



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Inquiries into NBN access pricing and wholesale service standards

Final report

November 2020

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601
© Commonwealth of Australia 2020

This work is copyright. In addition to any use permitted under the *Copyright Act 1968*, all material contained within this work is provided under a Creative Commons Attribution 3.0 Australia licence, with the exception of:

- the Commonwealth Coat of Arms
- the ACCC and AER logos
- any illustration, diagram, photograph or graphic over which the Australian Competition and Consumer Commission does not hold copyright, but which may be part of or contained within this publication.

The details of the relevant licence conditions are available on the Creative Commons website, as is the full legal code for the CC BY 3.0 AU licence.

Requests and inquiries concerning reproduction and rights should be addressed to the Director, Content and Digital Services, ACCC, GPO Box 3131, Canberra ACT 2601.

Important notice

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

Parties who wish to re-publish or otherwise use the information in this publication must check this information for currency and accuracy prior to publication. This should be done prior to each publication edition, as ACCC guidance and relevant transitional legislation frequently change. Any queries parties have should be addressed to the Director, Content and Digital Services, ACCC, GPO Box 3131, Canberra ACT 2601.

ACCC 11/20_20-65

www.accc.gov.au

Contents

| | |
|--|----|
| Abbreviations and acronyms | 1 |
| 1. Executive Summary | 3 |
| 2. Introduction | 5 |
| 2.1. Role of regulation..... | 5 |
| 2.2. Wholesale access to the NBN..... | 5 |
| 2.3. Our public inquiries into NBN access terms | 5 |
| 2.4. The regulatory assessment framework | 9 |
| 2.5. Key findings | 10 |
| 2.6. Structure of this final report..... | 12 |
| Part A—Price related terms and conditions of access | 14 |
| 3. Discussion of the price related terms of the access arrangements | 14 |
| 3.1. Entry-level access pricing | 14 |
| 3.2. Pricing certainty of NBN Co's access products | 18 |
| 3.3. Other pricing related access terms..... | 20 |
| 4. ACCC consideration of the price related access arrangements against the statutory assessment framework | 23 |
| 4.1. Long-term interests of end-users | 23 |
| 4.2. Legitimate business interests..... | 25 |
| 4.3. Interests of all persons who have a right to use the declared service | 25 |
| 4.4. Direct costs of providing access..... | 25 |
| 4.5. Value of extensions or enhancements borne by someone else..... | 26 |
| 4.6. Safe and reliable operation | 26 |
| 4.7. Economically efficient operation..... | 26 |
| 4.8. The proposed access arrangements and NBN-specific restrictions..... | 26 |
| Part B—NBN Co's service standards proposals..... | 27 |
| 5. Discussion of service standards in NBN Co's proposed access arrangements | 27 |
| 5.1. Connections and faults | 27 |
| 5.2. Missed appointments | 31 |
| 5.3. Underperforming service speeds | 33 |

| | |
|--|----|
| 5.4. Service information and operational matters | 40 |
| 5.5. Consumer safeguards..... | 44 |
| 6. ACCC consideration of the service standards related access proposal against the statutory assessment framework..... | 49 |
| 6.1. Long-term interests of end-users | 49 |
| 6.2. Legitimate business interests | 51 |
| 6.3. Interests of all persons who have a right to use the declared service | 51 |
| 6.4. Direct costs of providing access..... | 52 |
| 6.5. Value of extensions or enhancements of capability by someone else | 52 |
| 6.6. Safe and reliable operation | 52 |
| 6.7. Economically efficient operation..... | 52 |
| Appendix A: Matters the ACCC must take into account in making an access determination | 53 |
| Appendix B: Segment analysis for the NBN 12/1 product..... | 61 |

Abbreviations and acronyms

| | |
|--------|---|
| 4G | 4 th generation mobile communications technology |
| ABS | Australian Bureau of Statistics |
| ACCAN | The Australian Communications Consumer Action Network |
| ACCC | Australian Competition and Consumer Commission |
| ACMA | Australian Communications and Media Authority |
| ADSL | Asymmetric digital subscriber line |
| API | Application programming interface |
| AVC | Access virtual circuit |
| B2B | Business to Business |
| BCAR | Bureau of Communications and Arts Research |
| CCA | Competition and Consumer Act 2010 (Cth) |
| CSG | Customer Service Guarantee |
| CSP | Carriage service provider |
| CVC | Connectivity virtual circuit |
| FAD | Final Access Determination |
| FTTB | Fibre to the building |
| FTTC | Fibre to the curb |
| FTTN | Fibre to the node |
| HD | High definition |
| IAD | Interim Access Determination |
| Kbps | Kilobits per second |
| LTIE | Long-term interests of end-users |
| MBA | Measuring Broadband Australia |
| Mbps | Megabits per second |
| mELB | Modified entry-level bundle |
| NBN | National Broadband Network |
| NBN Co | National Broadband Network Company Limited |
| NSNW | New service never worked |

| | |
|------|---------------------------------------|
| PA | Priority Assistance |
| PIR | Peak information rate |
| RKR | Record keeping rule |
| RSP | Retail Service Provider |
| SAU | Special access undertaking |
| SAO | Standard access obligations |
| SD | Standard definition |
| SIO | Services in operation |
| SIP | Statutory Infrastructure Provider |
| SQ | Service qualification |
| TC-2 | Traffic Class 2 |
| TC-4 | Traffic Class 4 |
| TIO | Telecommunications Industry Ombudsman |
| WBA | Wholesale Broadband Agreement |
| WBA3 | Wholesale Broadband Agreement 3 |
| WBA4 | Wholesale Broadband Agreement 4 |
| WSSI | Wholesale service standards inquiry |

1. Executive Summary

In this report we set out our findings in respect of our public inquiries into NBN entry level pricing and NBN wholesale service standards.

We consider that the following NBN access arrangements should be made available to access seekers in order to promote the long-term interests of end-users (LTIE), and balance the competing business interests of NBN Co as the access provider with those of its access seekers:

- The price of NBN Co's entry-level broadband access bundle should reduce to \$24.70 for the period from December 2020 to April 2021, and then to \$22.50 for the period from May 2021 to November 2022 (down from \$28.20 when our inquiry commenced and currently \$26.60).
- Access seekers should receive additional certainty over the access products and prices that will be available to them over time, via:
 - additional protections regarding the withdrawal of NBN Co's access bundles,
 - price caps and CVC allowance floors to apply to these access bundles.
- Service transfer charges and service reactivation charges should rebalance at \$5 per transfer or reactivation (previously \$22.50 and \$0 respectively when our inquiry commenced).
- Stronger and more effective wholesale service standards that include:
 - no wholesale charges in cases of failed connections (a failed connection is where a service does not work despite work being performed by a technician)
 - a new rebate framework be implemented that includes daily rebates for late connections and fault rectifications of \$7.50 and \$15 per business day respectively for most customers (currently a one-off \$25 rebate). Higher rebates will apply for priority assistance customers
 - higher rebates for missed appointments: \$50 for the first missed appointment escalating to \$75 for subsequent misses (currently \$25)
 - a revised approach to underperforming service speeds, including rebates and more accurate and timely speed performance information, that appears to address many of the issues raised during the inquiry
 - the extension of rebates to business grade (TC-2) services, meaning small-medium business customers will be eligible for the benefits of rebates in cases of poor service
 - a series of improvements to operational procedures and reporting arrangements.

These access arrangements represent a significant step change in the arrangements that were in effect when we commenced our inquiries. The arrangements will make retail markets for broadband services more competitive and efficient; and will significantly improve service standards regarding appointment keeping, activations and fault handling.

These effects are likely to result in improved consumer outcomes in a number of respects. The pricing changes should allow the supply of unlimited quota broadband plans on the NBN of similar quality and price to those that were available to consumers on legacy networks. This will protect consumers from a forced price increase as they are required to migrate to the NBN. The improvements to service standards are likely to provide stronger incentives on NBN Co to meet reasonable service standards and to address individual cases of poor performance.

We have reached these findings after consulting broadly at multiple stages in our inquiries, which has allowed us to test and refine our approach to these access arrangements. As part of this process, we published our positions in respect of both inquiries in April 2020. In response, NBN Co submitted a package of access arrangements in August 2020 for our consideration.

We sought feedback on this package of access arrangements, which NBN Co had committed to incorporating into the next version of its wholesale broadband agreement (WBA4). We also stated an indicative view that the package was a reasonable implementation of our public positions concerning the matters that had been raised in the inquiries. Since then NBN Co has been progressing the development of WBA4 to the point where it has now offered these improved pricing and service standard commitments in contractual form until the end of 2022.

In light of this development, we have decided not to issue an access determination, but rather will closely monitor the implementation of the new access arrangements under WBA4. Although not our intention to do so, we would assess our regulatory options should these access arrangements not be fully implemented in an effective and timely manner.

We have also had regard to existing market conditions in the fixed line broadband market. Although our consideration of the revised access arrangements has been directed towards the next two years, this should not necessarily be taken as an indication of a regulatory approach to price related NBN access arrangements over a longer period. NBN wholesale and downstream markets remain in a period of significant transition with a number of important developments underway. This includes the completion of NBN Co's initial network build, the migration of remaining customers on legacy networks to the NBN, emerging alternative supply options and changes in consumer demand.

There is also considerable interest from access seekers in revisiting more fundamental aspects of access (such as removal of charges for CVC). Further changes to the regulatory arrangements under NBN Co's special access undertaking (SAU) are also likely with the transition to module 2 of the SAU in 2023, and potentially a further SAU variation to incorporate all NBN services under a single regulatory framework. In relation to longer term arrangements for pricing, the revised access arrangements do not provide a direct prohibition on NBN Co effectively reverting to a heavy reliance on short term discounts. The underlying concerns we have previously stated on the use of discounts as the primary means of implementing its products and pricing remains in the longer term. This is contrary to the initial intention of the SAU, which was intended to provide a high degree of long term certainty of NBN Co's products and pricing.

We will need to understand the potential implications of these matters and anticipated developments before deciding whether default access arrangements are required in order to promote the LTIE following the expiry of WBA4 in 2022.

2. Introduction

2.1. Role of regulation

The National Broadband Network (NBN) is designed, built, and operated by NBN Co with the mandate to ensure that, at the wholesale level, all Australians have access to very fast broadband. The wholesale terms of access are of fundamental importance to competition in dependent markets and have a strong bearing on the price, service standards and degree of reliability experienced by end-users.

Given that NBN Co largely operates as a monopoly within the wholesale broadband market, uneven bargaining power exists across the supply chain. This structure undermines ordinary mechanisms of competition. Ordinarily, good faith commercial negotiation between the supplier and acquirer of a service can be expected to result in reasonable commercial arrangements. Generally, this process can be relied upon to ensure that markets exist with low barriers to entry, competitive pricing and product quality and variety. However, this process is not sufficient for competitive markets where only one party has power in a market, as NBN Co does, given it is the near to ubiquitous provider of last mile fixed access.

Therefore, there is a need for regulatory oversight to make up for this market failure. This means that the wholesale terms of access to the NBN can be potentially developed via commercial negotiation or via regulatory processes with the implementation of an access determination. Here, the role of regulation is to address the uneven bargaining powers which currently exist between access seekers and NBN Co. Effective terms of access are critical to the existence of competitive and efficient markets and promoting the long-term interests of end-users.

2.2. Wholesale access to the NBN

Wholesale terms of access to the NBN can be developed via commercial negotiation leading to a commercial agreement and/or via regulatory processes leading to an access determination. In this regard, our inquiries are occurring in the context of NBN Co moving to finalise WBA4 with a view to revised commercial terms of access becoming available to access seekers from December 2020. The relatively short two year period recognises that the network as a whole remains in transition and the economics of each of the technologies is still emerging.

These two pathways are not mutually exclusive, as negotiation could successfully resolve a broad range of access terms for inclusion in the commercial agreement, while a regulatory instrument would focus on those areas that remain contentious.

Nor are the commercial and regulatory pathways towards the development of NBN access terms entirely separate, as positions reached in one process can have a direct influence on the other. For instance, positions foreshadowed in a regulatory process could influence commercial negotiations, and vice versa.

However, once an access agreement has been finalised by NBN Co and signed by an access seeker, and there are matters that are covered by both the access agreement and an access determination, the access determination has no effect to the extent to which it is inconsistent with the access agreement.

2.3. Our public inquiries into NBN access terms

We are providing this final report in respect of two public inquiries that we have conducted into NBN wholesale access terms. The first of these inquiries was commenced in

November 2017 and relates to the wholesale service standards that NBN Co provides to its access seekers, which in turn allows access seekers to offer higher quality services in downstream markets. The focus of this inquiry has been to determine appropriate terms of access to the NBN that would provide suitable incentives to NBN Co to better meet commitments to keep appointments, activate services and fix faults, and to provide more accurate and timely speed performance information to access seekers. This would allow access seekers to offer suitable support and compensation to end-users on those occasions where the commitment was not met or services did not meet the expected speed performance.

We commenced the second inquiry in October 2019 into wholesale pricing for residential grade NBN access services. Wholesale access charges are a significant cost component for retailers of NBN services and so have a direct bearing on the level and range of pricing at which downstream services can be supplied. This inquiry has focused on developing suitable entry level pricing that will serve as an anchor for higher speed products, as well as measures to provide more certainty over future access product and pricing offers. The intent is to promote competition and protect consumers in the migration to the NBN, and reduce risks faced by access seekers and encourage the efficient use of and investment in the NBN.

We have consulted broadly in the course of these inquiries, including issuing discussion papers and calling for public input. These submissions have allowed us to better target our inquiries and develop proposed terms of access by reference to the regulatory framework that we apply.

Consultation on NBN wholesale service standards

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

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

On 18 December 2017, the ACCC published the first discussion paper on NBN wholesale service standards. The paper outlined key issues for the inquiry and sought stakeholder input on whether interim regulated terms were necessary. Following consultation, we proposed to make an interim access determination (IAD) which would implement regulatory measures on a temporary basis whilst the inquiry was ongoing. Subsequently, NBN Co proposed to commit to a set of service level improvements through amendments to the wholesale broadband agreement (WBA) in the form of an enforceable undertaking.

In September 2018, the ACCC accepted this enforceable undertaking in which NBN committed to: payment of rebates for every late connection or fault rectification (not just those below its 90 per cent performance objective threshold), a new rebate for missed appointments, simplification of processes and conditions for claiming rebates, and a range of additional reporting commitments (particularly in relation to fixed wireless services).

In December 2018, we undertook further consultation through the release of a second discussion paper which sought stakeholder views on longer term issues that had been previously raised in the inquiry but were not addressed within the enforceable undertaking.

On 1 October 2019, the ACCC released its draft decision and draft final access determination (FAD) for consultation. This proposed NBN wholesale service standard terms, including: daily rebates for late connections and unresolved faults, increased rebates for missed appointments which retail service providers (RSPs) were required to pass through to consumers, monthly rebates for fixed wireless services in congested cells or connected to congested backhaul links and fixed line services that fail to meet certain minimum speed objectives and, enhanced reporting and automation requirements to promote better information flows, transparency and supply-chain coordination. Developments in the inquiry since the draft decision and draft FAD are discussed below.

Consultation on NBN access pricing

In October 2019, the ACCC commenced a public inquiry with the release of a discussion paper into the prices that NBN Co charges access seekers to use the NBN for supplying residential grade (TC-4) broadband services.

The genesis of the inquiry was the withdrawal by NBN Co of pricing discounts towards the end of 2018 that led to several RSPs withdrawing basic speed NBN retail plans and increasing entry level prices in the months that followed.

This raised two specific concerns. Most directly, it called into question whether consumers could continue to enjoy a smooth transition from ADSL services to the NBN, which until that point had been an expected outcome from NBN Co's SAU commitments. More generally, it illustrated potential problems from NBN Co's continued use of pricing discounts as its primary pricing mechanism. This is because, under this approach to pricing, important price measures can be withdrawn with minimal notice, which causes uncertainty for RSPs in framing their retail offers. We noted these concerns in a public statement that we issued in October 2018 following NBN Co's withdrawal of a proposed variation to its SAU.

In September 2019, NBN Co released a new basic speed pricing offer that was directed at addressing our first concern. Our initial assessment of this offer was that it appeared inadequate to addressing that concern, and that the broader issue of pricing uncertainty remained. We therefore decided to commence an inquiry so that these matters could be tested in a public and transparent process.

Responses to our October 2019 discussion paper indicated that many access seekers considered NBN Co's entry level offer to be inadequate to allow them to supply an ADSL equivalent broadband product over the NBN. Many also called for the inclusion of a higher AVC speed tier within a new entry level product. Access seekers identified the uncertainty and complexity of NBN Co's pricing offers as a significant cause for concern, particularly in the context of very strong demand for CVC.

April 2020 position papers

In April 2020, we released position papers for our two inquiries. These papers provided a public statement on the key issues that had arisen in the course of our inquiries including a description of the changes to wholesale access terms that we considered to be of most importance.

The position paper on wholesale service standards reaffirmed the ACCC's view in the draft decision which was that a FAD would likely be required to improve service outcomes for end-users of the NBN. To improve delivery of service standards on the NBN the position

paper proposed daily rebates for delayed connections and unresolved faults, a higher rebate for missed NBN appointments and, new rebates for underperforming services. Increased reporting arrangements and improved operational procedures were also proposed.

The pricing inquiry position paper confirmed that we would focus on the price of basic speed broadband access to allow consumers to migrate their services to the NBN without price shock along with overall pricing certainty for RSPs, with a view to promoting competition and efficiency in NBN markets.

The paper proposed a price and CVC inclusion range as an alternative to NBN Co's entry level offer as applying at May 2020 as well as expressing a view on an appropriate annual growth rate in the CVC allowance. It signalled we would give further consideration to measures to provide for greater price certainty and reduce complexity and the need for an improved voice only offer. It signalled that we would not consider some matters further under the inquiry, including regulation of higher bandwidth products.

We placed both inquiries on hold in April 2020 to allow stakeholders to focus on responding to the COVID-19 pandemic, as well as continue commercial negotiations in relation to WBA4 in the knowledge of the positions we had then reached in our inquiries.

August 2020 consultation paper

In August 2020, NBN Co proposed a package of wholesale access arrangements that it considered would reasonably respond to the public positions that we had outlined in both inquiries. NBN Co committed to implementing these wholesale access arrangements in the next version of its wholesale broadband agreement (WBA4), on the basis that doing so would avoid the need for us to issue an access determination.

As a consequence, the key focus of our inquiries became whether the access arrangements proposed by NBN Co were reasonable when viewed against the positions that we had reached in April 2020.

On 20 August 2020, we recommenced our inquiries by publishing a further consultation paper which attached NBN Co's outline of proposed access arrangements.

We sought views on whether the access arrangements that NBN Co had proposed to us were a reasonable response to the issues that had been raised in the inquiries, and on whether stakeholders still saw the need for us to take regulatory action as we had proposed in our position papers.

In doing so, we expressed an indicative view that the access terms as outlined appeared reasonable and as such there would not appear to be a need to proceed to make an access determination provided they were effectively implemented within WBA4.

To assist access seekers in providing more informed submissions, NBN Co also released an updated draft version of its WBA4, which demonstrated in more detail how it was intending to incorporate the relevant access terms into that agreement.

Submissions received in response to our August 2020 consultation paper

In September 2020 we received submissions from 11 stakeholders¹ in response to our consultation paper (available on our website). We also engaged broadly with stakeholders to

¹ The ACCC received submissions from the following stakeholders: Australian Communications Consumer Action Network (ACCAN), Aussie Broadband Pty Ltd (Aussie Broadband), Commpete, Gerald Hosier (member of the public), Macquarie Telecom Group Ltd (Macquarie Telecom), NBN Co Ltd (NBN Co), Singtel Optus Pty Ltd (Optus), Telstra Corporation Ltd (Telstra), Telecommunications Industry Ombudsman (TIO), TPG Telecom Ltd (TPG), Vocus Group Ltd (Vocus).

better understand the perspectives that they had shared with us and where necessary, we sought clarification from NBN Co on the issues that had been raised.

