 12, 21, 22 and 23
Urban	1	9	14	4
Major Rural	1	14	19	9
Minor Rural	1	14	19	14
Remote	1	19	19	N/A

There is no timeframe for Accelerated Connections in Remote areas for Service Class 1, 2, 11, 12, 21, 22 and 23 as there should be no FTTP/B/N/HFC services in those areas.

It is also worth noting that the process for a typical PA connection under the WBA is convoluted and may prevent PA customers from being appropriately treated at the outset. Specifically, with the exception of Service Class 3, 13 and 24 premises, connections are not flagged as PA customers when the NBN order is placed but are simply submitted as accelerated/standard connections.



Other measures

24. *Are there any other measures in place besides the connection fault rebates to deal with individual cases of poor performance regarding end user connections and service faults? Are these measures effective?*

There are no other measures in place besides the connection fault rebates to deal with individual cases of poor performance regarding end-user connections and service faults. NBN Co does provide monthly reports to RSPs against the performance objectives in the WBA, but this does not incentivise NBN Co to actually address any performance issues. Further, following the implementation of the WBA3, NBN Co has significantly reduced the level of detail that it provides within the monthly reports. The new format of reporting does not breakdown NBN Co's performance by access technology, location (e.g. urban, minor rural etc.) or service class. Under the WBA2 reports, Telstra and NBN Co were able to identify issues and work together to lift performance; this ability is reduced with the move to provide higher-level reporting.

Forecast plan and forecast accuracy conditions

25. *Why are forecast plan and forecast accuracy conditions in place for the connection rebate? How are these conditions affecting RSPs' ability to claim connection rebates?*

Telstra believes the onus should be upon NBN Co to explain why the connection rebate is overlaid with forecasting requirements. From Telstra's perspective, we understand that NBN Co will find forecasts useful as a tool for ensuring that resources are properly and adequately allocated. [c-i-c] [c-i-c] Telstra does not agree with NBN Co's view on the incentive properties of the forecasting requirements.

Telstra's overriding concern is to ensure the best possible customer experience. This includes ensuring that customers can be connected to the NBN when they want and that the migration and connection process is as simple as possible. Therefore it is in Telstra's interests to provide accurate forecasts to NBN Co in order to support them to complete connections in appropriate timeframes, and the availability or otherwise of a connection rebate does not impact upon those considerations. As such, Telstra has strongly advocated for the removal of the link between (1) the provision of forecasts and the accuracy of those forecasts and (2) the calculation of the connection rebate. In the WBA3, NBN Co did remove the forecast accuracy conditions from the connection rebate formula itself, but it retained them as an overlay to the calculation; the net result is the same.

Telstra acknowledges that NBN Co did increase the forecasting parameters in the WBA3 such that RSPs' forecast accuracy is now expected to be within +/- 30% for the month, but this does not address Telstra's fundamental point that the forecasts do not act as an incentive upon RSPs.

Notwithstanding the above, the forecasting conditions have not improved Telstra's ability to claim connection rebates. This is because Telstra always provides a forecast within the required parameters. However, as NBN Co's performance has improved, the amount of connection rebate has reduced to zero (over the six months to December 2017).

Telstra's view is that RSPs should no longer be required to provide a forecast as NBN Co is now in a better position to develop an accurate forecast. However, if a forecast is still required by NBN Co then there should be no connection between the forecast accuracy and the payment of the Connection Rebate. The Connection Rebate should be paid or not paid simply on the basis of NBN Co connection performance.



Enhanced fault rectification rebates

26. *Are the enhanced fault rectification rebates resulting in faster fault rectification for those consumers purchasing this service? To what extent are the enhanced fault rectification rebates flowing through to consumers?*

It is difficult to be definitive as to whether or not the enhanced fault rectification rebates are resulting in faster fault rectification for these customers. This is because in the six months from July 2017 to December 2017 there were only [c-i-c] [c-i-c] service faults where customers had paid for enhanced service levels. NBN Co met the enhanced service level on [c-i-c] [c-i-c] of these events.

