



Submission to the ACCC – Second Discussion Paper on NBN Wholesale Service Standards

1 March 2019

Public Version



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Executive Summary

nbn welcomes the opportunity to respond to the issues raised in the ACCC's Second Discussion Paper. **nbn**, the ACCC, RSPs and end users all have a common interest in ensuring that services provided over the **nbn**[™] network deliver a good customer experience (CX). In conjunction with our goal to complete the rollout of the network in 2020, improvement of CX is a key focus of **nbn**, and one which we recognise is critical to both our commercial success, as well as meeting the Government's policy objectives for us.

In responding to the Second Discussion Paper, the overarching comments that **nbn** wishes to make are:

- As both RSPs and **nbn** have roles to play in delivering good CX outcomes, we believe that a commercially driven approach where improvements are negotiated and are operationally feasible, is likely to be the best way to actually achieve this, rather than regulatory intervention.
- Regulatory intervention should only occur where the evidence demonstrates that commercially driven solutions have failed. **nbn** does not consider that the evidence provided to date demonstrates that any market failure in respect of service standards has occurred which would necessitate regulatory intervention by the ACCC in advance of upcoming WBA4 commercial negotiations.
- Where the need for regulatory intervention is established, this should be done by reference to the statutory criteria that the ACCC must consider. **nbn** suggests that the following Guiding Principles should assist the ACCC in navigating its assessment of any proposed regulatory intervention, consistent with the relevant statutory criteria:
 1. Commercial negotiations deliver superior outcomes, given the ability of parties to manage operational practicalities of any changes, and should be preferred to regulatory intervention
 2. Focus must be on delivering benefits to end users
 3. Accountability should follow responsibility with the party that can best manage or has responsibility for the relevant portion of the supply chain being accountable for it
 4. Cost impact must be considered and in particular whether the cost is disproportionate to the value that end users derive from any changes
 5. Regulation should take into account the commercial context
- **nbn** has every incentive to deliver good CX outcomes to ensure that consumers join the network early, stay on it and take higher value services over time. These incentives can be seen to be playing out in practice, evidenced by improvements in both our commitments to RSPs and the actual performance outcomes achieved.
- We expect to continue to improve our commercial arrangements with RSPs as the next iteration of our Wholesale Broadband Agreement is negotiated with RSPs this year. A key focus of these arrangements will be to ensure that both **nbn** and RSPs are working together effectively to help deliver improved CX outcomes, to the extent each party is in a position to do so.

In saying this, **nbn** believes that it is important to reiterate a number of relevant considerations when considering the service standards currently in place. **nbn** is operating in a unique context, which cannot be disregarded, and this shapes what service standards are appropriate are at this point in time:

- **nbn** is still engaged in the most complex, scrutinised and ambitious network deployment ever carried out in Australia, and is currently in the middle of its most intense year of construction and migration. Any regulatory intervention at this stage would be based on data from a unique phase of **nbn**'s operation, and potentially divert resources from achievement of our network deployment objectives;



- In most cases, end users will already have an existing service in place prior to the migration to an **nbn** service, mitigating any adverse impacts associated with delays in connection;
- Unlike previous operating models in Australia, there are many participants in the overall delivery of services to end users. **nbn** only controls part of the delivery chain, and is reliant on RSPs also playing a significant role in the end-to-end CX story; and
- As a wholesale-only operator, **nbn** is entirely reliant on its RSP customers to generate the revenues it requires to make a return on investment. There are competitive alternatives to **nbn** services in a number of markets and geographies, which will only grow over time as technologies such as 5G fixed wireless are introduced. We must therefore provide services that respond to the needs of RSPs and their customers, providing strong incentives to continue to improve our service levels.

Our submission provides additional insight and context to the issues the ACCC has identified in its Second Discussion Paper, as we believe a complete picture is required before considering whether any regulatory invention is justified. Our initial submission provided in March 2018 (**March 2018 Submission**) also includes relevant context for our current service levels and should be considered in conjunction with this submission.

In providing this additional detail on our current service standards and ensuring the ACCC has the full context for how they operate, **nbn** is not suggesting that there is no room to make further enhancements to our current service standards. Rather, our position is that this must be done in a commercially negotiated manner that takes into account our operating environment, the needs of RSPs and end users, recognises some inherent limitations that can't be accelerated by incentives or penalties, and acknowledges improvements that **nbn** has made and is continuing to make.