This led to NBN Co providing a submission in response in October 2020, in which it provided further explanation or clarification of its position, including in respect to the manner in which it would implement the access arrangements that it had outlined.

The particular issues raised with us at this stage of the inquiries and the position we have reached on those matters are discussed in more detail below.

NBN Co executable version of WBA4

NBN Co has now proceeded to issue an executable version of WBA4 to its access seekers for their consideration. NBN Co has advised us that should an access seeker execute this agreement, NBN Co would be contractually bound to apply the access terms from the later of the date on which the access seeker signs or 1 December 2020.

Consequently, we consider there can be a high level of assurance that access seekers can obtain the commercial terms of access that are contained in the executable version of WBA4 that NBN Co has now provided to access seekers.

2.4. The regulatory assessment framework

In considering potential access terms in the course of each inquiry, we have had regard to the matters set out in section 152BCA of the *Competition and Consumer Act 2010* (CCA). These are matters that the ACCC must take into account in making an access determination.

The criteria are broad in scope, first requiring consideration of the LTIE of the services that are supplied by means of NBN access services. This in turn requires an examination of the extent to which an access arrangement promotes competition and encourages efficient use of and investment in infrastructure by which services are supplied.

The criteria also include, relevantly, consideration of the direct costs of providing access, and the legitimate business interests of the access provider on the one hand, and of access seekers on the other. Each of the criteria is discussed in further detail in Appendix A of this paper.

As part of this analysis, we have contrasted the situation with the proposed access arrangements in place with the situation where the current access arrangements were to remain in effect. This allows us to assess more directly the incremental impact of proposed access measures on the relevant wholesale and downstream fixed broadband markets.

As noted above, in the most recent stage of our inquiries, we have considered against this regulatory assessment framework a package of access arrangements that NBN Co has publicly proposed. To be clear, we do not have a legislative role in approving the NBN Co's commercial arrangements.

Rather, the ACCC can decide to set out, in an access determination, the terms and conditions of access to declared services to address issues relating to their supply. Here we considered whether this regulatory response was required given the proposed access arrangements, having formed an indicative view that they appeared reasonable in the context of the views that we had expressed in our April position papers where we outlined access arrangements that we considered should be made available, having regard to the statutory framework.

We have made this assessment having regard to how the package of pricing and service standard arrangements responds to the issues considered within each inquiry, rather than to each component measure individually. Taking this perspective better allows any inter-relationships between individual components of the access arrangements to be taken into account and the overall impact of the access measures being proposed.

In saying that, it was still necessary to consider whether any of the component measures mean that the overall package does not sufficiently address the issues raised in the inquiries. This may have been the case had one or some of the components suffered from a significant shortcoming that could serve to inhibit the development of competitive markets or discourage economic efficiency, or tilt the potential benefits too far in favour of the access provider at the expense of the interests of access seekers.

2.5. Key findings

As noted above, in applying the regulatory framework, we have considered the package of access arrangements that NBN Co has proposed to address the matters raised in our inquiries and set out in the April position papers.

In doing so, we considered the reasonableness of those access arrangements having regard to the positions that we set out in respect of each inquiry in April 2020.

Whether the proposed access arrangements address the issues raised in the inquiries

As discussed below in Parts A and B of this final report, we consider that the package of measures that NBN Co has proposed addresses the matters of concern that have arisen in our inquiries.

We have formed this view on the basis of the information that NBN Co, access seekers and other interested parties made available to us in the course of our inquiries, and have considered both the intended operation of the relevant access arrangements, as well as any potential impediments to those terms operating as intended in practice. We have made this finding in respect of the specific matters that have been the focus of our inquiries, and we do not express an opinion on other aspects of access arrangements that have not been raised with us for detailed examination and assessment.

Further, we have undertaken our assessment in the context of current market conditions and reasonably foreseeable developments. We note that NBN markets remain in transition, and so it is likely that we could need to revisit our findings should conditions change or we consider it is in the LTIE to do so.

In saying that, we note the commitments that NBN Co has given to develop further certain aspects of the access arrangements that it proposed. In this regard, NBN Co has committed to consult further with access seekers on:

- price-related access terms, and to issue a revised 'TC-4 discount pricing roadmap' by May 2021 that will provide binding price caps and CVC inclusion floors for two years
- the performance thresholds by which faults reports will be assessed. This has already occurred in respect of FTTN services, and extending this work to cover the other access technologies will be important to ensuring the wholesale service standard measures are operating as intended.

We will continue to monitor developments in this regard to ensure that the further consultation and development occurs in a way that is consistent with the regulatory framework.

Whether to make an access determination

As noted above, the access arrangements that we have found as reasonable have been included within the commercial offer that NBN Co has recently provided to access seekers.

Consequently, this raises the question as to what, if any, additional benefit there would be in us proceeding to make an access determination given our finding that NBN Co's commercial offer represents reasonable terms of access. We received views from interested parties on this question, with opposing views from some access seekers on the one hand, and NBN Co and other access seekers on the other.

Telstra expressed some concern that the intended benefits of the access arrangements may still not flow through via the commercial agreement or that the latitude provided under the agreement to NBN Co to respond to certain events by modifying the access terms applying under WBA4. As well as providing additional assurance in this regard, Telstra also considered that an access determination provided a better position from which to negotiate other commercial terms of access in the lead up to WBA4 or alternatively when the next access agreement comes up for negotiation. Commpete expressed a similar point of view as Telstra on this issue.²

Macquarie Telecom favoured an access determination being issued largely on the basis that it considered NBN Co's proposal did not provide certainty for RSPs, including due to the complexity of the access terms and lack of transparency over how they would operate in practice.³

TPG acknowledged that the ACCC inquiries have assisted in delivering improvements to NBN Co's WBA4 proposals.⁴

ACCAN also expressed concern with leaving important access terms entirely to commercial negotiation although it noted that there would still be potential for Ministerial rule making powers proposed under the Statutory Infrastructure Provider (SIP) arrangements should that be needed.⁵

NBN Co initially noted its view that a commercially led implementation would best promote the LTIE, and submitted that the WBA4 proposal was made in response to issues of concern raised by the ACCC and RSPs during the inquiries. It also considered that WBA4 establishes the necessary baseline for future negotiations, noting that an access determination has no effect to the extent of any inconsistency with the access agreements established by the signing of WBA4. The possibility of a failure to reach agreement based on commercial negotiations of WBA5 in late 2022 (or possibly even later) did not in its view provide sufficient grounds on which to make an access determination.⁶

² Commpete, *Submission in response to the ACCC's consultation paper on ACCC inquiries into NBN access pricing and wholesale service standards (Submission to the ACCC consultation paper)*, 11 September 2020, pp. 6–7. Telstra, *ACCC inquiries into NBN access pricing and wholesale service standards public submission (Submission to the ACCC consultation paper)*, 18 September 2020, p. 3.

³ Macquarie Telecom, *Submission to the ACCC inquiry into NBN access pricing and wholesale service standards (Submission to the ACCC consultation paper)*, 11 September 2020, p. 2.

⁴ TPG, *TPG Telecom submission to ACCC access pricing and wholesale service standards inquiries (Submission to the ACCC consultation paper)*, 11 September 2020, p. 1.

⁵ ACCAN, *ACCC inquiries into NBN access pricing and wholesale service standards: Submission by the Australian Communications Consumer Action Network to the ACCC (Submission to the ACCC consultation paper)*, 11 September 2020, p. 4.

⁶ NBN Co, *Submission to the ACCC—ACCC inquiries into NBN access pricing and wholesale service standards (Submission to the ACCC consultation paper)*, 11 September 2020, pp. 5 and 17–19. NBN Co, *Supplementary submission to the ACCC: ACCC inquiries into NBN access pricing and wholesale service standards (Supplementary submission to the ACCC consultation paper)*, 23 October 2020, p. 8.

We have carefully considered the views that we have received on this issue, as well as the subsequent changes that NBN Co has made to some aspects of its commercial offer. We consider that in light of NBN Co making these further changes to its commercial offer, and proceeding to issue an execution copy of WBA that includes those terms, there is sufficient certainty over the access terms that will be available to access seekers over the term of WBA4.

In this regard, we note the relevant access terms can now only be modified or withdrawn with access seeker agreement, or where necessary to do so to comply with a law or legally binding regulatory direction. Consequently, we do not consider that we need to make an access determination in order to provide additional certainty.

We agree with the submissions that there is considerable value in the regulator making clear the terms of access that it thinks would promote the LTIE, so access seekers are aware of the default form of access that is potentially available should they be unable to agree commercial terms with NBN Co. This is consistent with how the access regime is intended to operate.

We note that our April 2020 position papers provided guidance on the substantive access terms that have been in issue in the course of the inquiries, and although those positions did not constitute default terms of access they did bring forward an improved set of access arrangements from NBN Co.

Having said that, we consider that we should only proceed to issue an access determination if necessary to do so to introduce more reasonable terms of access in the immediate term.

Although we accept that it could be appropriate in a relatively stable market to make an access determination to influence negotiations over a longer term, it is important to have regard to existing market conditions in the fixed line broadband market. NBN wholesale and downstream markets remain in a period of significant transition with a number of important developments underway. This includes the completion of NBN Co's initial network build, the migration of remaining customers on legacy networks to the NBN, emerging alternative supply options and changes in consumer demand.

There is also considerable interest from access seekers in revisiting more fundamental aspects of access (such as removal of charges for CVC). Further changes to the regulatory arrangements under the SAU are also likely with the transition to module 2 of the SAU in 2023, and potentially a further SAU variation to incorporate all NBN services under a single regulatory framework.

We will need to understand the potential implications of these developments before deciding whether default access terms are required in order to promote the LTIE from 2022 following WBA4.

2.6. Structure of this final report

The remainder of this final report is divided into two parts. Part A sets out our final assessment on NBN Co's access pricing proposal whilst Part B sets out our final assessment on NBN Co's service standards proposal. These sections are structured as follows:

- Part A—NBN Access Pricing Inquiry
 - Chapter 3 discusses the price related access arrangements against concerns raised by stakeholders.
 - Chapter 4 considers the price related access arrangements against the regulatory assessment framework.

- Part B—NBN Wholesale Service Standards Inquiry
 - Chapter 5 discusses the key topics raised in the NBN wholesale service standards inquiry against stakeholder concerns and the key principles we consider should apply to the formulation of these wholesale terms.
 - Chapter 6 considers the service standard related access arrangements having regard to the regulatory assessment framework.

Part A – Price related terms and conditions of access

3. Discussion of the price related terms of the access arrangements

In this section, we discuss the price related access arrangements that were raised in the course of this inquiry, including entry-level pricing, pricing certainty and other price related terms.

Our consideration of these access arrangements is directed towards the next two years and should not necessarily be taken as an indication of a regulatory approach to price related NBN access arrangements over a longer period. For instance, the completion of the migration of legacy products to the NBN and other market developments over the next two years may require a different regulatory approach to these access arrangements in future.

3.1. Entry-level access pricing

April position paper

In our April position paper, we considered that the following entry level access bundle should be made available:

- An AVC at the 12/1 Mbps speed tier plus an allowance of 0.15 Mbps of included CVC per service at a price of between \$24.80 and \$25.70 when used to supply broadband (or \$22.50 if used to supply a voice-only service).
- Supply on a bundled CVC, with CVC overage available at \$8 per Mbps.

This was to allow an efficient RSP to incur an access cost of around \$35 per month and supply an unlimited retail broadband product over the NBN at an entry level price of \$60 per month, which was a typical price paid by ADSL broadband customers. In this regard, we found that the CVC requirement for an unlimited retail broadband product supplied on the NBN with a 12/1 Mbps speed likely fell within the range of 1.31 and 1.42 Mbps.

We also found that the price for this access bundle should reduce over time so that the access cost and retail price could remain steady in nominal terms notwithstanding ongoing growth in CVC utilisation. In this regard, we estimated that CVC per service would grow at a rate of 20 per cent per annum for entry level broadband.

The rationale for these access arrangements was twofold – that it would allow retail customers to migrate to the NBN without a price shock, and would serve as an effective anchor on the pricing of higher bandwidth NBN offers.

August consultation

For the August consultation, we sought views on more specific price-related access arrangements for this entry level access bundle, which NBN Co had developed in response to the position we had presented in our April paper.

We based our August consultation on these specific access arrangements as, on our review, they appeared to accord with the position we had set out in our April position paper, and NBN Co had indicated that it could implement them by varying the pricing on an existing commercial access product, which it calls the modified entry-level bundle ('mELB').

These price-related access arrangements are specified in table 1 below. They represent an additional price reduction in December 2020 of \$1.90 per month below the mELB price and a further reduction of \$2.20 per month in May 2021.

Stakeholder submissions

Broadly, there were two key themes in submissions from RSPs and other stakeholders in relation to entry level pricing:

- the 12/1 Mbps mELB price should be further reduced either to make a \$60 price point for an unlimited quota product more commercially viable, including to provide additional assurance that COVID related demand increases can be met within CVC provisioning levels.
- higher speed tiers should be price regulated either instead of or additional to the 12/1 Mbps speed tier, to achieve additional socio-economic benefits from more ubiquitous access to higher broadband speeds and/or due to concerns that some consumers may be left on plans that do not reasonably meet their needs due to affordability or other issues.

NBN Co submitted that the revised pricing for its mELB access bundle will continue to meet the objective of allowing consumers to migrate to an NBN broadband product that is of similar quality to ADSL without price shock. In this regard, NBN Co reiterated its view that CVC growth for entry level broadband will likely be less than the 20 percent allowance that is implied in the revised pricing. NBN Co also stated that some users of entry level broadband access products are very high data users and that these users may over time migrate to higher speed NBN plans (which would potentially dampen growth in CVC utilisation on the mELB access product).⁷

ACCC views

After considering the submissions that we have received, we remain of the view that the price-related access arrangements that we outlined in our August consultation paper for an entry level access bundle are appropriate.

That is, we are not persuaded by the submissions that we received that more generous access arrangements are required at this time, in terms of either an increased CVC allowance or a higher bandwidth inclusion within the entry level access bundle from what we had proposed.

Further, we consider the revised pricing for the mELB access bundle that NBN Co proposed is a reasonable implementation of these access arrangements, given that it falls within the bounds of the offer we specified in our April position paper (see table 1 below).

⁷ NBN Co, *Supplementary submission to the ACCC consultation paper*, 23 October 2020, p. 4.

Table 1: Comparison of NBN Co's access arrangements for the mELB and ACCC position paper

| | May 2020 | Dec 2020 | May 2021 | Dec 2021 | May 2022 |
|---|----------|----------|----------------------|----------|----------|
| ACCC position paper | | | | | |
| mELB effective charge (\$) | 25.72 | 24.72 | 23.81 | 22.42 | 21.34 |
| CVC inclusion at \$35 wholesale charge (Mbps) | 1.31 | 1.44 | 1.55 | 1.72 | 1.86 |
| | May 2020 | Dec 2020 | May 2021 to Nov 2022 | | |
| ACCC position paper (levelisation)* | | | | | |
| mELB effective charge (\$) | 25.72 | 24.72 | 22.52 | | |
| CVC inclusion at \$35 wholesale charge (Mbps) | 1.31 | 1.44 | 1.71 | | |
| | Dec 2020 | | May 2021 to Nov 2022 | | |
| NBN access arrangements | | | | | |
| mELB effective charge (\$) | 24.70 | | 22.50 | | |
| CVC inclusion at \$35 wholesale charge (Mbps) | 1.44 | | 1.71 | | |

* The levelised charge and CVC inclusion are obtained by averaging the Position Paper CVC charges and inclusions for May 2021, Dec 2021 and May 2022.

In this regard, these access arrangements represent a 'levelisation' of pricing from May 2021 to November 2022, i.e., more staggered prices over this period are averaged over the entire period. This means that prices reduce more quickly initially but remain higher in the out period.

As noted in our August consultation paper, the levelisation of pricing has two advantages:

- It simplifies pricing arrangements by removing complex rules intended to apply different pricing for when the access bundle is used to supply a broadband product or a voice only product.
- It mitigates a risk that growth in CVC requirements may increase more quickly than had been forecast in the immediate term—by making allowance for an increase of up to 42.5 per cent in CVC provisioning for entry level broadband products by May 2021 as compared to the allowance implied in commercial pricing on offer in 2020.

A number of submissions encouraged us to include a higher speed tier within the entry level access bundle. This was on the basis that the 12/1 Mbps speed tier may be insufficient to meet the needs of consumers, or that a significant number may derive additional benefit from acquiring a higher speed broadband product at an entry level price.

In our view, however, the 12/1 Mbps speed tier is a close functional equivalent for the ADSL service that the NBN is replacing. That is, while some individual ADSL services could achieve maximum speeds that were higher, or lower, the overall performance of ADSL is proximate to that of an NBN 12/1 Mbps speed service.

Consequently, we consider that the 12/1 Mbps speed is an appropriate inclusion in the entry-level access bundle, and that a higher speed tier is not required in order for consumers to access an NBN broadband product at a similar quality and price as ADSL.

We also consider that a 12/1 Mbps NBN broadband product is currently a viable substitute for a reasonably large segment of the market, although this will likely steadily reduce as applications with higher bandwidth requirements become available, or consumers more

strongly preference streaming applications in highest picture quality and screen resolutions. We discuss the basis for this view in Appendix B.

By reasonable substitute, we mean there would be households that would be prepared to take-up or move to a 12/1 Mbps service, such as in response to a material price increase for higher bandwidth retails plans that meant those plans no longer represented value. Although there is relatively low demand for 12/1 Mbps services at present, this has been heavily influenced by RSP decisions concerning migrating existing customers from ADSL to the NBN.

As a consequence, we consider that pricing for the mELB access bundle should serve as an effective anchor for other wholesale access bundles for the next couple of years. This could operate in two ways. First, it will constrain wholesale pricing and CVC inclusions of the higher speed bundles so that these remain attractive. Or second, if it does not, it will offer a viable alternative of a lower bandwidth service at a lower price.

We note however that should the mELB provide only a subdued anchoring effect then this may mean we need to revise our approach in any future inquiry into NBN pricing. In the meantime, there will be price caps in place for the remaining access bundles, as discussed below in relation to pricing certainty, which provide some safeguards against inefficient price increases.

Finally, we note that submissions raised whether further access arrangements were needed for disadvantaged households so they could access a subsidised higher speed broadband service. We acknowledge that the 12/1 Mbps access product might not adequately support the use of all online applications by some larger households, and the additional price of a higher speed plan may not be affordable for some larger households from a disadvantaged background. We consider that these issues are better considered via direct government assistance that can be targeted more directly at eligible households rather than via an internal cross subsidy.

A number of submissions also called for a lower access price to allow for additional growth in CVC requirements, such as has been seen while COVID measures have been in place.

The CVC provisioning that we have allowed for is consistent with confidential information provided to us regarding 12/1 Mbps NBN broadband products supplied with an unlimited quota, as well as regarding the equivalent network capacity that retail ADSL services utilise. This exceeds the levels shown by confidential data that NBN Co has shared of the average utilisation of CVC across all 12/1 Mbps services, as those average measures are reduced by the inclusion of lines used to supply limited quota plans.