Telstra does pass on the enhanced rectification rebates and details are located in Telstra's terms and conditions available on Telstra's website.⁷ The table below sets out the rebate that Telstra provides to end-users.

	Telstra	NBN Co
Monthly Access Rebate	20% of the monthly access fee per complete hour beyond the restoration time and capped at 100% of your monthly access fee per month.	20% of monthly AVC and UNI charge per complete hour beyond the SLA restoration time (i.e. Associated CVC not included in rebate calculation). This rebate is capped at the AVC monthly recurring charge.
Enhanced SLA Rebate	Rebate 50% of the annual Premium service level charge for first missed SLA. If SLA is missed again will rebate the other 50% but rebate is capped at 100% of the annual charge.	Rebate amount of monthly Enhanced Fault Service Charge, if first occurrence for the month.

As the table shows, Telstra will refund the Premium Service charge to the customer if the SLA is missed twice within 12 months.

Process for claiming CSG costs

27. *How is the process for claiming CSG costs from NBN Co working in practice? To what extent have RSPs been able to claim CSG costs from NBN Co?*

To date, Telstra has not succeeded in claiming any CSG compensation from NBN Co where the latter has been wholly or partly responsible for a failure to meet the CSG timeframes. In large part this is due to the complexity of the claims process that requires RSPs to demonstrate to NBN Co:

- the level of primary damages that have been paid to the end-user;
- the allocation of time between the RSP and NBN Co, i.e. which party is responsible for the failure to meet the CSG timeframe; and
- whether the RSP took reasonable steps to mitigate any CSG liability, e.g. through the provision of an interim service.

This analysis needs to be completed for each fault and a claim submitted to NBN Co. However, this is an extremely time-consuming process that under WBA2 was made harder by a lack of reporting from NBN Co regarding the breakdown of time between the RSP and NBN Co. Further, the WBA2

⁷ <https://www.telstra.com.au/content/dam/tcom/our-customer-terms/business-government/pdf/bg-restoration.pdf>



requirement on RSPs to demonstrate that they had taken reasonable steps to mitigate CSG liability was not tempered by any consideration of the cost of providing such mitigation.

As part of the WBA3 negotiations, Telstra argued that NBN Co should provide stop-the-clock reporting that would enable RSPs to better allocate responsibility for a ticket between the RSP and NBN Co. [c-i-c] [c-i-c] Telstra will still be unlikely to claim CSG compensation from NBN Co because the time and effort involved in analysing the reports and making the claims is prohibitive, other than for very straightforward tickets, i.e. those that did not go into a pending or held status at any point.

Telstra acknowledges that in the WBA3 NBN Co has modified its requirement that a RSP take steps to mitigate CSG liability by acknowledging that an interim service does not need to be provided as a mitigation if the cost of supplying that interim service exceeds the amount of primary damages that would be payable. This is a welcome improvement that recognises the reality of the provision of interim services by RSPs. Nevertheless, as discussed elsewhere in this submission, the fact remains that by requiring RSPs to mitigate their CSG liability and not contributing towards the cost of such mitigations (except in very limited circumstances for PA customers), NBN Co limits the incentives of the CSG regime.

Changes to CSG arrangements

28. Are changes to the CSG arrangements introduced into WBA3 promoting more effective processes?

Telstra does not believe the CSG arrangements introduced into WBA3 promote more effective processes. NBN Co has made minor changes to the WBA3 that address some of Telstra's concerns. These include allowing RSPs to claim CSG compensation when one of their wholesale customers has paid primary damages to the customer and winding back the requirement on RSPs to take steps to mitigate CSG liability such that RSPs no longer have to take such action if the cost of mitigation would outweigh the CSG liability. Both of these are helpful steps and NBN Co has been keen to work with RSPs to develop processes to make it easier to claim reimbursement of CSG costs. However, Telstra remains very concerned that the processes for allocating costs between NBN Co and RSPs are simply unworkable and Telstra will again be left in the situation where it compensates customers for service level misses, but cannot successfully claim reimbursement from NBN Co. Further details of those processes are set out below.