Submission Summary

Section 1: Overall framework for ACCC Inquiry

- A commercially driven approach, rather than regulatory intervention, is the better path forward to deliver improved service outcomes for end users. This approach is also consistent with the overarching legislative framework in which **nbn** operates.
- The negotiation of WBA4 provides an ideal opportunity for RSPs and **nbn** to identify and implement new service standards, taking into account issues raised by the ACCC and the operational and commercial needs of all parties.
- **nbn** has strong incentives to improve service performance outcomes, and these incentives are working in practice. **nbn** has focussed on continuing to deliver improved service performance outcomes. While challenges remain as the volume of activity increases, these continue to be addressed as they arise.
- **nbn** proposes a set of five Guiding Principles that are aligned with the legislative criteria that the ACCC takes into account when making an access determination under the 'Part XIC factors' set out in section 152BCA of the *Competition and Consumer Act 2010 (CCA)*. This principles-based framework should assist the ACCC in its assessment of the need for, and nature of, any regulatory intervention.
- **nbn** has introduced recent enhancements to its commercial agreements with RSPs in the form of a Voluntary Undertaking that was accepted by the ACCC in September 2018. These enhancements address a number of previous concerns of RSPs and provide a number of end-user targeted benefits. In particular, they deliver an improved rebate scheme that also requires RSPs to take reasonable steps to pass through a fair value benefit of those rebates to end users.

Section 2: Rebates

- **nbn** agrees with the ACCC that rebates are an important component of **nbn**'s service level framework, and that they can play a range of purposes. However, they are still only one component of that framework, and their importance in achieving improved service outcomes should not be over-stated.
- Beyond the purposes identified by the ACCC, **nbn** considers that a key consideration is whether end users receive the benefits of any rebate arrangements established between **nbn** and RSPs.



- While rebates *can* provide financial incentives to improve performance, **nbn** submits that it has already made commitments to improve service outcomes with a financial impact that is materially greater than any rebate scheme. This highlights that it is our underlying economic incentives, rather than the financial incentives provided by rebates, which are the primary drivers of **nbn**'s approach. At best, rebates should be seen as *complementary* to **nbn**'s broader and more powerful economic incentives.
 - Examples of these types of commitments made by **nbn** include the decision to pause connection of HFC services until performance issues could be addressed (at the expense of revenue foregone), provision of an additional \$800 million in fixed wireless network upgrades, and significant organisational focus on reduction in long-held connection orders and trouble tickets.
- In considering any new rebate arrangements, **nbn** believes that they need to take into account the accountabilities of each party, the costs imposed and the wider context of incentives and other service levels that already exist.
- The rebates in WBA3 (and enhanced through the commitments made in **nbn**'s Voluntary Undertaking) were developed in the context of **nbn**'s state of deployment and operation at that time. **nbn**'s expectation is that the nature and scope of these rebates will continue to evolve as RSPs and **nbn** negotiate commercial arrangements.

Section 3: Service speed and performance

- **nbn** agrees that RSPs require appropriate information about attainable service speeds to support their sales and marketing activities. **nbn** already provides such information, subject to inherent limitations faced by **nbn** in relation to specific technologies, such as FTTN/B and fixed wireless.
- **nbn** is already responding to fixed wireless performance issues by investing an additional \$800 million into capacity upgrades. The imposition of a rebate in relation to cells below the network design threshold would have limited incentive effect, as **nbn** already has an upgrade program in place, involving considerable resources and which cannot be significantly accelerated. There are also a number of other material changes taking place in **nbn**'s fixed wireless network configuration which should help to address the concerns raised by the ACCC.
- For copper-based services in the co-existence period, there are factors outside **nbn**'s control which mean that imposition of a rebate for services performing below 12/1 would have no meaningful incentive effect on **nbn**.
- It would not be economically efficient to impose a rebate obligation on **nbn** while it is remediating a copper line given there are existing remedies available to end users at the retail level and RSPs at the wholesale level where line speed does not support ordered speeds.

Section 4: Retail consumer safeguards

- Both **nbn** and RSPs play key roles in ensuring that appropriate consumer safeguards are delivered, and this allocation of accountability needs to be reflected in regulatory arrangements.
- Priority Assistance (PA) is an important consumer safeguard, which we play a role in supporting. However, **nbn**'s view is that there are more effective and focused solutions that will genuinely prioritise and protect the needs of dependant and medically vulnerable end users.
- If the focus is on ensuring that PA customers actually experience minimal interruption of service continuity, this cannot be solved by addressing the access network alone.
- In reviewing the current operating model for PA, it is helpful to first understand the three significant challenges that need to be solved for:
 - 1) End users living in a home that does not have a physical **nbn** connection yet and need connection as soon as possible.
 - 2) End users who have a reliance on high availability services, despite no single network being able to guarantee uninterrupted service.