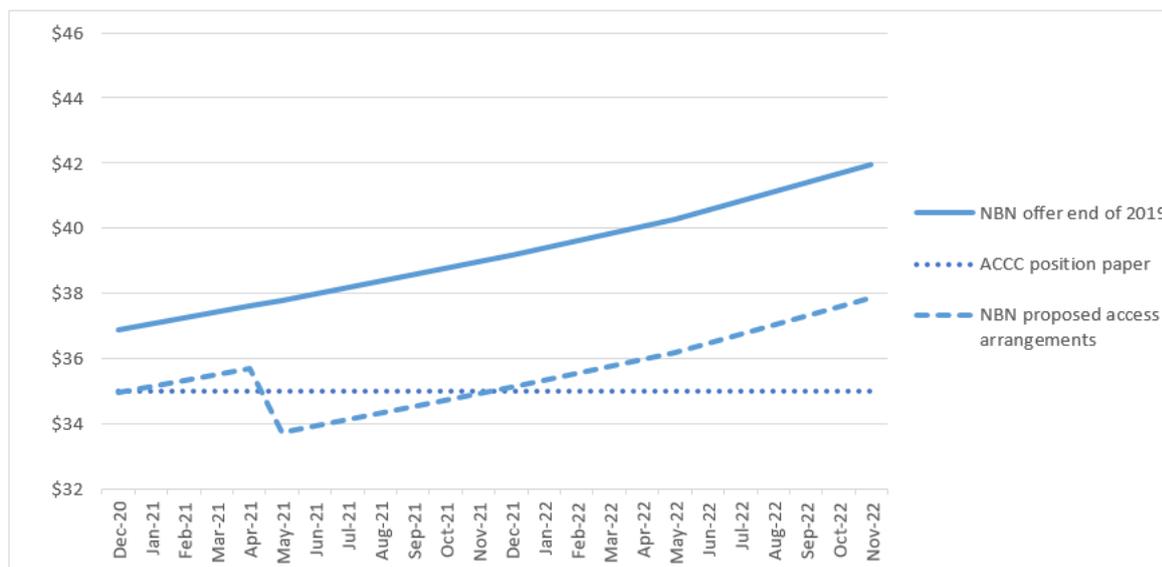
We consider it is reasonable to forecast this to grow at 20 percent per annum, which is below overall growth in network utilisation, as higher speed broadband will experience greater growth in demand for network capacity than will more basic speed products. This view is supported by confidential data that NBN Co has provided.

We acknowledge that the data we have relied on in forming these views has largely predated the COVID measures, and that CVC demand has increased significantly while COVID measures have been in effect. However, we consider that temporary relief measures are the better means by which to safeguard against inefficient use of the NBN when COVID measures are in place. In this case we note NBN Co has announced it will taper down rather than withdraw its COVID 40 per cent CVC boost measure,⁸ which makes further allowance for residual impacts from the remaining COVID measures over December 2020 and January 2021.

⁸ *NBN Co launches new Focus on Fast campaign*, Press Release, 22 October 2020.

As shown in figure 1, the implementation of the revised mELB pricing will materially reduce access costs incurred to supply entry level retail broadband products. The access costs shown are based on provisioning 1.44 Mbps of CVC for each mELB in December 2020, and this provisioning rate steadily increasing at a rate of 20 per cent per annum.

Figure 1: Comparison of costs of acquiring a 12/1 Mbps service



3.2. Pricing certainty of NBN Co’s access products

April position paper

In our April position paper, we observed that access seekers continued to raise strong concerns with the lack of certainty over the composition of access products and prices they would face over time.

These concerns stemmed from NBN Co’s prevailing access arrangements having been structured as time-limited discount offers, with little assurance that they would continue or whether sufficient notice would be provided as to what form replacement arrangements would take.

August consultation

In our August consultation paper we sought views on a series of measures to provide greater price certainty over time which NBN Co had proposed as capable of meeting access seeker concerns. These included:

- A commitment that the mELB will remain available for the next two years, and other TC-4 access bundles will not be withdrawn except after consultation with access seekers and giving 12 months’ notice.
- A commitment that any replacement access bundle would provide at least equivalent value to a withdrawn bundle product.
- Maximum price and minimum CVC inclusions for each of its TC-4 bundle products to be specified in a two year pricing roadmap that is to be periodically updated so that it never provides less than 12 months forward visibility.

- A commitment that periodic reviews of the pricing roadmap will not unwind price caps and CVC inclusion floors that have already been specified for a given period under an existing roadmap.
- A commitment to implement standard rules around introduction, variation, withdrawal, suspension, and extension of its various discounts, credits, rebates and waivers.

Stakeholder submissions

Some submissions raised concerns about the sufficiency of the pricing roadmap as it related only to the TC-4 access bundles, which could become of limited relevance should NBN Co choose to implement price changes via other forms of short term discounts.⁹ Macquarie also noted that the roadmap only provides certainty regarding the TC-4 access bundles for 12 months, which is insufficient by industry standards.¹⁰

Telstra also expressed concerns about the potential for NBN Co to act inconsistently with the pricing roadmap in responding to a regulatory event. Telstra also expressed concern that, other than for the mELB, the initial Bundles Roadmap that NBN Co provided to access seekers for comment provided price caps and inclusions up until May 2022 only.¹¹

Several RSPs continued to express the view that more fundamental reforms would be needed to fully address their certainty concerns, indicating that the complete removal of CVC pricing would be needed to provide sufficient certainty to RSPs in framing their retail offers.¹²

NBN Co responded to these views in a number of ways. It has increased the scope of the pricing roadmap that it will initially issue in December 2020 so that it will also provide for a price cap on CVC overage for all TC-4 bundles of \$8 per Mbps for a two year period.¹³

NBN Co has also provided a commitment to consult with access seekers before amending a pricing roadmap, and to complete the first such review so a revised pricing roadmap can be issued in April 2021 for the following two years. NBN Co has indicated that as part of this review, it will consider access seeker views on prices and inclusions for the TC-4 bundles, as well as their concerns over CVC pricing more generally. Further, the review will also serve as a reset of the CVC price cap that applies under the SAU.¹⁴

Finally, NBN Co has provided further commitments that reduce its ability to change these commitments in response to a regulatory event.

ACCC views

As noted in many of the submissions we have received, uncertainty over future pricing has significant implications for competition and efficiency in NBN markets. This is because access seekers would need to mitigate the risk of significant increases in their access costs by withholding value from their retail offers and/or incurring the cost and disruption of flowing through higher retail prices to its customer base. Given the overall significance of access

⁹ Commpete, *Submission to the ACCC consultation paper*, 11 September 2020, p. 2; Macquarie Telecom, *Submission to the ACCC consultation paper*, 11 September 2020, p. 2.

¹⁰ Macquarie Telecom, *Submission to the ACCC consultation paper*, 11 September 2020, p. 2.

¹¹ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, pp. 3–4.

¹² Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 14; Optus, *Submission in response to ACCC consultation paper—Inquiries into NBN access pricing and wholesale service standards (Submission to the ACCC consultation paper)*, September 2020, p. 4; Vocus, *Response to NBN Co's WBA4—Pricing & service proposals: ACCC inquiries into NBN access pricing & wholesale service standards (Submission to the ACCC consultation paper)*, September 2020, p. 1; TPG, *Submission to the ACCC consultation paper*, 11 September 2020, p. 1; Aussie Broadband, *Submission to the ACCC consultation paper*, 11 September 2020, p. 3.

¹³ NBN Co, *Supplementary submission to the ACCC consultation paper*, 23 October 2020, p. 2.

¹⁴ NBN Co, *Supplementary submission to the ACCC consultation paper*, 23 October 2020, pp. 2–3.

costs, uncertainty over them also has the potential to discourage firms from entering markets or cause them to exit.

We consider that the TC-4 bundle price caps and CVC inclusion floors to be implemented by way of the pricing roadmaps will serve as important safeguards to reduce uncertainty and risk for RSPs. Although the initial roadmap will only cover until May 2022, we note NBN Co's commitments to consult with access seekers ahead of each review, and to take into consideration the views of access seekers in an extended pricing roadmap to be issued by no later than April 2021.

Although there will be a high degree of certainty over key aspects of NBN Co's pricing during WBA4, the revised access arrangements do not provide a direct prohibition on NBN Co effectively reverting to a heavy reliance on short term discounts. The underlying concerns we have previously stated on the use of discounts as the primary means of implementing its products and pricing remains in the longer term. This is contrary to the initial intention of the SAU, which was intended to provide a high degree of long term certainty of NBN Co's products and pricing.

In this regard, we consider that the potential benefits of NBN Co having an opportunity to trial revised pricing arrangements ahead of making longer-term pricing commitments needs to be balanced against the potential for this flexibility to be abused to in effect supplant the certainty measures NBN Co has itself proposed in this inquiry. If the latter were to occur, it would likely have implications for our approach to this issue in any future regulatory reviews.

We also note that the SAU requires NBN Co to review the CVC price on an annual basis once the NBN rollout reached a specified coverage metric, which was met in late 2019.¹⁵ This review is to be done with a view to reducing the CVC price as aggregate demand for CVC increases, having regard to the level of aggregate demand and corporate plan information. This pending CVC price review (which NBN Co has indicated it will undertake shortly) will provide a further opportunity for NBN Co to provide longer-term certainty over its intentions regarding its pricing of CVC.

On the question of the removal of CVC altogether, we note that we had indicated early in the inquiry we were not likely to consider this measure in this inquiry.¹⁶ Although the removal of CVC would have the potential to provide more certainty over access costs, the manner of implementation of any such initiative would likely require careful consideration against the regulatory framework relevant to NBN Co. The pending consultation over the pricing roadmap and CVC price cap review that NBN Co has announced will provide a further opportunity for NBN Co and RSPs to develop their respective positions on this issue.¹⁷

3.3. Other pricing related access terms

April position paper

The other price related access arrangements raised in our April position paper were:

- the reasonableness of a \$5 charge for service transfers and re-activations
- the complexity of NBN pricing, such as, with CVC utilisation conditions
- pricing of a voice only access product.

¹⁵ NBN Co Special Access Undertaking, December 2013, Clause 1C.4.3(d).

¹⁶ ACCC, *ACCC inquiry into NBN access pricing*—Discussion paper, 14 October 2019, p. 42.

¹⁷ NBN Co, *Supplementary submission to the ACCC consultation paper*, 23 October 2020, p. 3.

In relation to service transfer and reactivation charges, NBN Co had reduced its service transfer charge from \$22.50 to \$5.00 in response to strong concerns that access seekers had expressed earlier in our inquiry. NBN Co had however made this reduction time limited, and so in our April paper we indicated that the \$5.00 charge appeared reasonable to apply over an extended period. In this regard, we did not consider that a strong case had been made on competition and efficiency grounds for this charge to be set at zero.

On CVC utilisation conditions, changes introduced by NBN Co early in 2020 had simplified the conditions that applied in determining whether an access seeker was liable to pay the additional charge. With this change, the penalty would apply should an access seeker use more than 95 percent of its purchased CVC capacity in more than 30 hours in a 30 day period.

However, we noted that the method of calculating the additional charge was not straightforward, and different penalty amounts could apply between access seekers depending upon the amount of CVC that has been purchased and the mix of speed tiers acquired.

On the need for a cheaper voice only product, we indicated that we would be interested in first reaching a view on the particular customer cohorts for whom a mobile service would not represent a viable voice product given that many consumers have already moved to mobiles for all of their voice calls, and there was potential for more to do so. We were also interested in hearing whether targeted assistance would be made available to the relevant cohorts for whom mobiles would not provide suitable support.

August Consultation paper

In our August consultation, we sought views on whether an extension of the \$5 charge for service transfers should be accompanied by a service re-activation charge also set at \$5. This re-activation charge had been set at zero.

Stakeholder submissions

We received a number of submissions concerning the application of a \$5 charge for service re-activations. These charges relate to the re-activation of a cancelled service at a premise connected to the NBN. TPG was concerned that a re-activation charge is not justified, and would represent a new charge on every sale made by RSPs.¹⁸

Commpete expressed concern over how these charges would be applied in practice, and Macquarie indicated that applying these changes in some cases could limit some aspects of its retail offers.¹⁹

Telstra sought the introduction of a \$10 voice-only product as the unsustainable margins that it currently faces on voice-only services put the long-term interests of customers who value these services at serious risk.²⁰

ACCAN agreed that NBN Co's method for calculating additional charges for exceeding the 95 per cent CVC utilisation condition seems very complex.²¹

NBN Co clarified the activities that attract the re-activation charge, and the activities it would treat as a subsequent installation, and noted that it would not impose an event-based charge

¹⁸ TPG, *Submission to the ACCC consultation paper*, 11 September 2020, p. 1.

¹⁹ Commpete, *Submission to the ACCC consultation paper*, 11 September 2020, p. 4; Macquarie Telecom, *Submission to the ACCC consultation paper*, 11 September 2020, pp. 2–3.

²⁰ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 15.

²¹ ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 7.

for re-activations that required a truck roll with the flat charge of \$5 per re-activation in place. NBN Co also indicated it would waive the charge in certain circumstances for the first 12 months. NBN Co also noted the benefit of aligning service transfer and re-activation charges in terms of a more efficient process where consumers switch retail provider.²²

ACCC views

We consider that it would be reasonable to apply a \$5 charge for service transfers, as well as for service re-activations. This small charge provides a modest price signal for access seekers not to use transfer or re-activation processes excessively, and allows NBN Co to recover the small costs it would likely incur on average in supporting service transfers and re-activations. Further, alignment of these charges will lead to better practices in retail markets. We consider that unlike the previous \$22.50 fee for transfers, a \$5 charge is unlikely to impede competition given consumers will stay with an RSP for a year or longer.

We remain of the view that the method of calculating the additional charge that is payable when the CVC utilisation conditions are not met is overly complex. We are also of the view that quite significant penalties could potentially apply under these arrangements. This is because it in effect requires an RSP to forgo all “discount amounts” they would otherwise have been entitled to receive in respect of services supplied over the relevant CVCs.

That said, NBN Co has advised us that it works with RSPs to ensure these charges can be avoided and so they are rarely levied in practice. RSP submitters also did not highlight the CVC utilisation charges as an issue in response to our August consultation paper. Consequently we do not consider that we need to vary these arrangements at this time. However, we would be willing to revisit this in a future review if these charges were then of greater significance to access seekers.

In relation to the proposition that a cheaper voice-only service be provided, we consider that a basic mobile service would be a suitable substitute for most segments of the retail voice market. These services are available at low prices. We also note that there are NBN voice products in the market at prices that are broadly similar to those that existed on the copper network, including via national brands.²³ Further, should pricing changes be required to support access to voice only services, such as for those consumers unable to access a mobile service due to coverage or demographic factors, we think this would be best achieved via targeted government assistance.

²² NBN Co, *Supplementary submission to the ACCC consultation paper*, 23 October 2020, pp. 12–13.

²³ For example TPG offers a 10GB 12/1 plan including phone line at \$29.00 per month with pay as you go calls, or call plan add-ons starting at \$10 per month.

4. ACCC consideration of the price related access arrangements against the statutory assessment framework

This section provides our assessment of the price related access arrangements discussed above having regard to the matters set out in the statutory framework that we are required to apply when considering regulated access arrangements. These access arrangements include the reduced pricing for the mELB, the additional measures to promote pricing certainty and the application of a \$5 charge for service transfers and activations.

As part of this analysis, we have contrasted the situation with the proposed price-related access arrangements with the situation where the current price related access arrangements were to remain in effect. This allows us to assess more directly the incremental impact of proposed price related measures. We do not have a legislative role in approving the proposed commercial arrangements. Rather, we are considering the proposed arrangements in the context of the position that we reached in the April position paper, where we set out the price-related access arrangements we considered should be made available, having regard to the relevant statutory matters.

We have focused this analysis on a two-year timeframe, which, as noted in section 3 above, is the timeframe for the completion of the migration of legacy products to the NBN and is consistent with the approach that is taken for commercial access agreements. Other developments may also occur in this dynamic market, so we do not consider it appropriate to extend the analysis to a longer timeframe. We have included wholesale and retail markets for broadband within its scope.

The assessment framework that we have applied is set out in full in Appendix A. We have considered the proposed access arrangements against each of these matters. The following discussion focuses on the application of the assessment framework to certain matters that we consider would benefit from additional explanation.

4.1. Long-term interests of end-users

In considering how the proposed price-related access arrangements promote the LTIE, we consider the likely effect that they will have on the promotion of competition in relevant markets, the achievement of any-to-any connectivity and the encouragement of the economically efficient use of, and investment in, relevant infrastructure.

Promoting competition

The proposed mELB price terms are likely to promote competition by reducing access costs to a level that allows retail service providers to supply basic speed retail broadband at an attractive price, thereby expanding the range of retail broadband products and providing a further source of price and quality differentiation in retail broadband markets.

It is likely that this competition will extend across retail broadband markets more generally, and would not be limited to the segment for entry-level products. This is because more keenly priced entry-level products should also prompt a competitive response by a range of RSPs that offer higher speed broadband.

Competition will also be promoted by the proposed measures that provide additional certainty over access prices over time. These measures are likely to reduce risks faced by RSPs and allow them to make more competitive retail offers.

Both sets of measures should also reduce barriers to entry, making entry by efficient retailers more likely. Reducing NBN transfer charges for the next two years (to \$5 per transfer) will also strengthen competition including via new entry, as retail service providers will not face a significant transfer charge when gaining an existing NBN service. We note that addressing these barriers to entry will become more important as other impediments to efficient firms entering the market reduce in the medium term with the end of the NBN scale build, as the significant cost and complexity of managing NBN connection and migration processes become less prevalent.

On the other hand, there is potential for the \$5 service re-activation charge to limit some aspects of RSPs retail product offers, such as offering temporary service suspensions without charge. However, we do not consider that such retail product features are likely to provide a significant point of product differentiation or that a small charge would significantly impede these features remaining in market for those customers for which they would provide value.

We note that the proposed price related access arrangements could also have implications for competition from wireless substitutes in wholesale and retail markets. Such competition remains at an early stage in its development. In this regard, lower mELB prices will mean that suppliers of wireless broadband products that compete with the NBN could also need to sharpen their wholesale and retail offers.

At the same time, since the mELB pricing will allow for the continuity of retail ADSL price and quality, wireless products would only need to represent similar value as legacy ADSL products in order to be competitive in the entry-level retail broadband segment.

Any-to-any connectivity

The proposed price related access arrangements will not have a direct effect on realising any to any connectivity. That said, the arrangements may have a small indirect influence to the extent that more competitive broadband markets lead to consumers connecting to a more reliable communications network.

Efficient use of and investment in infrastructure

The proposed price related access arrangements should encourage the efficient use of the NBN infrastructure that is in place by helping to encourage greater take-up of entry-level services on the network, and for customers to migrate to and remain on the network. Over time, this should also lead to greater use of and investment in NBN infrastructure as the needs of these customers change and they take up higher speed services.

The broader pricing certainty measures will further encourage efficient use of the NBN by reducing uncertainty over future access costs and thereby facilitate access seekers to develop more efficient retail broadband products.

The proposed access arrangements may bring forward additional demand for CVC capacity. In the short term, the extent of any such additional investment will depend upon the level of demand growth that NBN Co had already factored into its immediate investment plans, and the amount of idle capacity it has available from previous investments.

The proposed access arrangements will not impede this investment occurring efficiently, i.e., on an as needed basis as demand grows over time. This is because NBN Co is still able to recoup its investment from RSPs, with NBN Co retaining a degree of flexibility over the pricing of higher speed access within the constraints of the price anchoring effect of the mELB and the pricing certainty measures. This means that when end customers require

higher speeds than those offered on legacy services, NBN Co can earn higher access fees to recoup the additional investment in the network that is needed to supply such services.

The proposed access arrangements are also expected to encourage access seekers to make efficient investment in their networks and products. Access seekers will most directly experience an improved margin and/or scale economies through higher end user demand when supplying entry level retail products that will improve their ability to recover their investments. The pricing certainty measures will also provide greater predictability of wholesale pricing outcomes that will help promote investment to support retail broadband services dependent on these wholesale prices.