Process for determining CSG cost allocation

29. What is the process for determining how CSG costs are allocated between NBN Co and RSPs?

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

Quite simply, the burden of conducting the analysis to appropriately allocate CSG costs between RSPs and NBN Co falls entirely upon RSPs and is a significant cost. Telstra is continuing to discuss these processes with NBN Co, but we strongly believe that they need to be greatly simplified to enable RSPs to more easily claim the CSG costs that should be borne by NBN Co.



6. OTHER NON-PRICE MATTERS

The ACCC is interested in whether there are other elements of NBN Co's wholesale arrangements that relate to the allocation of risks and incentives on NBN Co and in other parts of the supply chain. Telstra agrees with the ACCC view that *'...an appropriate allocation of risk between parties along the supply chain is essential to ensuring all parties face good incentives for the areas for which they are responsible and ensuring positive consumer experiences.'* This section sets out Telstra's views on some of the matters raised by the ACCC in its Discussion Paper, noting that a number of issues have been addressed elsewhere in this submission.

Allocation of risk and incentives

30. *Do the matters identified in this section represent the key aspects of WBA3 that relate to the allocation of risk and incentives?*

Yes, the matters identified in this section do represent the key aspects of the WBA3 that relate to the allocation of risk and incentives. [c-i-c] [c-i-c]

Telstra acknowledges that NBN Co has introduced the MSF provisions (discussed further below) and that during the term of the WBA3 it is phasing out the per event liability cap. Both of these are welcome developments, although we continue to be of the view that they do not go far enough to balance the allocation of risk between RSPs and NBN Co. Our key concerns are described further below.

Material service failure provisions

31. *Are the material service failure provisions likely to provide appropriate protections and incentives for NBN Co in relation to significant network outages?*

Please refer to our response to Question 8.

Impact of third party claims regime

32. *What impact is the third party claims regime likely to have in practice, including on RSPs, consumers and NBN Co's incentives?*

Please refer to our response to Question 8.

Flow through of model terms

33. *Are RSPs flowing through or intending to flow through the model terms under the third party claims provisions to retail contracts?*

34. *Are there examples from other sectors where an upstream service provider has required downstream providers to contractually prevent claims being brought against it or otherwise indemnify it from claims?*

Telstra has flowed through the model terms under the third party claims provisions to our customer terms (OCT). However, we continue to be of the view (as discussed with NBN Co during WBA3 negotiations) that the risk of unfairness to end-users is potentially increased in doing so due to other limitation of liability provisions in end-user contracts with Telstra. For example, under Telstra's OCT, Telstra excludes its own liability for events outside its reasonable control. This could include circumstances



where the loss to the end user is caused solely by NBN Co's negligence (and therefore outside Telstra's control). Accordingly, if the end user experiences a fault or outage to their service caused solely by NBN Co's negligence, the combined effect of the model terms together with Telstra's own limitation of liability provisions, means the end-user is effectively left without any recourse (unless they have rights under the ACL consumer guarantee provisions). We do not believe it is reasonable for NBN Co to exclude their liability to end users in such circumstances.

Further, in circumstances where an RSP is selling NBN services to business and enterprise customers via fully-negotiated agreements, the RSP may be unable to pass through the model terms. In those instances, the RSP assumes the risk that would otherwise be excluded by operation of the model terms. Telstra continues to be of the view that liability should rightly sit with NBN Co and that it is unreasonable and inappropriate for it to shift the liability to the RSP. It is also worth noting that as NBN Co rolls out its business grade services, this issue will be magnified.

Telstra is not aware of examples from other sectors where an upstream provider has required downstream providers to contractually prevent claims being brought against it or otherwise indemnify it from claims. We have not, however, undertaken any research or made inquiries to confirm this.

Liability caps

35. How likely is it that liability caps will be reached? What type of event could potentially see the caps being reached?