3) End users' need for telecommunication service continuity during power outages despite **nbn** infrastructure and RSP consumer premises equipment relying on power availability to operate.

- The solution currently applied by RSPs under the industry code is to offer "interim services" to reactively address these three challenges as they arise and when no alternate solution exists in the home. This operating model requires a complex coordination of different databases, confirmation of medical certification and inter-carrier rebate transactions to support. All of these processes are a resource distraction to providing a solution that actually focuses on the people they are designed to service.
- Priority Assistance industry arrangements were designed in an era predicated on a model of a vertically integrated operator, long before the near-ubiquitous availability of mobile networks. **nbn** believes that the solution to the three challenges outlined above is best found in RSPs providing medically vulnerable customers with customer premises equipment (CPE) that has a voice-capable mobile modem integrated, SIM card provisioned and battery backup. This would reduce, if not eliminate, the need for an interim service, as well as significantly increasing the level of service continuity for these end users.
- **nbn** considers that its current service levels for PA connections and fault rectification support Telstra's existing "obligations", noting that the PA time frames do not actually apply to Telstra when supplying services over our network.
- Current WBA arrangements ensure that an RSP is able to claim CSG compensation from **nbn**, to the extent that **nbn** contributes to an RSP's delay in meeting retail CSG performance standards. However, these processes are complex (reflecting the fact that the CSG was established in a different industry context), and could be simplified if parties are willing to make trade-offs between simplification and accuracy of outcomes. **nbn** believes that this could be achieved through a commercially negotiated approach.
- **nbn** has responded to the new ACMA instruments for continuity of service and service migrations by enhancing its existing systems and connection processes in order to be able to provide RSPs with reasonable assistance for their new obligations. As these new obligations are only a few months old and the impact felt by end users has not been fully assessed, we consider that it is too soon to consider introducing additional measures beyond the new instruments.

Section 5: Measurement and reporting of operational performance

- The introduction of the "New Service Never Worked" classification is intended to ensure that these services are treated operationally with a higher priority than other fault types, to ensure they are resolved as quickly as possible. This also applies to service faults lodged within the first 10 business days of activation.
- **nbn** commences the timeframe for addressing a service fault from the time we have accepted a trouble ticket, which is after we have confirmed that all necessary information has been provided by the RSP. Changing to the approach proposed by the ACCC would mean that **nbn** would be accountable for addressing faults for which it does not have all required information, which is an activity within the control of RSPs, and would be unlikely to result in improved end user outcomes.
- **nbn** commenced providing RSPs with additional granular performance reporting in December 2018. We believe that this should address issues previously raised by RSPs about the level of detail provided, but will continue to review this based on ongoing discussions with RSPs.
- **nbn** accepts that RSPs require access to appropriate and timely operational information to manage their responsibilities and relationships with end users. Our systems already provide a number of real-time updates to RSPs, and we are continuing to assess options to add further capability to allow RSPs to have an even greater degree of control in the management of their customers.



Section 6: Liability and indemnity framework

- **nbn** agrees with the ACCC that liability should be allocated according to the principle that the party best placed to manage a risk should bear it. Allocating risk in line with this principle promotes the economically efficient use of, and investment in, **nbn**'s infrastructure.
- Moreover, by ensuring that risks are managed at the lowest possible cost, allocating risk in line with this principle is in the long-term interest of end-users.
- The liability and indemnity framework in WBA3 includes a set of complementary mechanisms designed to achieve two key objectives:
 - to incentivise each party to avoid commercially avoidable risks (by allocating liability to that party if they do not take all commercially feasible measures to avoid the risks); and
 - to the extent that a risk cannot be commercially avoided, to allocate liability for the resultant losses to the party best able to manage and mitigate those losses.
- **nbn** considers that the liability and indemnity framework in WBA3 is already more generous than those for comparable operators in the United Kingdom, Singapore and New Zealand, and includes unique features that provide RSPs with additional protections over and above what would typically be offered.
- The annual liability cap in WBA3 only applies to unforeseen losses, and does not directly relate to service delivery and network construction – for which **nbn** accepts uncapped liability.
 - Changing the annual liability cap would have not have any impact on **nbn**'s incentives to maintain or improve our service delivery outcomes.
- The Material Service Failure regime introduced in WBA3 is an unparalleled addition to our liability framework, which provides RSPs with additional protections in respect of significant service failures, over and above **nbn**'s general liability provisions for service failures. It provides additional incentives for **nbn** to respond in a timely manner to these significant events.
- The third party claims protection in WBA3 protects **nbn** from liability in respect of *pure economic losses*, and hence predominantly relates to business services. These business end users are best placed to understand their business continuity risk and to determine how to respond in a proportionate and efficient manner.
- Conversely, without such protection, **nbn** would effectively be required to mitigate business continuity risk for all businesses across Australia, which would likely result in inefficient over-investment (“gold plating”) and drive increases in costs which would be reflected in higher prices.