4.2. Legitimate business interests

We consider that the new price-related access arrangements do not undermine NBN Co's legitimate business interests. They are in line with commitments that NBN Co made in providing the SAU that end customers should not be worse off on transitioning to the NBN, and simplifying and providing greater certainty over future price paths will address sources of inefficiency in retail broadband markets from which NBN Co also stands to gain.

We acknowledge that the mELB pricing commitment will limit the revenues that NBN Co can earn from entry level retail products, although NBN Co will also benefit from more connections to its network than otherwise, potentially better setting it up for improved revenues over the longer term. The price related access arrangements also still allow NBN Co some flexibility to recover more of its costs from its highest speed plans where these are offered in a way that provides additional value to the end-user.

4.3. Interests of all persons who have a right to use the declared service

We consider that the proposed price related access arrangements will lower the costs and/or improve the quality of NBN access services, both directly and via the anchoring effect on other products. Similarly, the new access arrangements that simplify and promote certainty over future pricing better support access seekers to compete on their merits in retail broadband markets by mitigating a significant source of risk. This should enable these access seekers to improve their margins on the sale on NBN products and further improve the price or quality of their NBN retail offers to improve their competitive position in retail markets.

4.4. Direct costs of providing access

Based on its annual report financial data, NBN Co direct costs of providing access amounted to \$6,685 million in 2019–20.²⁴ This measure includes the costs of providing access across all of its access networks and traffic classes.

We consider that the proposed price related measures are unlikely to increase the direct costs of providing access, and may militate against cost increases by encouraging greater cost efficiency. Nor do we consider these arrangements will impede NBN Co from recovering its direct costs of access to a significant extent, or lead to NBN Co over recovering these costs.

On the one hand, NBN Co still retains a high degree of flexibility in its pricing so as to increase demand and so the revenues from which it can recover its direct costs of providing access. The more efficient use of service transfer and reactivation processes, and more

²⁴ NBN Co, *NBN Co Annual Results 2020*, p. 58. We have determined these as the sum of operating expenditure (\$2,071 million), depreciation and amortisation (\$3,154 million) and net financing costs (\$1,460 million).

competitive retail markets, will also assist in the efficient recovery of these costs, and the introduction of the re-activation charge will offset reduced revenues from the reduced service transfer charges.

On the other hand, the revised mELB prices are around \$4 per month below the access charges that NBN Co had previously announced for that product, and the charges for higher speed products could potentially be constrained by lower mELB charges to some extent.

However, we note that demand for the mELB currently represents a small proportion of total demand, and so the immediate effect of the pricing changes on NBN Co's revenues should be limited. Further, as NBN Co nominated the mELB pricing for consideration, this implementation is likely to represent the implementation of a pricing arrangement that would address the competition and consumer issues that have been the subject of the inquiries while keeping revenue impacts to a minimum.

4.5. Value of extensions or enhancements borne by someone else

We do not consider that the proposed price related access arrangements will have a significant bearing upon extensions or enhancements of capability whose cost is borne by others.

4.6. Safe and reliable operation

The proposed price related access arrangements are unlikely to have a direct or indirect effect that would compromise the safe or reliable operation of the NBN.

4.7. Economically efficient operation

The revised mELB and other price related access arrangements are likely to better accord with end customers' willingness to pay for entry-level broadband products, and therefore provide improved incentives for NBN Co to produce at least cost and expand the provision of services to these customers. This also applies for those higher bandwidth products on which the mELB will have an anchoring effect.

4.8. The proposed access arrangements and NBN-specific restrictions

We do not consider that there would be a legislative restriction on us making an access determination should we consider that step necessary in order to implement the proposed price-related access arrangements in the future. Specifically:

- The proposed price related access arrangements do not prevent NBN Co from engaging in conduct that is reasonably necessary to achieve national uniform pricing of eligible services to its customers. The mELB price terms or other price related access arrangements are not specified on a geographically differentiated basis, and it similarly remains open for NBN Co to price its other services, including services supplied over its wireless access networks, and higher speed or other traffic class services, in such a manner to support the objective of national uniform pricing.
- The proposed price related access arrangements do not discriminate between access seekers, as the measures are available to all access seekers. Nor is it the case that these arrangements would be likely to have different impacts or outcomes for different access seekers despite them being expressed in a uniform manner.

Part B—NBN Co’s service standards proposals

5. Discussion of service standards in NBN Co’s proposed access arrangements

The chapter discusses each of the key topics that the ACCC has considered over the course of the NBN wholesale service standards inquiry. It discusses the ACCC’s previous consideration of each topic, our position paper and draft FAD, NBN Co’s proposals for WBA4 made in response to the draft FAD, submissions from stakeholders and our final views on those matters.

In chapter 6 of this report, we discuss NBN Co’s proposed access arrangements in the context of the position we reached in our position paper and terms included in the draft FAD, and having regard to the statutory framework for considering regulated access terms. Our consideration of NBN Co’s proposed arrangements does not necessarily reflect a view on all access terms offered by NBN Co, or on the service standards offered by NBN Co over the term of WBA4 should market conditions change. We will continue to monitor the effectiveness of the service standard framework to ensure it meets the LTIE.

5.1. Connections and faults

Failed connections

Failed connections are new connections that do not function as expected after being confirmed by NBN Co as being successfully completed. Where the service has no functionality after connection it is currently classified as a ‘new service never worked’ (NSNW) fault type.

Position paper and draft decision

In the position paper and draft decision we considered that NBN Co should only confirm to the access seeker that a connection is complete, and begin charging for that service, after conducting appropriate testing to ensure installation activities are successful. In the position paper we also acknowledged that for some network technologies certain actions will be required from other parties before NBN Co can perform installation testing and that some flexibility would be required for the implementation of the general rule.²⁵

August consultation

In August we sought views on NBN Co’s proposal to refund charges to RSPs when a new service does not work after it is initially connected. The refund would be applied on a pro-rata daily basis and will apply from the date a connection order is completed until the date the fault is rectified. To be eligible for the rebate, an RSP must also raise a trouble ticket with NBN Co about the failed connection within 20 business days of the end user connection being completed.

²⁵ ACCC, *NBN Wholesale Service Standards Inquiry—Draft Decision (WSSI Draft decision)*, 1 October 2019, pp. 21–22. ACCC, *NBN Wholesale Service Standards Inquiry – Position paper (WSSI Position paper)*, 2 April 2020, pp. 5–6.

We noted that the proposed failed connection rebate should ensure that NBN Co is not charging for new services that are not actually functioning. We also noted that NBN Co's proposal did not include new installation processes that would result in fewer failed connections in the first place, however NBN Co has indicated that it would be investigating the introduction of automated testing to reduce failed connection issues.²⁶

Stakeholder submissions

Most stakeholders were generally supportive of NBN Co's proposal to address failed connections.²⁷ While they noted that the proposal didn't fully address the principle put forward by the ACCC, it was reasonable to the extent that RSPs should not be charged for a service that is not yet operational. Optus and Vocus also sought some further clarity around how the rebates would operate in practice and Telstra argued that a connection rebate should also apply in these instances.

TPG welcomed the extension of the proposed time for RSPs to raise a trouble ticket with NBN Co to 20 business days²⁸, while Optus considered that 90 business days would be more appropriate.²⁹ Other stakeholders did not comment specifically on the number of days allowed to raise a trouble ticket.

Telstra and TPG acknowledged and supported NBN Co's proposal to consult with RSPs in the 2020-21 financial year on the potential introduction of automated testing to reduce failed connection issues.³⁰

ACCC views

Having considered the issues raised in submissions to the consultation paper, the ACCC remains of the view that NBN Co's proposal regarding failed connections, which responds to our position in the draft FAD, is reasonable. We note that NBN Co's proposal does not include any additional processes to ensure installation activities are successful before they start charging, but consider that the rebate is a pragmatic solution given some of the current complexities with testing. We also welcome NBN Co's commitment to consult with RSPs shortly regarding further testing processes.

We note the concerns raised by Optus regarding the number of days to raise a trouble ticket. We understand that for some end-users with a working legacy service, the end-user is required to plug in their modem in order for activation of their NBN service to be finalised. This means there may be some time before the end-user plugs their modem in and a NSW fault is known. We consider that NBN Co's proposal to allow 20 business days is an improvement on previous proposals and should provide sufficient time for most scenarios. In the event that an end-user has not yet plugged in their modem to test the service, the 20 business day timeframe should allow adequate time for RSPs to be alerted to the fact that the modem has not yet been plugged in and for them to contact the end-user to discuss. Therefore, on balance, we consider the timeframe is likely to be reasonable.

²⁶ ACCC, *ACCC inquiries into NBN access pricing and wholesale service standards—Consultation paper (Consultation paper)*, 20 August 2020, p. 18.

²⁷ ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 11, Aussie Broadband, *Submission to the ACCC consultation paper*, 11 September 2020, p. 3, Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 17, TPG, *Submission to the ACCC consultation paper*, 11 September 2020, p. 4, Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 4.

²⁸ TPG, *Submission to the ACCC consultation paper*, 11 September 2020, p. 4.

²⁹ Optus, *Submission to the ACCC consultation paper*, September 2020, pp. 9–10.

³⁰ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 17. TPG, *Submission to the ACCC consultation paper*, 11 September 2020, p. 4.

Delayed connections and unresolved faults

NBN Co's wholesale arrangements include service level commitments and timeframes for connecting premises to the NBN and for rectifying service faults. These timeframes depend on matters including location and technology type.

Position paper and draft decision

The structure and level of rebates in cases where NBN Co does not meet its service level timeframes for connections and service faults has been considered throughout the ACCC's inquiry and has been subject to extensive consultation.

In the position paper, we considered that daily rebates provide more effective incentives for NBN Co to connect services promptly and rectify faults in a timely manner. We also considered these rebates must balance the need to strengthen the financial incentive on NBN Co by increasing its rebate liability, while not being disproportionately or unnecessarily onerous.³¹

In principle we considered that rebates should accrue on a daily basis where the relevant service level is not met. We also considered rebates for delayed connections should apply to all standard connections (including where the service level is one business day).³² Proposed draft FAD terms included the following rebates:

- a connection rebate of \$13.50 per business day for each missed connection service level, up to a cap of 20 business days, and
- a fault rebate of \$20 per business day, escalating to \$30 per business day after 5 business days, up to a cap of 40 business days.³³

August consultation

In August we consulted on NBN Co's proposed rebates for delayed connections and unresolved faults that accrue on a daily basis (subject to rebate caps):

- For delayed connections the daily rebate is \$7.50 per business day for non-priority assistance customers and \$10 per business day for priority assistance customers, capped at 30 business days.
- For unresolved faults the daily rebate is \$15 per business day for non-priority assistance faults and \$20 per business day for priority assistance faults, capped at 60 business days.

We also sought stakeholder views on NBN Co's proposal to extend rebate eligibility to AVC TC-2 services designed for business applications, and automatic payment of rebates, without a requirement for RSPs to submit claims where NBN Co misses a service level.³⁴

We noted that although the quantum of NBN Co's proposed rebates are below what we set out in the draft decision and position paper, NBN Co has proposed to apply the rebates to AVC TC-2 services which would extend the application of daily rebates to business grade services. We also noted that the quantum of the fault rebate is similar to the Customer Service Guarantee (CSG) rebate for residential customers that applies for the first five

³¹ ACCC, *WSSI Position paper*, 2 April 2020, p. 7.

³² ACCC, *WSSI Position paper*, 2 April 2020, pp.8-9. ACCC, *WSSI Draft decision*, 1 October 2019, pp. 30–32.

³³ See clauses 3 & 4, Schedule 2 of the draft FAD—NBN Wholesale Service Standards Inquiry

³⁴ ACCC, *Consultation paper*, 20 August 2020, p. 19.

business days (\$14.52), and that only a small proportion of faults remain unresolved after five business days.³⁵

Stakeholder submissions

Stakeholders generally focused on the rebate quantum, how the amounts compared against those previously proposed by the ACCC and their structure.

TPG, Vocus and Telstra provided support for a daily connection rebate.³⁶ Telstra considered that the rebates, although lower than those proposed by the ACCC, are a substantial improvement on that proposed by NBN Co to date during the commercial negotiation process.³⁷

However, not all submissions supported the rebate quantum or structure. ACCAN, the TIO and Optus considered the rebate amounts to be insufficient to adequately compensate consumers. Similarly, both ACCAN and the TIO did not support the rebate cap.³⁸ Optus went further and submitted that the consultation paper did not provide clear reasons for the ACCC's changed view on supporting the lower rebate amounts. However, Optus also submitted that connection issues are likely to become less common as the NBN rollout has neared its completion, in which case, revisiting the connection service level timeframes may not be appropriate at this late stage of the WBA4 negotiation process.³⁹

NBN Co considered that its overall WBA4 package provides stronger incentives to meet its service standards for connections with the implementation of the new daily rebate rather than a one off payment, and the fact that it now covers accelerated connections and TC-2 AVC services.⁴⁰

In the case of unresolved faults, Telstra, ACCAN and TPG agreed with the introduction of a daily fault rectification rebate.⁴¹ However, both ACCAN and Optus preferred the rebate framework proposed by the ACCC.⁴²

NBN Co submitted that although some of the rebates proposed in the WBA4 are lower than those proposed by the ACCC during the inquiry, it has invested in other areas which will reduce costs for RSPs, improve end-user experience and thereby deliver longer term benefits.⁴³

ACCC views

Having considered the views of submitters, we remain of the view that NBN Co's proposed rebate framework for both delayed connections and unresolved service faults are reasonable. More specifically, we consider that the rebates provide an appropriate balance

³⁵ ACCC, *Consultation paper*, 20 August 2020, pp. 18–19.

³⁶ TPG, *Submission to the ACCC consultation paper*, 11 September 2020, p. 5; Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 4; Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 17.

³⁷ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 17.

³⁸ ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 12; TIO, *Submission to the ACCC consultation paper*, 11 September 2020, p. 2; Optus, *Submission to the ACCC consultation paper*, September 2020, pp. 11–12.

³⁹ Optus, *Submission to the ACCC consultation paper*, September 2020, p. 12.

⁴⁰ NBN Co, *Submission to the ACCC consultation paper*, 11 September 2020, pp. 2, 3, 12.

⁴¹ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 17; ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 12; TPG, *Submission to the ACCC consultation paper*, 11 September 2020, p. 5.

⁴² ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 12; Optus, *Submission to the ACCC consultation paper*, September 2020, pp. 12–13.

⁴³ NBN Co, *Submission to the ACCC consultation paper*, 11 September 2020, p. 12, NBN Co, *Supplementary submission to the ACCC consultation paper*, 23 October 2020, pp. 5–7.

between providing incentives on NBN Co to complete these activities in a timely manner without being disproportionate or unnecessarily onerous.

Under the proposed rebate amounts, combined with the move from one-off payments to daily rebates, NBN Co is likely to face significantly higher financial consequences for late connections and faults compared to current arrangements under WBA3. As noted throughout the inquiry, and particularly in our position paper, changing the rebate structure to daily rebates will provide effective incentives on NBN Co to rectify service level faults and connection delays even after the target timeframe has been missed.

Although rebate amounts are generally lower than those we recommended in our draft FAD, we consider that this proposal should achieve our intended objective of providing NBN Co with proportionate financial incentives to meet expected service standards. We note that the proposed service fault rebate of \$15 is comparable to the first tier of fault rebates under the CSG. While the proposed connection rebate is less than the rebate we proposed in our position paper, the issue of late connections is likely to diminish in significance with the end of the rollout.

It is also important to note other related aspects of NBN Co's proposals under WBA4. This includes extending the coverage of rebates to include TC-2 service. We consider this is a significant outcome for business customers. NBN Co is also committing to investigate and rectify a wider range of service issues through the performance incident framework and introduce additional commitments on remediation (or network activity), including the new PIR objective rebate (discussed further below), than we had proposed in the draft FAD.

5.2. Missed appointments

A missed appointment refers to a situation where an NBN Co technician does not attend an end-user's premises at the agreed appointment time, within the agreed appointment window or within a specified time thereafter.⁴⁴

Position paper and draft decision

In the position paper and draft decision we considered that, as a general principle, missed appointment rebates should take into account the cost and inconvenience to the end-user when NBN Co missed an appointment, while at the same time provide a strong incentive for NBN Co to reduce the rate of missed appointments.

We also acknowledged the inconvenience of missed appointments to end-users and the limited scope for an RSP to ameliorate the impact. As such, we considered it appropriate for NBN Co to pay a rebate for missed appointments and for RSPs to pass-through the rebate to affected end-users.⁴⁵

August consultation

In August we sought stakeholder views on NBN Co's proposed access arrangements for missed appointments by an NBN technician. These include a missed appointment rebate of \$50 for the first missed appointment, and \$75 for each subsequent rescheduled missed appointment and, a reduction of the rebate amount by 50 per cent where it attends the appointment on the same day with the end-user's consent, despite missing the appointment

⁴⁴ See NBN Co, WBA Ethernet Product Module, Service Levels Schedule, sections 2 and 10. This relates to those appointments that are not rescheduled appointments. The performance objective for rescheduled appointments is 95 per cent. (taken from the position paper, p. 9, <https://www.accc.gov.au/system/files/NBN%20Wholesale%20Service%20Standards%20Inquiry%20-%20Position%20paper%20-%20April%202020.pdf>).

⁴⁵ ACCC, *WSSI Position paper*, 2 April 2020, p. 11. ACCC, *WSSI Draft decision*, 1 October 2019, pp. 34–36.

window for the service level. In line with other rebates, NBN Co also proposed to pay the rebate automatically without requiring the RSP to submit a claim for it.

We noted that while NBN Co's proposed access arrangements for the first missed appointment is less than the \$75 amount proposed in the draft decision, it compensates consumer detriment to a greater degree than the current \$25 rebate. We also considered that NBN Co's proposed access arrangements provides a new incentive to attend missed appointments on the same day when the consumer consents, which is likely to be a more convenient outcome for end-users. We considered that while this option adds some complexity, it could also result in better outcomes for end-users. Consistent with the draft decision and position paper, NBN Co had also agreed to automatic payment of rebates and to require RSPs to take reasonable steps to ensure that they pay or credit missed appointment rebates to the relevant consumer.⁴⁶

Stakeholder submissions

Stakeholders generally focused on the rebate quantum and tiered structure, the new processing commitments in the case of a rescheduled appointment and the ability for NBN Co to reduce the rebate amount by 50 per cent if a scheduled appointment is missed but attended later that same day.

Consistent with its submission to the draft decision, ACCAN submitted that the rebate for the first missed appointment should be increased to \$100. Vocus supported a \$75 initial missed appointment rebate⁴⁷, and Telstra submitted that the missed appointment rebate should align with the fee NBN Co charges if it attends a premises and an end user is not present.⁴⁸ Both ACCAN and TPG supported the tiered rebate structure on the basis that it would provide increased incentives for NBN Co to prevent subsequent missed appointments.⁴⁹ This view was somewhat shared by Commpete, who submitted that an increase to the subsequent missed appointment rebate (from \$25 to \$75) partially addressed concerns but could not be traded against value delivered elsewhere in NBN Co's proposal.⁵⁰

TPG and Telstra both provided support for the 50 per cent reduction if NBN Co is able to attend the appointment on the same day as long as the customer consented.⁵¹ This view was not shared by Optus. It considered that there was insufficient detail provided to explain how the rescheduled missed appointment process would operate and how it could be implemented.⁵²

NBN Co set out more detail about how the rescheduled missed appointment process would work in their supplementary submission. NBN Co did not comment directly on the rebate amounts or their tiered structure in their submission, however, it considered it is appropriate that the full monetary value of this rebate is passed onto the end user.⁵³

⁴⁶ ACCC, *Consultation paper*, 20 August 2020, p. 20.

⁴⁷ Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 4.

⁴⁸ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 17.