Telstra considers it unlikely that, under the terms of the WBA3, NBN Co would be liable to Telstra for the full amount of the annual liability (\$200m). This is because NBN Co has limited its liability for the most likely types of loss customers will suffer in other ways. For example:

- NBN Co's liability for service failures (other than MSF) is limited to the applicable Commercial Rebate or CSG Compensation (if any), subject to some limited exceptions. As discussed in detail above, the Commercial Rebates and CSG Compensation regimes (and the practical issues with being able to claim them) are not adequate incentives for good performance by NBN Co.
- NBN Co's exposure for catastrophic service failure is limited under the MSF regime to the amount of charges paid for the affected services for the period the service is affected. In other words, NBN Co will effectively refund charges for the period the service was not working. This clearly does not represent potential customer losses which are likely to be much higher (e.g. for liability to their downstream customers who have businesses affected by the MSF). Given the high threshold for a customer impacting incident to be classed as a MSF and the timeframe NBN Co has to remedy the failure before the compensation obligation is triggered (discussed in more detail above), Telstra considers this limitation of liability to be unreasonable.

The exclusion of the broadly defined 'Indirect Loss' also significantly limits NBN Co's exposure to liability for losses that would likely be suffered by its customers in connection with service failures, such as loss of profit if end users exercise a termination right in connection with the failure.

Given the way the contract is drafted, it is unlikely that the caps would be reached as the most significant losses to RSPs would likely come from a catastrophic service failure that resulted in RSPs being liable to their downstream customers. In Telstra's view, the WBA should have a material service failure regime that has the ability to recognise real downstream customer loss and which is not subject to a separate, smaller cap. The losses suffered by an RSP for a MSF would be directly linked to the number of downstream services they were providing (and therefore WBA contract value), which is why Telstra considers that a cap of 1 x annual fees is more reasonable than the current \$200m maximum cap.



36. Are there any comparable situations where liability caps have been imposed? If so, how are these caps structured and at what levels are the caps set?

The framework for the supply of fixed line broadband in Singapore is analogous to that in Australia, in that Singapore has a national broadband network with regulated terms of access, with a standard agreement made by the operator of the active network infrastructure. Accordingly, the Master Interconnection Offer Agreement (**MIOA**) between Nucleus Connect PTE LTD and retail service providers in Singapore is a useful benchmark for the WBA terms.

In the MIOA, the liability cap is the amount of charges paid or payable by the customer for the affected service in the 12 month period prior to the event giving rise to liability. There are some exceptions to the cap, including for death or personal injury, gross negligence and wilful default (all of which are uncapped). Additionally, if a service schedule contains remedies in relation to the provision of a service, those remedies are the customer's sole and exclusive remedy in connection with the service. The MIOA also has an indirect/consequential loss exclusion.



7. IMPLICATIONS FOR RETAIL SERVICE STANDARDS

If customers are to receive a great NBN experience, all parts of the supply chain need to deliver. It is therefore important that any retail service standards are appropriately supported by wholesale service standards. At present, this is not the case with some of the service standards offered by NBN Co to RSPs falling short of providing customers with service levels that meet expectations based on regulated requirements. Telstra's approach to reflecting wholesale service standards in retail customer contracts is outlined below.

Retail customer contracts

37. Why do retail customer contracts for NBN broadband services not, in general, reflect the wholesale NBN service standards, particularly for connections, faults and appointments? Please detail the key drivers for this and provide evidence to illustrate.

Retail contracts do not currently reflect NBN service standards because the majority of service levels set out in WBA3 are aspirational, non-binding targets only. Further, as described elsewhere in this submission, the absence of incentive on NBN Co to meet its service levels means that RSPs cannot with confidence reflect these to their customers.

The absence of real performance incentives on NBN Co, by way of service levels with appropriate associated rebates, means that RSPs are unable to guarantee service levels for their customers. RSPs are unwilling to guarantee service levels in circumstances where the RSP is dependent on the service levels (i.e. speed, repair profile and timeframes etc.), offered by NBN Co with inadequate rebates or, in most cases, on a best-efforts basis only.

A number of examples are set out below for the purpose of illustrating the points above.