1. Overall framework for ACCC Inquiry

1.1 Regulatory Context

1.1.1 A commercially driven approach has delivered appropriate service standards

While **nbn** agrees with the ACCC that ongoing development of our service standards is necessary, we believe a commercially driven approach is the more appropriate way forward given the context in which **nbn** operates, rather than regulatory intervention. Commercial negotiation and **nbn**'s existing economic incentives have already delivered what **nbn** considers to be appropriate service standards to date, and produced ongoing improvements in outcomes delivered to end users.

As **nbn** enters into the negotiations on the next version of its access agreement with RSPs (WBA4), we will be taking into account the issues raised by the ACCC in its Second Discussion Paper, as well as the issues that RSPs have identified as also requiring review. In this submission, we will indicate specific areas that we acknowledge will require further development in WBA4.

There are sound reasons why regulatory intervention is not required, as described in our March 2018 Submission, supported by ongoing improvements in service performance outcomes since the first phase of the ACCC's Inquiry. These reasons include:

- **nbn** is currently engaged in the most complex, scrutinised and ambitious network deployment ever carried out in Australia;
- at the same time as we are reaching the peak build phase of the network, **nbn** is also currently serving over four and a half million active premises and will be managing the migration of a similar number of premises across to the national broadband network by the end of FY21;¹
- **nbn** has prioritised customer experience (**CX**) over other aspects of **nbn**'s objectives² and there has been a significant and demonstrable improvement in end user outcomes due to **nbn**'s efforts;
- as a result, our service performance has substantially improved, most clearly seen over the past year or so, even during the huge ramp up in our network deployment and connection activities (see section 1.3 below);
- **nbn** has strong incentives to meet and improve its service levels, and these are demonstrably working to do so (see section 1.1.2 below);
- as a result of the Voluntary Undertaking made by **nbn** and accepted by the ACCC in September 2018, there have been a number of material enhancements made to **nbn**'s rebate arrangements, as well as other aspects of our service standards (see section 1.4 below);
- **nbn** has established and continues to improve our service levels and other performance commitments over time; and
- the performance levels which we have committed to exceed comparable international benchmarks.

nbn strongly believes that the ACCC should take an evidence-driven approach to determining whether commercial negotiations are delivering results or not. Only if the ACCC determines that a market failure is occurring and sub-optimal results are being achieved through commercial negotiation, after having regard to the relevant legislative criteria, should the ACCC consider regulatory intervention. In particular, the ACCC should not simply rely on general, anecdotal statements from RSPs that are unsupported by evidence nor grounded in principles of good regulation. Through an evidence-based approach, the ACCC should closely test any claims by RSPs and ensure that RSPs are not simply engaging in commercially rational "gaming" to improve their negotiating position relative to **nbn** (without delivering the objectives required by the regulatory framework).

¹ **nbn** Corporate Plan 2019-20 – Total activations expected by end of FY21 is 8.4 million.

² For example, see discussion in section 5.6 in our March 2018 Submission in relation to the HFC Pause.



The mere fact that an RSP has raised a concern with the ACCC is not an indication that the commercial negotiation process has failed to deliver results. The outcome of commercial negotiations should instead be assessed according to well-established regulatory principles (including the Part XIC factors in section 152BCA of the CCA), rather than on the extent to which they satisfy the commercially rational interests of individual RSPs.