⁴⁹ ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 13; TPG, *Submission to the ACCC consultation paper*, 11 September 2020, p. 6.

⁵⁰ Commpete, *Submission to the ACCC consultation paper*, 11 September 2020, pp. 5–6.

⁵¹ TPG, *Submission to the ACCC consultation paper*, 11 September 2020, p. 6; Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 17.

⁵² Optus, *Submission to the ACCC consultation paper*, September 2020, pp. 14–15.

⁵³ NBN Co, *Submission to the ACCC consultation paper*, 11 September 2020, p. 11, NBN Co, *Supplementary submission to the ACCC consultation paper*, October 2020, p. 11.

ACCC views

While we consider submissions raise important perspectives, we have decided to retain our views in the consultation paper for this matter and consider that, in the context of our position in the draft FAD, the access arrangements for missed appointments is reasonable. We consider that there are additional benefits offered to end-users in NBN Co's proposal as it will provide them with the option of having the technician attend later on the same day (if they consent). The escalating tiered rebate structure will also provide an incentive to NBN Co to not miss the same end-user's appointment on multiple occasions.⁵⁴

We note that most of the submissions raised concerns that had already been discussed throughout the inquiry, however, Optus and Telstra raised some new issues that are set out below.

In relation to Optus' concerns about the lack of details for the rescheduled missed appointment process, we note NBN Co has included further details on the procedures a technician would follow in cases when an appointment is missed. Based on this information, we consider that the risk of a poor experience in interacting with an NBN technician in relation to a missed appointment is low, and we consider that the process NBN Co has outlined is appropriate.

We note that, as the end-user must provide their consent for the technician to attend later on the same day, consumers are able to choose whether this is convenient or if the rebate is preferred. We consider this choice to be an improvement compared to the current wholesale arrangements as it would allow for an end-user's issues to be resolved more promptly (on the same day) rather than at a future point in time.

Telstra raised a new perspective on why the initial missed appointment rebate should be set to \$75 to align with the fee that NBN Co can charge an end-user when a technician attends and they are not present. We note NBN Co's scheduled charge to RSP's for missed appointments is \$75, but we understand that this fee is currently waived. We support NBN Co's waiver of this fee and encourage this to continue and, at minimum, ensure any fee it charges aligns with the rebate arrangements.

5.3. Underperforming service speeds

In the position paper and draft decision we considered that, as a general principle, NBN Co should be responsible for the speed and performance of its wholesale product and not charge for services that it does not provide. This principle was mainly directed toward fibre to the node, fibre to the building and fibre to the curb (FTTN/B/C) and fixed wireless technologies. We also considered that wholesale service level terms should include commitments in relation to NBN Co's provision of information on service speed, and where relevant, congestion.⁵⁵

FTTN/B/C services

FTTN/B/C services are generally defined by downstream peak information rates (PIRs) or overlapping PIR ranges (12 Mbps, 25 Mbps, 25-50 Mbps, and 25-100 Mbps) with a minimum speed commitment of either 12 Mbps or 25 Mbps depending on the technology and status of the line, known as the PIR Objective.

In addition to providing timely and accurate speed information, we considered that NBN Co should pay rebates for services that:

⁵⁴ ACCC, *Consultation paper*, 20 August 2020, p. 20.

⁵⁵ ACCC, *WSSI Position paper*, 2 April 2020, pp. 16-8. ACCC, *WSSI Draft decision*, 1 October 2019, pp. 41-46.

- have a maximum attainable speed of less than 50 per cent of the maximum speed specified by the wholesale speed tier (the 'speed performance rebate'), or
- are not capable of meeting the PIR Objective (the 'PIR Objective rebate').⁵⁶

August consultation

In August we sought stakeholder views on NBN Co's proposal with regards to the provision of additional speed performance information to RSPs via daily line rate report and weekly speed reports as well as the provision of a minimum assured speed (assured rate) for a line when an RSP places a connection order.

We consulted on NBN Co's proposal with respect to the FTTN/B/C underperforming speed rebate. Specifically, where speed performance information is not available to the RSP, or that information proves to be inaccurate, a one-off \$20 rebate will be paid to the RSP if the line achieves lower than 50 per cent of the maximum speed in the speed range profile selected by the RSP. NBN Co did not propose a pass-through requirement for this rebate on the basis that the purpose is to compensate the RSP for their costs of managing the customer in accordance with the ACCC Broadband Speed Claims Guidance.

In respect of the PIR Objective rebate, we sought stakeholder views on NBN Co's proposed graduated rebate for each month the service achieves less than the PIR Objective (downlink), depending on the number of months the service has been in remediation (\$10 for months 0–3, \$15 for months 4–6 and \$20 per month after 6-months). This rebate will also be paid automatically and backdated to the time the trouble ticket that initiated the remediation process was acknowledged.

We decided to consult on NBN Co's proposal because we regarded the additional service speed information as a significant improvement and one that could resolve speed information concerns for services that have been connected to the NBN. The minimum assured speed also served to clarify service speed commitments in our view.⁵⁷

We considered that where RSPs are able to make informed choices when purchasing wholesale service products with respect to line speed capabilities, remedies (such as the speed performance rebate proposed by the ACCC in the draft FAD and position paper) may not be appropriate where the service does not perform in accordance with the ordered product. We also noted that the one-off speed performance rebate proposed by NBN Co is the same amount as that proposed in the draft FAD and position paper, and that RSPs would be able to adjust wholesale service products that underperform.⁵⁸

In relation to the proposed PIR Objective rebate we noted that the rebate was initially less than the rebate amount proposed in the draft FAD and position paper, but accepted that the escalation would provide incentives to NBN Co to investigate and resolve remediation cases in a timely manner. In line with our position paper and draft decision, NBN Co also proposed automatic payment of the rebate, backdated to the time of trouble ticket acknowledgment.⁵⁹

⁵⁶ ACCC, *WSSI Position paper*, 2 April 2020, pp. 16–18., ACCC, *WSSI Draft decision*, 1 October 2019, pp. 41–46.

⁵⁷ ACCC, *Consultation paper*, 20 August 2020, p. 20.

⁵⁸ ACCC, *Consultation paper*, 20 August 2020, p. 21.

⁵⁹ ACCC, *Consultation paper*, 20 August 2020, pp. 20–21.

Stakeholder submissions

A number of stakeholders supported the provision of additional information relating to the speed performance of a service.⁶⁰ Optus also raised questions on the availability of line capability information for services in co-existence and readiness of the Dynamic SQ process.⁶¹ NBN Co responded that RSPs already receive the line capability for their services irrespective of the line's co-existence status (including the measured performance as well as the assured rate for services).⁶²

In terms of the fixed line speed performance rebate, Commpete considered it as not fit for purpose, not straight forward and not adequately supporting RSPs', consumers' or, the ACMA's or ACCC's expectations.⁶³ Other stakeholders, including Telstra, Optus and ACCAN, were however more supportive.⁶⁴

In its submissions NBN Co emphasised the benefits it has voluntarily offered in WBA4 that have not been subject to the public inquiries and, the fact that proposed WBA4 service level rebate amounts represent a significant step change from WBA3 where there was no rebate for underperformance.⁶⁵

Concerns about how NBN Co would handle speed performance rebates in practice were nevertheless raised.⁶⁶ In terms of the rebate quantum and structure, Vocus submitted that a flat rebate of \$20 for each month a service underperformed to be insufficient. It proposed a tiered approach so that higher speed tiers receive a higher rebate to compensate customers⁶⁷ while ACCAN argued for pass-through of the rebate in recognition of the inconvenience to the consumer.⁶⁸

Additionally, Telstra suggested a mechanism for acknowledging and tracking customers who are not receiving the service speed they expect.⁶⁹ Commpete proposed quarterly reporting around the NBN Assured Data rates available across NBN Co's network and the amount of rebate payments.⁷⁰

In terms of the PIR Objective rebate Telstra supported NBN Co's proposal. It considered the process for applying the PIR objective rebate to be complex but reasonable, and an improvement on that previously proposed by NBN Co, particularly in terms of the rebate commencement (from the time of trouble ticket acknowledgement rather than when the

⁶⁰ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 18. Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 5. ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 13.

⁶¹ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 18. Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 5. ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 13. Optus, *Submission to the ACCC consultation paper*, September 2020, pp. 16–19.

⁶² NBN Co, *Supplementary submission to the ACCC consultation paper*, 23 October 2020, p. 10.

⁶³ Commpete, *Submission to the ACCC consultation paper*, 11 September 2020, p. 5.

⁶⁴ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 18. Optus, *Submission to the ACCC consultation paper*, September 2020, p. 17. ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 14.

⁶⁵ NBN Co, *Submission to the ACCC consultation paper*, 11 September 2020, p. 1, NBN Co, *Supplementary submission to the ACCC consultation paper*, 23 October 2020, pp. 5–7.

⁶⁶ Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 5. Commpete, *Submission to the ACCC consultation paper*, 11 September 2020, pp. 5–6, Optus, *Submission to the ACCC consultation paper*, September 2020, pp. 16–19.

⁶⁷ Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 5.

⁶⁸ ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 14.

⁶⁹ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 18.

⁷⁰ Commpete, *Submission to the ACCC consultation paper*, 11 September 2020, p. 6.

service is put into remediation).⁷¹ Automatic application of the rebate was also welcomed by Vocus.⁷²

There were different views on the rebate quantum and structure. ACCAN agreed with NBN Co's proposed rebate structure but nevertheless preferred a flat rebate of \$20 a month on the basis that this would, in its view, represent a greater amount of compensation compared to NBN Co's proposed rebate.⁷³ Telstra considered that the escalating rebate structure provided an increased incentive for NBN Co to address services placed in remediation for extended periods.⁷⁴ However, Optus questioned the extent to which escalating rebates would provide an effective incentive, or actual benefit, given the low PIR commitments and vagueness of arrangements.⁷⁵

Optus also highlighted a number of processes that were still unclear in WBA4 drafting and related materials. These included the threshold criteria for accepting a fault ticket for PIR Objective underperformance and Network Activity (remediation), Service Health Summary measures (relevant to determining if the PIR Objective was being met), and the provision of updated line information once co-existence is removed. Additionally, it noted that NBN Co is not proposing to pay the PIR Objective rebate where it creates a remediation case (and a fault is not logged by an RSP). It proposed that NBN Co automatically log faults on TC-4 services where it is able to identify services that are underperforming against the PIR Commitment.⁷⁶

ACCC views

Overall we consider that NBN Co's proposal on speed information and rebates for fixed line services is likely to result in better information to RSPs, which will in turn allow more informed choices for their customers. Having regard to the position we reached in our draft FAD, we consider that this proposal is appropriate in the current market conditions.

The timely provision of line capability information (measured performance and assured rate) is a significant improvement on current arrangements and should assist to clarify NBN Co's service speed commitments as well as support RSPs in their purchase and marketing decisions. Having the assured rate available at the time a customer signs up to a new service will allow the RSP to advise the customer on suitable products given the capability of the line and customer preferences. It will also assist in a closer alignment of consumer expectations with service performance, which should result in better end-user outcomes.

The proposed rebate for underperforming services appropriately places responsibility on NBN Co to provide reliable information about service speeds at the time an RSP is seeking to make a connection order. Where RSPs are unable to make an informed choice because speed information is not provided or proves inaccurate and the service has a speed of less than 50 per cent of the maximum speed in the speed bandwidth profile purchased by the RSP, a one-off rebate of the same quantum to that proposed by the ACCC in the draft FAD and position paper applies.

We consider these arrangements will appropriately allocate responsibility between RSPs and NBN Co for ensuring end-users are signed up to speeds and plans that can be supported by the line capability. If the need for a rebate arises, it is because a customer is not on the right plan, and once the situation has been rectified there should not be any

⁷¹ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 18.

⁷² Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 5.

⁷³ ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 14.

⁷⁴ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 18.

⁷⁵ Optus, *Submission to the ACCC consultation paper*, September 2020, p. 19.

⁷⁶ Optus, *Submission to the ACCC consultation paper*, September 2020, pp. 17–19.

ongoing issues—therefore, we consider a one off rebate is appropriate in such circumstances. Additionally, we consider that RSPs should be compensated for costs involved in liaising with an affected customer and moving them to more appropriate plans where NBN Co has not provided the relevant information up front.

In terms of the proposed PIR Objective rebate we note that, although initially less than the rebate amount proposed in the position paper, we consider the escalation would be sufficient to provide an incentive to NBN Co to investigate and resolve remediation cases promptly. Other features of the rebate (automatic payment and backdating to trouble ticket acknowledgement) should also encourage delivery of minimum speed requirements. We note that a requirement on NBN Co to pay a rebate in cases where it proactively resolves speed underperformance issues (as proposed by Optus) may be a disincentive to NBN Co to resolve speed issues quickly and consider that, in such circumstances, end-users may prefer a working service rather than the proposed rebate.

We note that the proposed rebate framework is contingent on NBN Co providing accurate, timely and accessible speed information and that some stakeholders have raised concerns in relation to this. However, we acknowledge NBN Co's submission that it provides line capability information for all services (including those in co-existence) and that it provides this information on a daily basis via its Customer Centre or API interface.

In terms of the threshold criteria for accepting a fault ticket and network activity, we understand that this will be available for services on FTTN technology from the start of WBA4. In terms of the other technologies, we understand from NBN Co that it is currently incrementally building supporting capability as it rolls out the performance incident framework.⁷⁷ We note that a high level of end-user complaints regarding service standards concern FTTN and accept NBN Co's assurance that with respect to this technology, its service speed commitments are clear.

Overall we consider that the proposed rebate framework for underperforming FTTN/B/C services generally provides a clear service level commitment in relation to minimum service performance thresholds and associated rebates.

Fixed wireless services

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

Position paper and draft decision

In position paper and draft decision we considered that NBN Co should be held to its design standard and proposed a fixed wireless rebate of \$20 per month where this design standard is not met. We also noted that this rebate would compensate RSPs that are currently providing redress to end-users who are affected by congestion on the fixed wireless network.⁷⁸

NBN Co's revised WBA3 included commitments in relation to improved reporting of service level metrics in relation to fixed wireless performance, namely, the introduction of weekly

⁷⁷ NBN Co, *Supplementary submission to the ACCC consultation paper*, 23 October 2020, pp. 13–14.

⁷⁸ ACCC, *WSSI Position paper*, 2 April 2020, pp. 12–13.

reports to RSPs detailing the busy hour performance of fixed wireless cells and monthly public reports on its customer experience dashboard in accordance with the enforceable undertaking.⁷⁹ We noted the importance of NBN Co continuing to provide this reporting and proposed that NBN Co should also provide maximum attainable speed data post-connection to help RSPs better manage consumer expectations about the maximum speed the service can deliver and to promote better selling practices in accordance with the ACCC's broadband speed claims industry guidance.⁸⁰

August consultation

In August we consulted on NBN Co's commitments with regards to

- providing backhaul reporting on a similar basis to the voluntary reporting it has been providing for the past year and its commitment to continue its weekly reporting on the fixed wireless radio access network in a similar manner to the WBA3 reporting
- the development of an improved metric. While NBN Co does not include a commitment to provide maximum attainable speed data post-connection, it has flagged that it is investigating the provision of granular, regularly updated visibility of actual service performance to RSPs
- providing a rebate of \$20 for each fixed wireless service supplied via a wireless network cell that is persistently congested during that month. A cell is persistently congested where its performance falls below NBN Co's 6 Mbps design standard, and for backhaul congestion, where the backhaul links operate below NBN Co's backhaul metric (i.e. where the link operates with average packet loss of 0.25 per cent or greater)
- enabling it to establish an alternative metric that better reflects the experience of end users, it may amend the 'Persistently Congested' definition after consulting with RSPs for a period of at least four weeks and providing RSPs with at least 30 business days' notice of the change.

We noted in our consultation paper NBN Co's commitment to continue its congestion and backhaul reporting but considered that NBN Co should also provide RSPs with maximum attainable speed information based on the signal levels recorded at the time of installation for each fixed wireless service within two days of installation.⁸¹ We regarded NBN Co's proposed rebate of \$20 for each month that a wireless service is persistently congested to be consistent with the approach we proposed in the draft decision.⁸²

Stakeholder submissions

Stakeholders provided broad support for the provision of fixed wireless service speed information. ACCAN submitted that RSPs should be provided with as much speed information as possible⁸³, while Telstra provided support for NBN Co's commitment to provide weekly reporting on both the fixed wireless radio access network and backhaul transit links.⁸⁴ Optus submitted that it supports better reporting in relation to fixed wireless congestion.⁸⁵

⁷⁹ NBN Co, *Monthly progress report (customer experience) August 2020*, 12 September 2020.

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

⁸¹ ACCC, *Consultation paper*, 20 August 2020, pp. 21–22.

⁸² ACCC, *Consultation paper*, 20 August 2020, p. 22.

⁸³ ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 14.

⁸⁴ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 19.

⁸⁵ Optus, *Submission to the ACCC consultation paper*, September 2020, p. 22.

Telstra noted its previous support for the proposal that would require NBN Co to provide RSPs with maximum attainable speed data for fixed wireless and submitted that there remains a need for a consistent and agreed definition of maximum attainable speed or alternative measure for RSPs to use to ascertain fixed wireless performance.⁸⁶

NBN Co submitted that it considers the maximum attainable speed measurement to be inherently limited but noted that it is investigating the provision of granular, regularly updated visibility of actual service performance to RSPs.⁸⁷

In terms of the fixed wireless rebate there was broad support but differing views on the rebate quantum and the appropriateness of the 6 Mbps design metric for measuring fixed wireless performance. Optus and Telstra provided support for the \$20 fixed wireless rebate, while Vocus submitted that a \$20 rebate is not sufficient to meet consumer expectations.⁸⁸

Vocus and ACCAN submitted that there should be a scaled approach to the fixed wireless rebates, where the customer receives a higher rebate for each month the cell is congested.⁸⁹

In relation to the 6 Mbps metric that triggers the fixed wireless rebate, Telstra submitted that the 6 Mbps busy hour speed calculation would be considered slow by end users and should be extended to at least 12 Mbps as the trigger point for the rebate or higher.⁹⁰ ACCAN similarly submitted that the metric for measuring fixed wireless speed performance remains too low 'to provide an acceptable standard.'⁹¹

Telstra submitted that NBN Co should not have the right to change the definition of 'Persistently Congested' on 30 Business Days' notice and that the standard change rights that apply to the Ethernet Service Level Schedule should apply.⁹²

ACCC views

Our views in relation to the provision of fixed wireless service speed information remain the same as those set out in our position paper and consultation paper.

While we welcome NBN Co's ongoing commitment to provide weekly reporting on the fixed wireless radio access network and its commitment to provide backhaul reporting on a similar basis to the voluntary reporting it has been providing for the past year, we maintain our view that NBN Co should provide maximum attainable speed information post-connection to RSPs. Stakeholders supported our view.

We do, however, welcome NBN Co's commitment to investigate the provision of granular, regularly updated visibility of actual fixed wireless service performance to RSPs and we encourage NBN Co to implement this as soon as possible.

We note the concerns raised by stakeholders in relation to NBN Co's ability to change the definition of 'Persistently Congested' in the context of the fixed wireless rebate which NBN Co submits is necessary to enable it to establish an alternative metric that better reflects the experience of end users. The ACCC would be concerned if NBN Co amends this definition in a manner that disadvantages access seekers.

⁸⁶ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 19.

⁸⁷ ACCC, *Attachment 2—NBN Co WBA4 Proposal*, p. 16.

⁸⁸ Optus, *Submission to the ACCC consultation paper*, September 2020, p. 22; Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 18; Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 6.

⁸⁹ Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 6; ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 14.

⁹⁰ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, pp. 18–19.

⁹¹ ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 14.

⁹² Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 19.