- Connections - the service level schedule for end-user connections set out in WBA3 references different end-user connection timeframes for various classes of service (e.g. Service Class 1 – 24) which not only vary by Service Class but also by geographical area (e.g. metro, regional, rural). This matrix of service levels is then overlaid with an end-user connections rebate formula which is calculated based on NBN Co's overall performance every month, and not in respect of individual connections. This service level and rebate structure is not plain English, easily understood and customer friendly, and therefore cannot be flowed through to our OCT.
- Faults - The service levels relating to service fault rectification (not to be confused with service levels for network fault rectification) is a multi-stage process, i.e. the service levels for rectification of end-user faults only begin from the time of trouble ticket acceptance, which is effectively the first stage of end-user fault rectification. Again, service levels vary by geographical area, and rebates are calculated using a complex formula based on NBN Co's overall monthly performance for this service metric, not against restoration of individual services. This service level structure and uncertainty as to quantum of rebate on a month by month basis makes the flow-through to OCT impossible.
- Appointments - the end-user fault rectification appointment service levels specified in the WBA3 service levels schedule are aspirational and non-binding only. There are no rebates associated with the non-binding targets. Telstra does not believe that flowing through non-binding, aspirational service targets to end-user customers is helpful, and merely creates confusion and disappointment for end users when targets are not met.



Measures to achieve greater alignment

38. Are there any measures that could be put in place to achieve greater alignment of wholesale and retail NBN service standards and are any measures considered likely to be more effective than others?

Yes, there are many ways in which NBN wholesale service standards could be better aligned with retail NBN service standards. Some of the key measures Telstra believes would be most effective, many of which were raised with NBN Co during the course of WBA3 negotiations (and on an ongoing basis), include the following:

- **CSG Compensation** - As detailed in this submission the CSG compensation regime under the WBA3 allows RSPs to seek compensation for NBN Co's failure to meet CSG timeframes. In practice however Telstra has been unable to claim CSG compensation from NBN Co as the process has proved too complex and unwieldy to operationalise (even with recent changes agreed under WBA3). While the CSG compensation regime offers RSPs compensation in theory, there are too many caveats and exclusions, and the process cannot be applied in any real or practical way, leaving RSPs to pay CSG to customers without recourse to recoup the loss from NBN Co, even where NBN Co is wholly or partially responsible.
- **Commercial Rebates** - As set out in this submission the introduction of commercial rebates is Telstra's strong preference in circumstances where NBN Co misses its service levels. Telstra believes that a commercial rebate could replace the CSG compensation regime and the current one-off payment of \$25 for connection and assurance rebate. Currently where a fault or connection issue occurs and service levels are missed, Telstra applies credits or provisions interim services at its own cost.
- **Speed remediation** - RSPs are now required to monitor NBN Co's weekly FTTB/N weekly speed reports and take remedial steps where the highest internet speed that can be delivered to a customer's house or business (the Highest Attainable Speed) is lower than the upper limits of the customer's chosen speed tier. RSPs have no control over the Highest Attainable Speed given they have no control over the network. Despite this, RSPs are currently solely liable for paying customers compensation resulting from this network limitation. RSPs have been required to undertake extensive remediation work for FTTB/N customers which required a substantial compensation payout, with no contribution from NBN Co.
- **Customer Compensation Claims** – NBN Co currently excludes liability in respect of end-user claims, except in extraordinary circumstances where an outage or network issue is of such magnitude that it qualifies as a MSF (WBA3, clause E1.3). The threshold to qualify as a MSF is extremely high, meaning that NBN Co's liability in respect of end-user claims is effectively excluded under the WBA3. This leaves Telstra (and all RSPs) in the unenviable position of paying compensation to end-users (where their loss is substantiated) for issues caused or contributed to by NBN Co. Telstra continues to be of the view that NBN Co's exclusion of loss in relation to end-user claims caused by NBN Co is unreasonable. Additionally, NBN Co's exclusion of loss in relation to end-user claims provides no incentive for NBN Co to improve its network, service provisioning and remediation.