An evidence-driven approach shows that there is no market failure in respect of service standards that would necessitate regulatory intervention. As demonstrated by the improvements to **nbn**'s service standards and performance made by us through our CX program (amongst others), it is clear that commercial negotiation and **nbn**'s incentives are operating as they should be. Not only does **nbn** have strong economic incentives to improve service standards, it can be shown that these economic incentives are delivering actual results. Accordingly, there are no grounds for regulatory intervention and commercial negotiations should be allowed to prevail.

1.1.2 **nbn's incentives to improve service levels are working in practice**

nbn has every incentive to improve service levels so that our wholesale inputs contribute to an acceptable end user experience at the retail level. As a wholesale-only company, **nbn** is entirely dependent on RSPs as a channel to market to end users. We must work together with RSPs to offer appropriate service levels and to meet the expectations of end users. The arguments around these points are made in detail in our March 2018 Submission, and should be read as part of this current submission.

The ACCC suggests that "*NBN Co should face incentives to complete connections and rectify faults within a reasonable timeframe, and that RSPs and end users should be provided with meaningful compensation or remedies when this does not occur*".³ A key factor here is that **nbn** is currently engaged in a vast network deployment, coupled with the migration of almost all premises to this new network. In that context, **nbn** submits that our service level commitments already meet or exceed comparable networks around the world. For example, Openreach is only required to achieve 83% compliance with its assurance service levels, moving to 88% by FY21 and those service levels are themselves more generous to Openreach than **nbn**'s commitments.

nbn's service levels have also been set through a process of lengthy negotiation with our customers. As described in detail in our March 2018 Submission,⁴ there is no material mismatch in bargaining power between **nbn** and our customer base. The presence of large, sophisticated customers such as Telstra, Optus, TPG and Vocus with deep understanding of telecommunications networks and services, along with the bypass risk faced by **nbn** (particularly in specific markets and geographies, for example in multi-dwelling units and new estate developments), means that there is more evenly distributed bargaining power than can often be the case in these contract negotiations. **nbn** also engages and actively negotiates with smaller access seekers and those access seekers are empowered by **nbn**'s non-discrimination obligations.

It is also important to recognise that in negotiating appropriate commercial outcomes, all parties will need to have regard to their operational capabilities and preferences in relation to any proposals. It may be the case that operational constraints or implementation costs mean that a "theoretically correct" approach may not be the preferred outcome. This is important in the context of any consideration of regulatory intervention, which may not be able to factor in practical operational issues, and can potentially lead to unintended consequences.

[Commercial-in-Confidence]

Additional regulatory intervention has the potential to disturb this negotiated bargain in a detrimental way that would not promote the long-term interests of end users. In any even-handed negotiation, parties negotiate and reach a compromise. By intervening, the ACCC will potentially modify this bargained outcome in a way which imposes greater and unnecessary costs on **nbn** and end users. That is, **nbn** could be required to introduce changes which are not valued by end users, but have the effect of increasing our cost base, which ultimately gets passed on to end users. In addition, rules imposed on **nbn** by the ACCC are unlikely to be the most efficient and/or feasible for both **nbn** and RSPs to implement operationally, driving additional, unnecessary

³ ACCC, Second Discussion Paper, page 9.

⁴ In particular, the discussion in section 1.3.2 of **nbn**'s March 2018 Submission.



costs. Regulatory intervention could also have unintended consequences for the end user experience, such as diverting **nbn**'s resources away from existing CX improvement initiatives.⁵

nbn already has in place a wide range of CX improvement initiatives, spanning a range of activities of value to end users (and RSPs), which are not direct commitments in our contracts. These have been developed following an extensive process to determine key issues faced by end users and RSPs, and the implementation of targeted programs to address these issues – for example in reducing “long tails” of connection orders and trouble tickets and proactive remediation. We are also trialling additional initiatives such as in-home wiring to improve CX. If additional regulation is imposed, this is likely to result in **nbn** incurring additional costs or diverting resources from end-user focused initiatives onto regulator-identified ones.

1.1.3 A commercial negotiation approach is consistent with legislative objectives

As the ACCC and RSPs are aware, the access arrangements (WBA) which govern **nbn**'s wholesale supply activities have been drafted and agreed in the context of a legislative framework where commercially negotiated access agreements take precedence over mandated rules. That framework does not contemplate using access determinations to override commercially negotiated agreements. **nbn** continues to believe that this approach is the correct one, for the reasons outlined in section 2.3 of our March 2018 Submission, which include:

- parties entered into WBA agreements on a well-informed basis;
- the service levels developed by **nbn** and included in these agreements reflect both **nbn**'s role in deploying a new, nationwide network while allowing RSPs to meet their own retail regulatory obligations; and
- regulatory intervention by the ACCC should be a fall-back in the absence of a commercially negotiated agreement.