In terms of the fixed wireless rebate, our views remain the same as those set out in our position paper and consultation paper. We consider that a \$20 rebate takes into account NBN Co's legitimate business interests and would incentivise NBN Co to meet its design standard on an ongoing basis, while also compensating RSPs that are currently providing redress to end-users who are affected by fixed wireless congestion. The \$20 rebate amount is also consistent with NBN Co's proposed one-off \$20 fixed line speed performance rebate (that is payable where speed performance information is not available at the time of placing a connection order or if that information proves to be inaccurate). We maintain our view that a \$20 rebate amount is likely to be appropriate for instances of service speed underperformance.⁹³

While we have considered that submissions in support of a scaled approach to the fixed wireless rebate, so that the customer receives a higher rebate for each month the cell is congested, have merit, we consider that the \$20 rebate currently provides sufficient incentive for NBN Co to continue upgrading its network and to ensure it meets its design standard on an ongoing basis.

While we acknowledge stakeholder views that the metric for measuring fixed wireless speed performance remains too low to provide an acceptable standard and should be extended, we note that 6 Mbps is NBN Co's design standard for the fixed wireless network⁹⁴ and the purpose of the fixed wireless rebate is to incentivise NBN Co to meet its own design standard on an ongoing basis.

We note that NBN Co has committed to spend \$800 million in fixed wireless capacity upgrades through 2022⁹⁵ and that it has recently flagged continued investment to help manage capacity and performance into the future.⁹⁶ We consider that NBN Co and Government should assess whether the 6 Mbps design standard for fixed wireless remains appropriate in the longer term and whether any further upgrades should be made to ensure that the fixed wireless network meets the expectations of consumers.

5.4. Service information and operational matters

During the inquiry we have considered a number of areas related to service information. In particular:

- the availability of operational service information
- service level measurement and exclusions, and
- reporting of service level metrics.

Availability of operational service information

Position paper and draft decision

In the position paper and draft decision we considered that, as a general principle, NBN Co should make service specific information about the progress of appointments, connections and faults available to access seekers in a way that is accurate, timely and accessible. We also considered that information on whether a relevant service level has been missed should also be provided and be able to be used by RSPs to inform end-users where appropriate.⁹⁷

⁹³ ACCC, *WSSI Position paper*, 2 April 2020, p. 17.

⁹⁴ NBN Co, *Monthly progress report (customer experience) August 2020*, 12 September 2020.

⁹⁵ NBN Co, *Corporate plan 2019 (2019–2022)*, p. 65..

⁹⁶ NBN Co, *Corporate plan 2021 (2021–2024)*, p. 16.

⁹⁷ ACCC, *WSSI Draft decision*, 1 October 2019, pp. 52–53. ACCC, *WSSI Position paper*, 2 April 2020, p. 26.

August consultation

In August we sought stakeholder feedback on NBN Co's commitment to provide RSPs with service level activity outcomes and exclusion data and reporting via the Service Portal and business-to-business (B2B) APIs.

We considered that improvements to automated IT systems are consistent with the RSP requirements to be able to manage consumer services.⁹⁸

Stakeholder submissions

There was support from stakeholders on the provision of additional information in the service level reports and weekly reports via B2B APIs and NBN Co's Customer Centre.⁹⁹

Telstra and Vocus also raised the timeliness and form of service information provisions as issues.¹⁰⁰ Additional reporting on outages, such as outage type, notice periods, number of outages each customer has experienced, and the total combined hours services were down was also proposed.¹⁰¹

In its submission, NBN Co emphasised that the information and reporting commitments are an improvement on existing practices and that would allow RSPs to access key metrics in one place, thus leading to better outcomes with RSPs identifying, responding to and resolving service issues more efficiently.¹⁰²

In its supplementary submission NBN Co advised that it intends to provide RSPs with a weekly file with additional fields and stop the clock summary information to assist RSPs from the start of WBA4. From 1 April 2021, 24-hour reporting will be introduced to allow RSPs with more current information. It also intends to provide RSPs with Service Portal and B2B/APIs capability to query individual services or develop their own reporting via APIs using detailed line level data such as 'Met or Missed' status to determine if a rebate is payable, whether exclusions apply (where applicable), LOCID, access technology, speed tier etc.¹⁰³

ACCC views

Proposed reporting improvements will assist RSPs to better manage end-user expectations and, ultimately, end-users will be the beneficiaries of improved information flows between the wholesale and retail telecommunication industry sectors.

Given that time sensitive information is only useful if provided when an event is occurring, the proposed weekly and 24 hour reporting is a marked improvement on current monthly reporting. We accept NBN Co's assurances that the proposed 24 hour reporting will be delivered from 1 April 2021. We also understand that NBN Co will be undertaking an industry consultation shortly on the kind of outage reporting that is suggested by Telstra.

Service level measurement and exclusions

Service level measurement and exclusions refer to the starting point from which NBN Co begins measuring its performance against a service level timeframe, and the circumstances for which it is able to pause or 'stop the clock' on the measurement of its performance.

⁹⁸ ACCC, *Consultation paper*, 20 August 2020, p. 22.

⁹⁹ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 19. ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 5.

¹⁰⁰ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 19. Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 5.

¹⁰¹ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 24.

¹⁰² NBN Co, *Submission to the ACCC consultation paper*, 11 September 2020, pp. 2–3.

¹⁰³ NBN Co, *Supplementary submission to the ACCC consultation paper*, 23 October 2020, p. 13.

Position paper and draft decision

In the position paper and draft decision we considered that, as a general principle, NBN Co should only extend service level timeframes under limited specified circumstances which should be clearly logged and communicated to RSPs.¹⁰⁴

August consultation

In August we consulted on NBN Co's comprehensive list of circumstances under which measurement begins, ends, and the circumstances where it may be paused.¹⁰⁵ We considered that improved reporting commitments and clarity about when NBN Co may 'stop the clock' were in keeping with our position in the draft decision and position paper and would provide RSPs with greater confidence in NBN Co's operational practices.¹⁰⁶

Stakeholder submissions

Submissions generally agreed with the NBN Co's listed exclusions and increased reporting commitments.

A common theme across submissions was that the range of exclusions available to NBN Co may be too broad.¹⁰⁷ Optus argued that this creates a disparity in the allocation of risk and responsibility between the retail and wholesale industry given that the retail industry is subject to stricter timeframes and obligations.¹⁰⁸ NBN Co noted that it has sought to address this issue and improve the allocation of risk and responsibility through increasing NBN Co's service level commitments in WBA4.¹⁰⁹

Telstra and the TIO identified specific exclusions which they consider include circumstances that should be recognised as within NBN Co's control. Specifically, Telstra disagreed with NBN Co's ability to 'stop the clock' when NBN Co engages with a third party.¹¹⁰

The TIO submitted that exclusion timeframes and the parameters for the proposed 'stop the clock' provisions should be clearer to prevent unintended consequences.¹¹¹ Whilst Macquarie Telecom asked for further explanation regarding circumstances where entitlements to rebates and credits 'does not accrue'.¹¹² Further clarity was also sought surrounding the different trouble ticket statuses.¹¹³

Telstra disagreed with NBN Co's proposal to continue to measure trouble tickets from the time they are accepted rather than acknowledged by NBN Co's systems.¹¹⁴ Telstra also argued that NBN Co's ability to amend the exclusionary provisions was too short.¹¹⁵

¹⁰⁴ ACCC, *WSSI Draft Decision*, 1 October 2019, pp. 49–50. ACCC, *WSSI Position Paper*, 2 April 2020, p. 24.

¹⁰⁵ See Consultation paper on NBN Co's WBA4 proposal and submissions 20 August 2020, *Attachment 2—NBN Co's WBA4 Proposal*, p. 20.

¹⁰⁶ ACCC, *Consultation paper*, 20 August 2020, p. 9.

¹⁰⁷ Commpete, *Submission to the ACCC consultation paper*, 11 September 2020, p. 6, Macquarie Telecom, *Submission to the ACCC consultation paper*, 11 September 2020, p. 2, TIO, *Submission to the ACCC consultation paper*, 11 September 2020, p. 3, Optus, *Submission to the ACCC consultation paper*, September 2020, p. 12.

¹⁰⁸ Optus, *Submission to the ACCC consultation paper*, September 2020, p. 23.

¹⁰⁹ NBN Co, *Submission to the ACCC consultation paper*, 11 September 2020, p. 17.

¹¹⁰ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, pp. 22–23.

¹¹¹ TIO, *Submission to the ACCC consultation paper*, 11 September 2020, p. 3–4.

¹¹² Macquarie Telecom, *Submission to the ACCC consultation paper*, 11 September 2020, p. 2.

¹¹³ TIO, *Submission to the ACCC consultation paper*, 11 September 2020, p. 3. ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 15.

¹¹⁴ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 17–18.

¹¹⁵ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 22–23.

In its supplementary submission NBN Co agreed to change the drafting proposed for WBA4 which allowed for the activities of any third party to be excluded from its performance calculations, and limit the scope of the exclusion to electricity and utility companies. It also agreed to modify WBA4 drafting to allow the ACCC to request up to an additional 20 business days, if required, when considering on new exclusion changes.¹¹⁶

ACCC views

We consider that the list of exclusions proposed by NBN Co supports clear wholesale service level commitments. By identifying where NBN Co will not accept responsibility for matters outside of its control, we consider that the exclusions appropriately allocate risk and responsibility and provide further clarity to industry.

As a result of some of the issues raised by RSPs NBN Co has however adopted some changes. In particular, it has agreed to limit the exclusion on third parties to electricity companies and utilities and, extend the period for ACCC to consider any amendments to the exclusionary provisions. We consider these changes to be appropriate and reasonably address the key concerns raised by Telstra in relation to the exclusion applying to third parties directly engaged by NBN Co

We have considered the different ticket status' in detail, specifically with regards to the TIO and ACCAN's concerns.¹¹⁷ While we acknowledge there is an element of complexity, the underlying understanding of the 'held' and 'monitoring' status do appear to be relatively clear under WBA4.

We note that measurement of the PIR Objective rebate commences from the time of trouble ticket acknowledgment (rather than acceptance) and agree with Telstra that this should occur for all service level measurements. We also note Optus' submission on the imbalance between retail and wholesale regulatory obligations and consider that the proposal provides a step in the right direction in terms of addressing this imbalance.

We consider the need to add new exclusions is likely to be low given the detailed list proposed by NBN Co. However, we agree with NBN Co that flexibility to introduce a new exclusion to adapt to changing circumstances or address new issues relating to service level measurement is desirable. We also agree with the ability of the ACCC to object if it considers a new exclusion to be unreasonable. With the additional 20 business days available (with possible further extensions provided by NBN Co) we consider this to an adequate timeframe for the ACCC to consider a new exclusion.

Reporting of service level metrics

Position paper and draft decision

As a general principle we have proposed that NBN Co should provide regular reports to access seekers about the overall performance of its network and that this should include its performance meeting service levels by location, service class and network.¹¹⁸

August consultation

In August we consulted on NBN Co's reporting commitments which adopted all changes proposed by the ACCC except where aggregating reporting results in NBN Co disclosing confidential information of an RSP.

¹¹⁶ NBN Co, *Supplementary submission to the ACCC consultation paper*, 23 October 2020, pp. 11–12.

¹¹⁷ TIO, *Submission to the ACCC consultation paper*, 11 September 2020, p. 3, ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 15.

¹¹⁸ ACCC, *WSSI Draft Decision*, 1 October 2019, pp. 54–55. ACCC, *WSSI Position Paper*, 2 April 2020, pp. 27–28.

Stakeholder submissions

Stakeholders generally welcomed the adoption by NBN Co of the changes proposed by the ACCC concerning reporting of service level metrics.¹¹⁹ Industry level reporting of key performance metrics and information relating to the proposed rebate framework was also proposed by Optus to allow the ACCC, industry and other stakeholders to monitor their effectiveness.¹²⁰

ACCC views

We consider the reporting of service level metrics by NBN Co to be a welcome improvement. We consider that better reporting on service level metrics will provide an incentive on NBN Co to improve its performance, and result in better end-user outcomes. Having regard to the matters set out in our position paper, we consider that the changes proposed by NBN Co in relation to this matter are reasonable.

5.5. Consumer safeguards

Our inquiry necessarily focuses on the wholesale terms within NBN Co's access agreements with RSPs. However, NBN Co's wholesale terms have a part to play in ensuring telecommunications consumer safeguards are fit for purpose in a post-rollout NBN environment.¹²¹

Currently the Australian telecommunications consumer safeguards framework is under review by the Department of Infrastructure, Transport, Regional Development and Communications (the Department).¹²² Part B of this review is focused on the reliability of services and is particularly relevant to our inquiry by foreshadowing a number of future changes to the safeguards framework.¹²³

Position paper and draft decision

In the position paper we noted that we are working closely with the Department regarding the overall framework for consumer safeguards and standards. We have not proposed new consumer safeguard terms as part of the inquiry but consider that NBN Co should commit to discuss with RSPs the additional support it could provide in its wholesale arrangements in light of such changes.¹²⁴

As a general principle we considered that NBN Co should support the delivery of NBN services in line with existing consumer safeguards, where they apply, in particular the CSG and priority assistance (PA) services. PA connections and faults should be prioritised over standard connections and faults. NBN Co should commit to updating the WBA service standards to support any changes to the consumer safeguards framework that affect NBN services.¹²⁵

¹¹⁹ Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 6, ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 15, Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 22, Optus, *Submission to the ACCC consultation paper*, September 2020, pp. 22–23.

¹²⁰ Optus, *Submission to the ACCC consultation paper*, September 2020, p. 9.

¹²¹ ACCC, *Consultation paper*, 20 August 2020, p. 23.

¹²² See ACCC, *WSSI position paper*, p. 2; see also Department of Infrastructure, Transport, Regional Development and Communications for more information on the review (<https://www.communications.gov.au/what-we-do/internet/consumer-safeguards-review>).

¹²³ <https://www.communications.gov.au/documents/part-b-reliability-services-consumer-safeguards-review-final-report>.

¹²⁴ ACCC, *WSSI position paper*, p. 29.

¹²⁵ ACCC, *WSSI Draft Decision*, 1 October 2019, pp. 58-59.

August consultation

In August we sought stakeholder views on NBN Co's commitment to conduct a 4 week consultation with a view to potentially changing the WBA if a regulatory event occurs and, as a result of which, an RSP states that they cannot comply with an obligation imposed under an applicable law and with the WBA.

We noted that NBN Co's proposed access arrangements includes a simplified calculation and claims process for CSG compensation and higher rebates for PA customers for delayed connections and unresolved faults compared to non-PA customers.¹²⁶

Stakeholder submissions

Telstra, ACCAN and Optus supported the improvements made to the CSG claims process for compensation.¹²⁷ Telstra considered the changes NBN Co is proposing to make to the CSG process are reasonable and reflect the accepted and demonstrated template followed by Telstra Wholesale. However, it noted that NBN Co had not specified the basis for the apportionment of the CSG.¹²⁸ Optus provided support for NBN Co's proposed higher rebates for PA customers compared to non-PA customers, and considered this should incentivise NBN Co to prioritise these customers.¹²⁹

NBN Co submitted that for connections and end user fault rebates, higher rebates are payable in relation to PA end users, recognising their reliance on access to telecommunications services, and providing NBN Co with incentives to prioritise their services.¹³⁰

ACCAN, Vocus and Telstra supported the proposed 4 week consultation with RSPs in the event of new or changing consumer safeguards.¹³¹ This was in contrast to Optus who raised specific concerns with the drafting and considered it provided NBN Co with too much discretion on whether or not to make changes to the WBA. Optus also raised broader concerns that risk and responsibility are not spread equitably across the industry in certain cases when RSPs have retail obligations that depend on wholesale performance (e.g. in the case of the current ACMA service continuity obligations).¹³² Commpete also considered that NBN Co's proposal did not support future changes to the safeguards framework and considered that a FAD obligation would be appropriate¹³³, although they did not provide more specific detail.

ACCC views

We note that NBN Co's proposed rebate framework for delayed connections and unresolved faults feature greater rebate amounts for PA customers than non-PA customers. We consider that this should provide incentives to prioritise the resolution of connections and faults for PA customers.

¹²⁶ ACCC, *Consultation paper*, 20 August 2020, p. 24.

¹²⁷ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 20; ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 15; Optus, *Submission to the ACCC consultation paper*, September 2020, p. 19.

¹²⁸ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 20.

¹²⁹ Optus, *Submission to the ACCC consultation paper*, September, p. 19.

¹³⁰ NBN Co, *Submission to the ACCC consultation paper*, September 2020, p. 12.

¹³¹ ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 15; Vocus, *Submission to the ACCC consultation paper*, September 2020, p. 6; Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 20.

¹³² Optus, *Submission to the ACCC consultation paper*, September 2020, p. 19–21.

¹³³ Commpete, *Submission to the ACCC consultation paper*, 11 September 2020, p. 6.

There is also general support from industry on the simplified calculation and CSG compensation claims process that is being proposed by NBN Co. In terms of CSG apportionment, we consider that this may be a matter that is best resolved during a commercial negotiation process.

We note Optus' concern on the drafting of the regulatory events clause. We consider the recent drafting changes made by NBN Co provide it with less discretion to change the service standards in its proposal in the event of a regulatory event occurring and we support those changes.

Pass-through of wholesale rebates to consumers

Position paper and draft decision

In the position paper we agreed with the principle that consumers should be compensated where they have suffered a detriment due to poor performance of the NBN.¹³⁴ However, with the exception of missed appointment rebates, we have not proposed to include a provision within the wholesale terms requiring general pass through of rebates to consumers.

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

August consultation

In the consultation paper our primary concern with regards to a general pass through requirement was that it may limit the ability of RSPs to offer differentiated remedies to customers in cases of poor experience. Additionally, as a term within the wholesale contract, NBN Co would be put in the position of 'policing' RSPs compliance with the pass-through terms.¹³⁵

NBN Co's proposed access arrangements require the full pass through of missed appointment rebates (consistent with the draft decision) and a fair value benefit of the following rebates:

- the connection rebate
- the failed connection rebate
- the service fault rebate
- the PIR Objective rebate, and
- the wireless speed performance rebate.

Guidance on what constitutes 'fair value' pass-through is the subject of a consultation between NBN Co and RSPs, although we note that it recognises that some RSPs offer remedies that mitigate the impact of service faults, such as offering back-up services to ensure consumers remain connected.

NBN Co has not proposed RSP pass-through requirements for the FTTN/B/C speed performance rebate on the basis that the purpose of the rebate is to compensate the RSP

¹³⁴ ACCC, *WSSI Position Paper*, April 2020, p. 21.

¹³⁵ ACCC, *ACCC inquiries into NBN access pricing and wholesale service standards—Consultation paper*, August 2020, p. 25.

for their costs of managing the customer in accordance with the ACCC Broadband Speed Claims Guidance.

Stakeholder submissions

Stakeholders had different perspectives on pass-through requirements.

NBN Co maintained its position that a pass through requirement on rebates ensures that NBN Co's incentives are aligned with RSPs in improving customer experience.¹³⁶

Telstra's preference was for no pass-through requirements (with the exception of the missed appointment rebate). It noted the drawbacks of a pass-through requirement, including complexity of administration and imposition of costs that may outweigh the rebate. However Telstra welcomed NBN Co's recognition of RSP initiatives in its consideration of 'fair value'.¹³⁷

ACCAN supported pass-through of the FTTN/B/C speed performance rebate on the basis that not achieving expected speeds is a detriment to consumers.¹³⁸ Telstra and Commpete argued that any retail level compensation regime should not require the RSP to compensate a consumer beyond what can be recovered from NBN Co, or proposed in the WBA4.¹³⁹ Similarly, Optus noted that, as regulations are imbalanced (in its view) and obligations stricter at the retail level than in the WBA, there would likely be instances where an RSP may have to offer an end-user a remedy even though the RSP is not responsible for the end-user's issue and may not be eligible for a rebate. Optus was of the view that RSPs should be compensated for losses they incur.¹⁴⁰

ACCC views

We continue to hold the same views expressed throughout the inquiry. We note that NBN Co proposes full pass-through of the missed appointment rebate, and that this is also supported by industry. Where RSPs do not have access to speed information (or it proves inaccurate), we consider that the FTTN/B/C speed performance rebate should compensate RSPs for the costs in managing their customers and, where necessary, adjusting retail service plans when services underperform due to issues on the NBN. If this rebate is payable it may mean the RSP has the customer on the wrong plan due to NBN Co not having the relevant information. This creates a one-off cost for the RSP and we think it is appropriate that they receive the benefit. Further, unlike other cases where rebates apply, there is no ongoing service issue to address. As such, we consider NBN Co's proposed approach in this regard to be appropriate.