There are many reasons why the relevant legislative instruments were drafted so as to prioritise bilaterally negotiated access agreements, including the significant (and often immediate) cost, efficiency and flexibility benefits for both **nbn** and RSPs arising from commercial negotiations. In addition, negotiated agreements (i.e. in the form of the WBA) are likely to be more effective because:

- 1) They are developed by the parties that will actually need to operationalise and implement the arrangements in practice; and
- 2) They are flexible and can be varied (consistent with any change rights or further negotiated outcomes) to address issues as they arise.

These benefits have been recognised as the foundational policy rationale for encouraging and favouring privately negotiated telecommunications access terms over regulated terms for some time, as evident in the following excerpt from the Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010:

*Access agreements will enable access providers and access seekers to negotiate and agree alternative access arrangements that are mutually beneficial and provide more efficient outcomes than access determinations.*⁶

Commercially negotiated arrangements are also favoured on the basis that mandatory rules can have unforeseen consequences for industry, will generally result in increased costs to ensure compliance, and can result in a high degree of non-compliance from smaller operators (or smaller operators being forced out of the market). Strict rules also leave no flexibility to account for the complexities of the operational supply chain and service delivery partner arrangements.

⁵ As described in section 5 of our March 2018 Submission.

⁶ *Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, page 197.



For these reasons, even if the ACCC believes that there are still aspects of **nbn**'s service standards which warrant improvement at this time, the better approach is for a commercial solution to be developed which reflects the interests of all parties involved, rather than attempting to impose regulation which may have unintended cost, operational or consumer outcomes. **nbn** also notes that as end user outcomes are the shared responsibility of **nbn** and RSPs, it makes sense for those parties to attempt to develop workable, efficient approaches to delivering improved CX outcomes, rather than having solutions imposed.

nbn benefits from inputs from a range of sources in relation to **nbn**'s service standards and **nbn** notes the ACCC's statement that the public consultation and identification of specific issues or concerns by stakeholders "will be useful in informing discussions between NBN Co and its customers".⁷ **nbn** always welcomes these discussions, and will use information from this consultation for WBA4 negotiations. Ultimately, we believe the best forum for these discussions to be resolved is through commercial negotiation and that RSPs should use the commercial negotiation avenue as the means of achieving results.

1.2 Guiding principles to inform ACCC decision-making

1.2.1 Rationale for Guiding Principles

As the ACCC has noted, when considering whether to make an access determination in relation to the service standards issues raised in the Second Discussion Paper, the ACCC is required to take into account the 'Part XIC factors' set out in section 152BCA of the CCA. **nbn** agrees that these Part XIC factors should underpin any assessment performed or action that the ACCC determines to make in relation to **nbn** service standards.

The ACCC has also asked interested parties to identify the principles that should underpin **nbn** service level rebates. **nbn** agrees that it is important to establish a principles-based framework that provides a clear yardstick or standard against which any such improvements can be assessed.

Accordingly, **nbn** has developed the principles set out in Table 1 below, which draw on the Part XIC factors and are tailored to reflect the key issues that arise in considering **nbn**'s service standards. These principles should assist the ACCC in assessing the extent to which any regulatory intervention is required, in a manner consistent with the Part XIC factors.

1.2.2 Guiding Principles

Table 1: nbn's suggested Guiding Principles for assessing the extent to which any regulatory intervention in relation to service standards is required having regard to the Part XIC factors

Key relevant Part XIC factors	nbn suggested Guiding Principle
<p>ACCC must take into account the:</p> <ul style="list-style-type: none"> • long-term interests of end-users of carriage services or of services supplied by means of carriage services (s152BCA(1)(a)); and • interests of all persons who have rights to use the declared service (s152BCA(1)(c)). 	<p>Principle 1: Commercial negotiations deliver superior outcomes and should be preferred to regulatory intervention</p> <p>Commercially negotiated and implemented solutions are superior to regulated solutions because they reflect the commercial and operational needs and constraints of the parties, and should minimise unintended consequences. This is particularly the case given the more evenly distributed bargaining power that exists between nbn and larger RSPs (the benefits of which flow to smaller RSPs), as large RSPs have both significant knowledge about telecommunications network and countervailing market power due to their ability to opportunistically bypass nbn's network (particularly in specific markets and geographies).</p> <p>If regulation is required due to an identified market failure, it should be:</p>

⁷ ACCC, Inquiry into NBN Wholesale Service Standards, Second Discussion Paper, page 2.