We also consider a flexible approach to fair value benefit is appropriate, will encourage RSPs to offer their own remedies, and would continue to support existing practices, such as 4G backup modems etc. As discussed in our position paper, we consider it important that end-users experiencing poor performance on the NBN benefit from differentiated and innovative remedies in addition to, or instead of, direct financial compensation where wholesale rebates are incurred. We also agree with RSPs that they should not be required to compensate a consumer beyond what can be recovered from NBN Co for issues on the NBN.

¹³⁶ NBN Co, *Submission to the ACCC consultation paper*, 11 September 2020, p. 4.

¹³⁷ Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 20.

¹³⁸ TIO, *Submission to the ACCC consultation paper*, 11 September 2020, p. 1. ACCAN, *Submission to the ACCC consultation paper*, 11 September 2020, p. 16.

¹³⁹ Commpete, *Submission to the ACCC consultation paper*, 11 September 2020, p. 6. Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, p. 20.

¹⁴⁰ Optus, *Submission to the ACCC consultation paper*, September 2020, p. 21.

Generally we consider that if stronger requirements regarding how rebate payments made by NBN Co are to be treated or reflected by RSPs, this is likely to be best achieved through direct retail regulation rather than wholesale arrangements. We also note the ACMA intention to create rules on pass-through following the implementation of the wholesale rebate framework.¹⁴¹ We consider that a retail pass-through mechanism will ultimately serve to align incentives across the supply chain that are in the best interests of end-users. The nature of any rules made by the ACMA are still subject to consultation.

¹⁴¹ <https://www.acma.gov.au/articles/2020-08/acma-proposes-new-rules-broadband-service-failures>.

6. ACCC consideration of the service standards related access proposal against the statutory assessment framework

In the position paper, we explained the reasons for our view that the terms in our draft FAD would likely promote the LTIE. We also set out the service standard commitments that we considered would be appropriate, having regard to the relevant matters in the statutory framework.

In the consultation paper, we assessed NBN Co's proposed access arrangements against the positions that we put forward in the draft FAD. We described a set of principles that supported the statutory matters to help frame our discussion and focus submissions from stakeholders. In particular, we considered NBN wholesale service standards should:

- have clear service level commitments by NBN Co
- allocate risk and responsibility between NBN Co and RSPs appropriately
- provide effective incentives on NBN Co to improve its performance, and
- result in better end-user outcomes.

Our consideration of these principles has informed our consideration of NBN Co's proposal in the context of the position that we reached in our position paper. We have not considered the commercial arrangements as a whole, and have no legislative role in approving the commercial offer.

We have considered NBN Co's proposed service standard commitments in light of views and concerns raised in the inquiry, and given current arrangements and market circumstances. However we note that there are likely to be further changes within the market over this period, and that the matters upon which we have relied on in our assessment will likely change.

We have considered the retail and wholesale fixed broadband markets when considering whether the proposal made by NBN Co will promote the LTIE. Based on our overall assessment, we consider that in the current market conditions, there is no need at this stage for a final access determination in relation to the matters that have been the subject of our service standards inquiry.

6.1. Long-term interests of end-users

In the ACCC's view, particular terms and conditions promote the interests of end-users if they are likely to contribute towards lower prices, increased quality and performance of services and/or greater diversity and scope of product offerings. We consider that service level measures included in NBN Co's proposed access arrangements will have a direct influence on the quality of NBN retail services within wholesale and downstream fixed broadband markets that RSPs will be able to provide over the term of WBA4.

Consistent with our views expressed in the consultation paper, we consider that the market conditions are such that NBN Co's proposed access arrangements for those matters raised in the inquiry will address many of the issues of concern raised by the ACCC in its wholesale service standards inquiry. While the proposed arrangements from NBN Co differ from the positions we set out in the draft FAD in certain respects, we consider that they are a marked improvement over the current WBA3 terms and should result in improved end-user outcomes. In particular, the revised rebate mechanisms should increase the incentives for

NBN Co to improve its overall performance. For example, the move from a one-off rebate for unsuccessful connections and faults to one that accrues on a daily basis will benefit those consumers who are experiencing very poor service levels by providing NBN Co with an incentive to meet its service level timeframes and, where the service level is missed, resolve faults and unsuccessful connections in shorter timeframes.

Consumers will also benefit from the pass-through of rebates or other fair value benefit from RSPs, which are designed to ensure consumers get the benefit of wholesale rebates paid by NBN Co where appropriate. Additionally, consumers would benefit from operational improvements to enhance reporting. For example, RSPs should have access to better information about line speed capabilities and operational information which will allow RSPs to better manage their customer expectations and overall experience.

Promoting competition

We consider that clear service level commitments on those matters set out in our position paper will promote competition by providing RSPs with a reliable basis on which to develop differentiated product offerings within retail markets. We consider that NBN Co's proposal will significantly improve the clarity of current service level commitments by:

- introducing new daily rebates where NBN Co does not meet specified timeframes for connections or fault rectification
- introducing new FTTN/B/C and fixed wireless rebates that provide remedies where NBN Co fails to meet certain performance standards, and
- improving its reporting processes, including the implementation of 'near to real time' operational information about the status of connections, faults, service level outcomes and exclusions data.

While some of the rebates are lower than those proposed in our draft FAD and position paper, we consider that, in the current market conditions, NBN Co's proposal on wholesale service standards as a whole will promote competition by providing greater certainty, strengthening the incentives for NBN Co to meet its service level commitments and improving access to information for RSPs.

We also consider that competition will be promoted by ensuring that risk and responsibility is allocated to the party most appropriate to deal with it. This will reduce distortions to consumer decisions regarding switching providers, which can result from incorrectly attributing a performance issue on the NBN to an RSP rather than NBN Co. Consumer switching promotes competition in retail markets because it provides incentives for RSPs to compete for customers by improving or varying their service offerings, including with respect to non-price factors. One measure on which we would expect RSPs to compete is their offer of different solutions to their customers when NBN service levels are not met. The pass through measures set out in NBN Co's proposal will support RSPs to do so. Overall we consider that NBN Co's proposal should improve the allocation of risk and responsibility between RSPs and NBN Co, and thereby promote competition.

Any-to-any connectivity

NBN Co's proposed wholesale service standards will not have a direct effect on realising any to any connectivity. Overall, the measures should improve the quality of service and thus the ability of end-users to communicate with other end-users of communications services, whether they are using the NBN or another telecommunications network.

Efficient use of and investment in infrastructure

As discussed in our position paper, we consider that where set at an appropriate level, commercial rebates provide an incentive for NBN Co to maintain, improve and invest in the operationally efficient provision of services. We consider that the rebate framework proposed by NBN Co is a significant improvement on the existing rebate arrangements.

While some stakeholders objected to the quantum of rebates proposed by NBN Co, other features of the rebate framework were broadly supported by stakeholders. These features include the provision of daily rebates (rather than a one-off rebate) for delayed connections and unresolved faults, and the extension of these rebates to accelerated connections and TC-2 AVC services. It also includes escalating rebates for missed appointments and automatic application of the PIR Objective rebate for services that are in remediation.

We acknowledge that the level of rebates proposed by NBN Co is lower than those proposed by the ACCC in its draft FAD. While a higher rebate level would serve as a stronger incentive for NBN Co to improve its service outcomes, our decision on whether or not to make an access determination also took into account the other aspects of NBN Co's commitments on wholesale service standards and the current market conditions. At this stage, we consider that NBN Co's proposed rebate framework is generally reasonable as part of the broader proposal. It is a significant improvement on existing arrangements and will provide more targeted incentives for NBN Co to improve service outcomes.

6.2. Legitimate business interests

We consider that the proposed service level access arrangements on those matters considered in our service standards inquiry do not undermine NBN Co's legitimate business interests. We acknowledge that improved service levels and the revised rebate framework may come at an additional cost to NBN Co but consider that these additional costs are not disproportionate and will be outweighed by the improved end-user experience. We note that NBN Co would have the opportunity to recover these costs under the long term revenue constraint methodology set out in its SAU.

We also note that the proposed service level arrangements improve the allocation of risk and responsibility between NBN Co and RSPs, which will further support NBN Co's legitimate business interests.

6.3. Interests of all persons who have a right to use the declared service

We consider that the interests of access seekers will be supported through the clearer service level commitments proposed by NBN Co. We consider that an exhaustive list of exclusions supports clear wholesale service level commitments and that the proposal in general improves the allocation of risk and responsibility between NBN Co and RSPs by clarifying and extending its service level commitments, and improving its' reporting of operational outcomes to RSPs.

We acknowledge Optus' concern about the appropriate allocation of risk across the supply chain and concerns raised by Telstra and the TIO about the number of exclusions.¹⁴² As discussed in section 5, we consider that there should be an appropriate forum for RSPs to work with NBN Co to resolve these concerns but we will continue to monitor how the industry operates to ensure appropriate risk allocation. We will also consider regulatory intervention if it is required and appropriate to promote competition and improve the outcomes of end-

¹⁴² Optus, *Submission to the ACCC consultation paper*, September 2020 p. 7, Telstra, *Submission to the ACCC consultation paper*, 18 September 2020, pp. 22–23. TIO, *Submission to the ACCC consultation paper*, 11 September 2020, p. 3.

users. However, by specifying the matters that are outside of NBN Co's control, the exclusions appropriately allocate risk and responsibility as well as clarify the circumstances in which NBN Co may pause measurement of its performance. We also note that NBN Co has narrowed the scope of the exclusion relating to third parties in response to Telstra's submissions.

6.4. Direct costs of providing access

We expect that NBN Co will have considered the direct costs of providing access when developing their proposal regarding service level access arrangements. Therefore, the proposal should not provide any impediments to NBN Co recovering its direct costs of access.

6.5. Value of extensions or enhancements of capability by someone else

We consider that this criteria is less relevant because NBN Co's proposal will not have any significant implications for extensions or enhancements of capability where the costs are borne by someone else, or on the supply of other eligible services by NBN Co or RSPs.

6.6. Safe and reliable operation

We consider that the proposed arrangements are unlikely to compromise the safe or reliable operation of the NBN.

6.7. Economically efficient operation

We consider that NBN Co's proposed access terms, particularly the new rebate mechanisms, will create incentives to improve the economically efficient operation of the NBN. On balance, we consider that NBN Co's proposals for rebates are an improvement on existing arrangements and will provide more targeted incentives for NBN Co to improve service outcomes.

Appendix A: Matters the ACCC must take into account in making an access determination

The ACCC must have regard to the matters specified in section 152BCA(1) of the CCA when making a FAD.

These matters are:

- (a) whether the FAD will promote the long-term interests of end-users (LTIE) of carriage services or services supplied by means of carriage services
- (b) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- (c) the interests of all persons who have rights to use the declared service
- (d) the direct costs of providing access to the declared service
- (e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- (f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- (g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

Section 152BCA(1) matters reflect the repealed section 152CR(1) matters that the ACCC was required to take into account in making a final determination in an access dispute. The ACCC intends to interpret the sections 152BCA(1) matters in a similar manner to the approach taken in access disputes.

Sections 152BCA(2) set out other matters that the ACCC may take into account in making a FAD. More specifically, these provisions allow the ACCC to take into account the characteristics, costs, revenues and demand for other eligible services supplied by (or capable of being supplied by) the carrier or CSP of the relevant declared service.

The ACCC can also take into account any other matters it thinks are relevant.¹⁴³

The ACCC's views on how the matters in section 152BCA should be interpreted for the FAD process are set out below.

Long-term interests of end-users

The first matter for the ACCC to consider when making a FAD is whether the determination 'will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services'.¹⁴⁴

The ACCC has published a guideline explaining what it understands by the phrase 'long term interests of end-users' in the context of its declaration responsibilities.¹⁴⁵ This approach to the LTIE was also used by the ACCC in making determinations in access disputes. The

¹⁴³ CCA, ss. 152BCA(3).

¹⁴⁴ CCA, ss. 152BCA(1)(a).

¹⁴⁵ ACCC, ['A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010'](#), August 2016, in particular pp. 28–31.

ACCC considers that the same interpretation is appropriate for making FADs in relation to the declared NBN Access Service.

In the ACCC's view, particular terms and conditions promote the interests of end-users if they are likely to contribute towards the provision of:

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.¹⁴⁶

The ACCC also notes that the Australian Competition Tribunal (Tribunal) has offered guidance in its interpretation of the phrase 'long-term interests of end-users' (in the context of access to subscription television services):

Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary to take the following matters into account when applying the touchstone – the long-term interests of end-users:

- *End-users: "end-users" include actual and potential [users of the service]...*
- *Interests: the interests of the end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings... [T]his would include access to innovations ... in a quicker timeframe than would otherwise be the case...*
- *Long-term: the long-term will be the period over which the full effects of the...decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth — as well as entry and/or exit — strategies.¹⁴⁷*

To consider the likely impact of particular terms and conditions on the LTIE, the CCA requires the ACCC to have regard to whether the terms and conditions are likely to result in:

- promoting competition in markets for carriage services and services supplied by means of carriage services
- achieving any-to-any connectivity, and
- encouraging the economically efficient use of, and economically efficient investment in:
 - the infrastructure by which listed carriage services are supplied, and
 - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.¹⁴⁸

Promoting competition

In assessing whether particular terms and conditions will promote competition, the ACCC will analyse the relevant markets in which the declared services are supplied (retail and

¹⁴⁶ ACCC, '[A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010](#)', August 2016, p. 28.

¹⁴⁷ *Re Seven Network Limited (No 4)* [2004] ACompT 11 at [120].

¹⁴⁸ CCA, s. 152AB(2).

wholesale) and consider whether the terms set in those markets remove obstacles to end-users gaining access to telephony and broadband services.¹⁴⁹

Obstacles to accessing these services include the price, quality and availability of the services and the ability of competing providers to provide telephony and broadband services.

The ACCC is not required to precisely define the scope of the relevant markets in which the declared services are supplied. The ACCC considers that it is sufficient to broadly identify the scope of the relevant markets likely to be affected by the ACCC's regulatory decision.

Any-to-any connectivity

The CCA gives guidance on how the objective of any-to-any connectivity is achieved. It is achieved only if each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service. This must be the case whether or not the end-users are connected to the same telecommunications network.¹⁵⁰

The ACCC considers that this criterion is relevant to ensuring that the terms and conditions contained in FADs do not create obstacles for the achievement of any-to-any connectivity.

Efficient use of and investment in infrastructure

In determining the extent to which terms and conditions are likely to encourage the economically efficient use of and investment in infrastructure, the ACCC must have regard to:

- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
 - the technology that is in use, available or likely to become available
 - whether the costs involved in supplying and charging for the services are reasonable or likely to become reasonable, and
 - the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks
- the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope
- incentives for investment in the infrastructure by which services are supplied; and any other infrastructure by which services are, or are likely to become, capable of being supplied, and
- the risks involved in making the investment.¹⁵¹

The objective of encouraging the 'economically efficient use of, and economically efficient investment in ... infrastructure' requires an understanding of the concept of economic efficiency. Economic efficiency consists of three components:

- productive efficiency—this is achieved where individual firms produce the goods and services that they offer at least cost

¹⁴⁹ CCA, s. 152AB(4). This approach is consistent with the approach adopted by the Tribunal in *Telstra Corporations Limited (No 3)* [2007] A CompT 3 at [92]; *Telstra Corporation Limited* [2006] A CompT 4 at [97], [149].

¹⁵⁰ CCA, s. 152AB(8).

¹⁵¹ CCA, ss. 152AB(6) and (7A).

- allocative efficiency—this is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provide the greatest benefit relative to costs), and
- dynamic efficiency—this reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

On the issue of efficient investment, the Tribunal has stated that:

*An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.*¹⁵²

*... efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.*¹⁵³

*... access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.*¹⁵⁴

Legitimate business interests

The second matter requires the ACCC to consider ‘the legitimate business interests’ of the carrier or CSP when making a FAD.¹⁵⁵

In the context of access disputes, the ACCC considered that it was in the access provider’s legitimate business interests to earn a normal commercial return on its investment.¹⁵⁶ The ACCC is of the view that the concept of ‘legitimate business interests’ in relation to FADs should be interpreted in a similar manner, consistent with the phrase ‘legitimate commercial interests’ used elsewhere in Part XIC of the CCA.

For completeness, the ACCC notes that it would be in the access provider’s legitimate business interests to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved. However, an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.¹⁵⁷ Further, the Federal Court has ruled that the regulatory framework did not require that the determination provide for full cost recovery in respect of the consequential costs or losses that a service provider may incur.¹⁵⁸

The Tribunal has taken a similar view of the expression ‘legitimate business interests’.¹⁵⁹

¹⁵² *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

¹⁵³ *ibid* at [164].

¹⁵⁴ *ibid* at [176].

¹⁵⁵ CCA, ss. 152BCA(1)(b).

¹⁵⁶ ACCC, [Resolution of telecommunications access disputes – a guide, March 2004 \(revised\)](#) (Access Dispute Guidelines), p. 56.

¹⁵⁷ ACCC, [Access pricing principles — Telecommunications](#), July 1997 (1997 Access Pricing Principles), p. 9.

¹⁵⁸ *Telstra Corporation Ltd v ACCC* (2017) 344 ALR 511 at [95]–[133].

¹⁵⁹ *Telstra Corporation Limited* [2006] ACompT 4 at [89].

Persons who have a right to use

The third matter requires the ACCC to consider ‘the interests of all persons who have the right to use the service’ when making a FAD.¹⁶⁰

The ACCC considers that this matter requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.¹⁶¹ The access seekers' interests would not be served by higher access prices to declared services, as it would inhibit their ability to compete in the provision of retail services.¹⁶²

People who have rights to currently use a declared service will generally use that service as an input to supply carriage services, or a service supplied by means of carriage service, to end-users.

The ACCC considers that this class of persons has an interest in being able to compete for the custom of end-users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.¹⁶³

However, the ACCC does not consider that this matter calls for consideration to be given to the interests of the users of these ‘downstream’ services. The interests of end-users will already be considered under other matters.

Direct costs of providing access

The fourth matter requires the ACCC to consider ‘the direct costs of providing access to the declared service’ when making a FAD.¹⁶⁴

The ACCC considers that the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access, and includes the incremental costs of providing access.

The ACCC interprets this matter, and the use of the term ‘direct costs’, as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal’s approach in an undertaking decision.¹⁶⁵ A contribution to indirect costs can also be supported by other matters.

However, the criterion does not extend to compensation for loss of any ‘monopoly profit’ that occurs as a result of increased competition.¹⁶⁶

The ACCC also notes that the Tribunal has considered the direct costs criterion ‘is concerned with ensuring that the costs of providing the service are recovered.’¹⁶⁷ The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this matter.¹⁶⁸

¹⁶⁰ CCA, ss. 152BCA(1)(c).

¹⁶¹ *Telstra Corporation Limited* [2006] ACompT 4 at [91].

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ CCA, ss. 152BCA(1)(d) (FAD).

¹⁶⁵ Application by Optus Mobile Pty Limited and Optus Networks Pty Limited [2006] ACompT 8 at [137].

¹⁶⁶ See Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44: [T]he ‘direct’ costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

¹⁶⁷ *Telstra Corporation Limited* [2006] ACompT 4 at [92].

¹⁶⁸ *Telstra Corporation Limited* [2006] ACompT 4 at [139].

Extensions or enhancements of capability

The fifth matter requires that the ACCC consider ‘the value to a party of extensions, or enhancements of capability, whose cost is borne by someone else’ when making a FAD.¹⁶⁹

In the 1997 Access Pricing Principles, the ACCC stated that this matter:

...requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.¹⁷⁰

The ACCC considers that this application of section 152BCA(1)(e) is relevant to making a FAD.

Safe and reliable operation

The sixth matter requires the ACCC to consider ‘the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility’ when making a FAD.¹⁷¹

The ACCC considers that this matter requires that terms of access should not compromise the safety or reliability of carriage services and associated networks or facilities, and that this has direct relevance when specifying technical requirements or standards to be followed.

The ACCC has previously stated in the context of model non-price terms and conditions, it is of the view that:

...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.¹⁷²

The ACCC considers that these views will apply in relation to this matter for the making of a FAD.

Economically efficient operation

The ACCC must consider ‘the economically efficient operation of a carriage service, a telecommunications network facility or a facility’ when making a FAD.¹⁷³

The ACCC has noted that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as discussed earlier under the LTIE. That is, it calls for a consideration of productive, allocative and dynamic efficiency. The ACCC has also noted (in the context of resolving access disputes) that the ACCC may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.¹⁷⁴

Consistent with the approach taken by the Tribunal, the ACCC considers that in applying this matter, it is relevant to consider the economically efficient operation of:

¹⁶⁹ CCA, ss. 152BCA(1)(e).

¹⁷⁰ [1997 Access Pricing Principles](#), p. 11.

¹⁷¹ CCA, ss. 152BCA(1)(f) (FAD).

¹⁷² ACCC, [Final determination – Model Non-price Terms and Conditions](#), November 2008, p. 8.

¹⁷³ CCA, ss. 152BCA(1)(g).

¹⁷⁴ [Access Dispute Guidelines](#), p. 57.

- retail services provided by access seekers using the access provider's services or by the access provider in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply these services.¹⁷⁵

Other eligible services

In making a FAD that applies/apply to a carrier or CSP who supplies, or is capable of supplying, the declared services, the ACCC may, if the carrier or provider supplies one or more eligible services,¹⁷⁶ take into account:

- the characteristics of those other eligible services
- the costs associated with those other eligible services
- the revenues associated with those other eligible services, and
- the demand for those other eligible services.¹⁷⁷

The Explanatory Memorandum to the Bill that introduced section 152BCA(2) states that this provision is intended to ensure that the ACCC, in making an AD, does not consider the declared service in isolation, but also considers other relevant services.¹⁷⁸ As an example, the Explanatory Memorandum states:

...when specifying the access price for a declared service which is supplied by an access provider over a particular network or facility, the ACCC can take into account not only the access provider's costs and revenues associated with the declared service, but also the costs and revenues associated with other services supplied over that network or facility.¹⁷⁹

Any other relevant matters

The ACCC may also take into account any other matters that it thinks are relevant when making a FAD.

The ACCC is of the view that considerations of regulatory certainty and consistency will be important when setting the terms and conditions of a FAD.

The ACCC also considers that it should have regard to:

- submissions in response to its consultation processes, and
- other information provided to the ACCC by stakeholders.

Considerations of these other relevant matters do not limit the matters that the ACCC may have regard to when making a FAD.

Restrictions on access determinations

Section 152BCB imposes certain restrictions on the ACCC's ability to make an access determination.

More specifically, the ACCC is restricted in making an access determination that would have any of the following effects:

¹⁷⁵ *Telstra Corporation Limited* [2006] ACompT 4 at [94]–[95].

¹⁷⁶ 'Eligible service' has the same meaning as in section 152AL of the CCA.

¹⁷⁷ CCA, s. 152BCA(2) sets out other matter that the ACCC may take into account in making a FAD.

¹⁷⁸ Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, p. 178.

¹⁷⁹ *ibid.*

- preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements,
- preventing a carrier or CSP from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements,
- preventing a person from obtaining, by exercise of a pre-rules right, a sufficient level of access to the declared service to be able to meet their actual requirements,
- depriving any person of a protected contractual right,
- resulting in an access seeker becoming the owner (or one of the owners) of any part of a facility without the consent of the owner of the facility,
- requiring a person (other than an access seeker) to bear an unreasonable amount of costs of:
 - extending or enhancing the capability of a facility, or
 - maintaining extensions to or enhancement of the capability of a facility,
- requiring a carrier or CSP to provide an access seeker with access to a declared service if there are reasonable grounds to believe that:
 - the access seeker would fail, to a material extent, to comply with the terms and conditions on which the carrier or provider provides, or is reasonably likely to provide, that access; or
 - the access seeker would fail, in connection with that access to protect the integrity of a telecommunications network or to protect the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

The ACCC is also unable to make an access determination (under section 152BCB(3)) that is inconsistent with any of the standard access obligations (SAOs) that are, or will be, applicable to a carrier or CSP.

NBN-specific restrictions

The legislation also provides for specific restrictions on the making of access determinations in relation to NBN corporations. That is, the ACCC must not make an access determination that would have the effect of:

- imposing requirements or prohibitions on an NBN corporation that are inconsistent with conduct authorised under section 151DA(2) or (3) of the CCA (relating to a refusal to supply a service)¹⁸⁰
- preventing an NBN corporation from engaging in conduct that is reasonably necessary to achieve uniform national pricing of eligible services supplied by the NBN corporation to service providers and utilities¹⁸¹, or
- discriminating between access seekers in relation to any or all of the Category B SAOs applicable to an NBN corporation.¹⁸²

¹⁸⁰ CCA, ss. 152BCB(3B).

¹⁸¹ CCA, ss. 152BCB(3C).

¹⁸² CCA, ss. 152BCB(4A). These provisions do not apply where the NBN corporation has reasonable grounds for believing that an access seeker will not comply with its obligations: CCA, ss. 152BCB(4B).

Appendix B: Segment analysis for the NBN 12/1 product

Introduction

This Appendix provides supporting evidence of why the 12/1 product tier is considered to be:

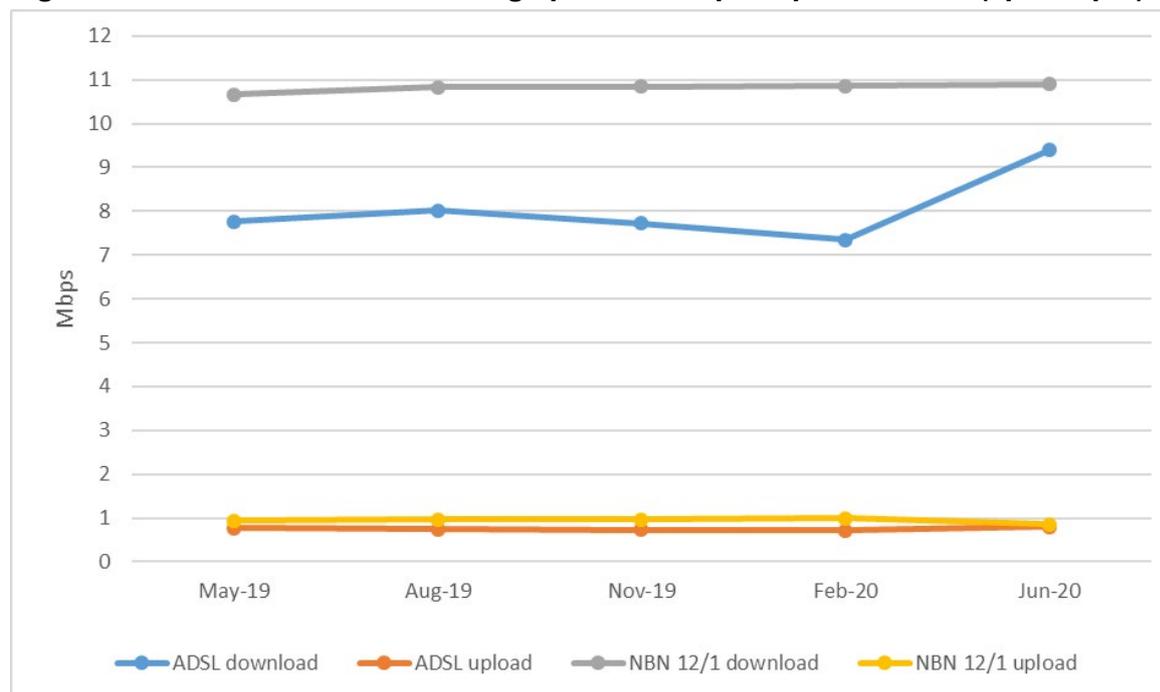
- functionally equivalent to ADSL services
- suitable for a large proportion of households and more immediate uses, and
- a suitable substitute, and product anchor, for higher speed broadband services.

Functional equivalence to ADSL

Our key rationale for specifying NBN Co's 12/1 Mbps service as the entry level product is that it is a similar product to ADSL and is directed at ensuring that those customers that are forced to migrate to the NBN to maintain a fixed line broadband service can obtain a similar service on the NBN at a similar price.

Our position on the similarity between ADSL and NBN 12/1 services is supported by recent Measuring Broadband Australia (MBA) data that indicates that average peak hour (7-11pm) download speeds achieved on the NBN 12/1 service are slightly higher than for ADSL. Average upload speeds during the same peak period are also slightly higher. These speed comparisons are shown in Figure 1 below.

Figure 1: ADSL and NBN 12/1 average peak hour speed performance (7pm-11pm)



Source: ACCC Measuring Broadband Australia reports.

In relation to the June 2020 MBA data (covering a 30 day period to 20 June 2020) average peak hour speeds achieved on ADSL and NBN 12/1 services were 9.40 Mbps and 10.90 Mbps respectively. Average peak hour upload speeds were 0.80 Mbps and 0.86 Mbps respectively. It is noted that these data, and particularly the ADSL data, come from fairly small samples. While there is a narrow confidence interval on the NBN 12/1 results (average peak hour download speed is between 10.78 – 11.01 Mbps at 95% confidence), there is a

broader confidence interval on ADSL results (average peak hr download 6.13 – 12.78 Mbps at 95% confidence).¹⁸³

Household and use analysis

RSP views on how many users NBN12/1 can support

RSPs are required to publish an NBN Key Fact Sheet that provides consumers with information in relation to what each of its NBN speed tier products online application capabilities are, the typical evening (7pm-11pm) download speeds users are likely to experience and the recommended number of users/devices most suitable for the product.¹⁸⁴

The consensus view from various RSPs based on their individual published NBN Key Fact Sheets is that the NBN12/1 product is capable of supporting 1-2 simultaneous users or devices at the same time (see Table 1 below). Any additional users or devices will likely decrease the NBN12/1 products service functionalities and ability for consumers to reasonably use the product for its intended purposes.

As such, the market segment for which the NBN12/1 product would be a viable substitute to other NBN speed tier products can be based at least partially on the number of people living in a household.

Household analysis

The Australian Bureau of Statistics conducted the most recent Census in August 2016. The results from the Census provide a detailed view over the composition of Australian households, including occupancy levels.

1–2 person households

In light of the above RSP fact sheet analysis, it is reasonable to assume that the NBN12/1 product is a viable substitute for households with 1 or 2 people. Based upon the 2016 Census results, 1 and 2 person households in major and other urban regions (as a proxy for the NBN fixed footprint) make up 24.7% and 32.8% of households in these areas respectively. This means that the NBN12/1 product could be a suitable substitute to a minimum of around 57.5% of households in the fixed footprint.

3 person households

The NBN12 may still be suitable for a small percentage of larger households as well, notably some 3 person households on the basis that the third (or addition!) resident member is unlikely to use online applications. For example a family of 2 adults and 1 child aged between 0-4 years old.

We estimate that around 2.06% to 4.12% of 3 member households in major and other urban regions consists of a child aged between 0-4 years. Hence the proportion of households for whom the NBN 12/1 product could be a substitute product based on occupancy level alone could be around 60% of households in the relevant footprint.

¹⁸³ ACCC, Measuring Broadband Australia, Report 10.

¹⁸⁴ Telecommunications (NBN Consumer Information) Industry Standard 2018.

Table 1: Key fact sheet analysis of NBN 12/1 retail products

Source: RSP websites accessed October 2020.

| Bundle | | | | | | | | | | | |
|---------------------------------------|----------------|------------|--------------|------------------|----------------|-------------------------|--------------|-----------------------|----------------|----------------------------|--------------|
| Provider | Telstra | TPG | iiNet | Internode | Leaptel | Aussie Broadband | Mate. | Southern Phone | Westnet | Australia Broadband | Optus |
| Download Speed (Evening) | 9 Mbps | 11.2 Mbps | 10.3 Mbps | 11.2 Mbps | 10 Mbps | 11 Mbps | 10 Mbps | 10 Mbps | 11.1 Mbps | 10 Mbps | 9.6 Mbps |
| Simultaneous Users | 1-2 | 1-3 | 1-3 | 1-3 | 1 | 1 | 1-2 | 1-2 | 1-3 | 1-2 | 1-2 |
| Emails & Browsing | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Voice (making phone calls) | Yes | Yes | Yes | Yes | Yes | Yes | N/A | N/A | Yes | N/A | N/A |
| Standard Definition Video | Yes | Yes | Yes | Yes | Yes | Maybe | N/A | Yes | Yes | Yes | No |
| High Definition Video | No | No | No | No | No | No | Yes (1x) | No | No | N/A | No |
| Online Gaming | No | N/A | N/A | N/A | No | No | No | No | N/A | N/A | No |
| Downloading and Uploading Large Files | No | N/A | N/A | N/A | No | No | N/A | N/A | N/A | No | N/A |

Use/application analysis

In addition to occupancy level, the range of online applications that are used also have a bearing on whether the NBN 12/1 speed tier would be a suitable substitute for a given household.

RSP views

The consensus view of RSPs for the NBN12/1 typical evening download speed ranges from 10Mbps to 11Mbps. Given this, RSPs recommend this speed tier as not capable of supporting all online applications. RSPs do however recommend the speed tier for online application uses such as email and browsing, voice phone calls and standard definition streaming. RSPs do not recommend the speed tier for more intensive online application uses such as online gaming, downloading and uploading large files and streaming multiple HD videos.

MBA data on single HD streaming

Most RSPs indicate that HD streaming is not possible on NBN12/1 due individual users network configurations outside the control of RSPs that can significantly impact the ability of RSPs to 'commit' to HD streaming

However, the latest MBA report found that NBN 12/1 was suitable to support streaming of one HD resolution video. This testing was undertaken when the NBN connection was not being concurrently used by another application.

Video conferencing

RSP fact sheets do not address video conferencing which has recently become more popular. Video conferencing providers Zoom, Microsoft Teams and Skype do however provide recommendations on the bandwidth requirements that would support their applications. These are summarised in Table 2 below. This is particularly relevant to the upload speed of a broadband service, which is a maximum of 1 Mbps in the case of the NBN12/1 service.

Table 2: Summarised bandwidth requirements (Microsoft Teams, Skype and Zoom)

| Call type | Minimum download speed | Minimum upload speed |
|--|------------------------|----------------------|
| Audio calling | 30 - 80kbps | 30 - 60kbps |
| 1:1 Video calling / Screen sharing | 130 - 150kbps | 50 - 130kbps |
| 1:1 video calling / High quality video | 400 - 600kbps | 400 - 600kbps |
| 1:1 video calling / 720p HD video | 1.2Mbps | 1.2Mbps |
| Group calling / High quality video | 1Mbps | 500-800kbps |
| Group calling / 720p HD video | 1.5 – 2.0 Mbps | 1.0 - 1.5 Mbps |

Sources:

Teams: <https://docs.microsoft.com/en-us/microsoftteams/prepare-network#bandwidth-requirements>

Skype: <https://support.skype.com/en/faq/FA1417/how-much-bandwidth-does-skype-need>

Zoom: <https://support.zoom.us/hc/en-us/articles/201362023-System-requirements-for-Windows-macOS-and-Linux>

Table 2 shows that the most intensive activity are group calls and the more people on the call the higher the Mbps bandwidth is required. Regardless, the table shows that NBN12/1 is likely to support all video conferencing except HD calls.

Suitable substitute and product anchor for higher speed services

We note, that in terms of actual take-up of 12/1 plans, our latest Internet Activity RKR data indicates that as at 30 June 2020, 12.5 per cent of NBN retail SIOs (numbering 819,000 out of 6.5 million in total) had a wholesale speed of 12 Mbps.¹⁸⁵

When taking into account household size and use requirements, this suggests that a large proportion of households with an NBN service (potentially in the order of 20 to 40 per cent) may be on retail plans that provide much more bandwidth capacity than what they require. This likely reflects that not all retailers offer 12/1 plans to their customers, and Telstra in particular, did not transfer customers to the NBN on 12/1 services.

Modelling by the Bureau of Communications and Arts Research (BCAR) estimates that in 2018 a median household could access all their online applications in very good quality with a download speed of 14 Mbps. This is forecast to increase to 22 Mbps in 2023 and 29 Mbps in 2028.¹⁸⁶

Table 3: BCAR forecast of household bandwidth requirement

| Households | Bandwidth in 2018 (Mbps) | Bandwidth in 2023 (Mbps) | Bandwidth in 2028 (Mbps) |
|--------------|-----------------------------|-----------------------------|-----------------------------|
| 50% | 14 | 22 | 29 |
| 75% | 18 | 29 | 39 |
| 90% | 22 | 38 | 48 |
| 95% | 24 | 43 | 56 |
| 98% | 27 | 51 | 66 |
| 99% | 29 | 54 | 66 |
| 99.9% | 35 | 63 | 78 |

Source: BCAR

A significant driver of BCAR forecast bandwidth demand for households is their consumption of video streaming, which is largely driven by the resolution of the video devices they use.

BCAR adopted the following assumptions on bandwidth requirement for various resolution types as well as the percentages of devices for those in households (see table 4).

¹⁸⁵ <https://www.accc.gov.au/regulated-infrastructure/communications/monitoring-reporting/internet-activity-record-keeping-rule-rkr/june-2020-report>.

¹⁸⁶ Bureau of Communications and Arts Research (BCAR), *Demand for fixed-line broadband in Australia 2018–2028*, Working paper, July 2020.

Table 4: Household percentage and bandwidth requirement for video resolution type

| | % of households for each resolution type 2018 | % of households for each resolution type 2028 | Bandwidth requirement (Mbps) 2018 | Bandwidth requirement (Mbps) 2028 |
|----|--|--|--|--|
| SD | 9 | 0 | 2 | 1 |
| HD | 69 | 9 | 5 | 3 |
| 4K | 22 | 79 | 18 | 9 |
| 8K | 0 | 12 | 70 | 37 |

BCAR noted that the reductions in bandwidth requirement in 2028 reflects expected growth in video compression (7 per cent annually) over time. BCAR also considered scenarios where growth in compression is higher (i.e. 10 per cent), which would lead to even lower bandwidth requirement.

Given the above it appears that BCAR's demand forecast could be quite sensitive to assumptions on customer choices of video resolution type.

BCAR noted that its modelling did not consider consumer willingness to pay for higher bandwidth. BCAR noted that "as peak bandwidth demand may only occur for short periods, a consumer may prefer to pay less for a lower speed plan and either moderate their application usage or tolerate slightly slower performance during these peak times."

Conclusion

We therefore consider that the NBN12/1 product is currently a viable substitute for a significant segment of the retail market, which supports its use as an anchor product for regulated pricing. Over the longer term we accept, in line with BCAR analysis, increased take-up of higher resolution video streaming in particular will likely mean that this becomes less so.