Key relevant Part XIC factors	nbn suggested Guiding Principle
	<p>a. evidence based;</p> <p>b. targeted to address clearly identified problems; and</p> <p>c. proportional to the identified concern.</p> <p>The ACCC applies a 'with and without' test when considering the LTIE and other criteria. In this case, the base scenario is the outcome arising from commercial negotiation.</p> <p>nbn considers that, in respect of service standards, commercial negotiation will always produce outcomes that more closely give effect to the Part XIC factors, including the LTIE, than regulatory intervention. This is because the process of commercial negotiation allows the interests of all parties to be made more fully transparent, including cost, operational practicalities and prioritisation of one issue over another.</p>
<p>ACCC must take into account the:</p> <ul style="list-style-type: none"> long-term interests of end-users of carriage services or of services supplied by means of carriage services (s152BCA(1)(a)); economically efficient operation of a carriage service, a telecommunications network or a facility (s152BCA(1)(g)); and interests of all persons who have rights to use the declared service (s152BCA(1)(c)). 	<p>Principle 2: Focus must be on delivering benefits to end users</p> <p>Proposed changes should deliver improved outcomes in end users' experience of using the service. Pass-through by RSPs of benefits to end-users plays a role in determining whether end users experience will be improved.</p> <p>Delivering benefits to end users is a fundamental part of the LTIE criterion (and, in particular, the promotion of competition, which is a key component of the LTIE criterion⁸).</p> <p>Competition delivers benefits to end users. End users should be paramount when considering whether regulation will deliver the pro-competitive outcomes required by the LTIE.</p> <p>Allocative efficiency is also promoted when infrastructure is used in a way that produces services allocated to their highest value use. End users are paramount when determining this highest value use.</p>
<p>ACCC must take into account the:</p> <ul style="list-style-type: none"> legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service (s152BCA(1)(b)); and economically efficient operation of a carriage service, a 	<p>Principle 3: Accountability should follow responsibility</p> <p>The party that can best manage or has responsibility for the relevant portion of the supply chain should be accountable for it, including:</p> <ul style="list-style-type: none"> operational responsibility (e.g. an RSP is responsible for getting information about a fault from an end user and conveying that to nbn, while nbn is responsible for resolving a fault within nbn's network reported to nbn by an RSP); financial responsibility (i.e. whichever party is best-placed to price, control and mitigate financial risk should be accountable for that financial risk). Further, proposed solutions should recognise that nbn has no direct contractual relationship with end users. <p>It would be inefficient to impose accountability on a party that is unable to manage or have responsibility for the relevant part of the supply chain.</p>

⁸ Competition and Consumer Act 2010 (Cth), section 12AB(2)(c).



Key relevant Part XIC factors	nbn suggested Guiding Principle
<p>telecommunications network or a facility (s152BCA(1)(g)).</p>	<p>It would also neither be in the legitimate business interests of an access provider nor in the interests of access seekers to impose accountability where the access provider or access seeker (as the case may be) is unable to manage, or is not responsible for, that part of the supply chain.</p>
<p>ACCC must take into account the:</p> <ul style="list-style-type: none"> • direct costs of providing access to the declared service (s152BCA(1)(d)); • value to a person of extensions, or enhancement of capability, whose cost is borne by someone else (s152BCA(1)(e)); • the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service (s152BCA(1)(b)); and • the interests of all persons who have rights to use the declared service (s152BCA(1)(c)). 	<p>Principle 4: Cost impact must be considered</p> <p>Any proposed changes to service standards should take account of the cost impact of implementing that change, including whether:</p> <ol style="list-style-type: none"> a. the change would require nbn to bear unreasonable costs in making any required enhancements to our network; and b. the cost is disproportionate to the value that end users may ultimately derive from any change (particularly given changes may ultimately result in increased prices for end users). <p>As the ACCC recognised in its first discussion paper (at pages 19-20), it is in the legitimate business interests of the access provider to enable them to recover their costs. Requiring an access provider to bear a disproportionate level of costs that it is unable to recover would not be consistent with this criterion.</p>
<p>ACCC must take into account the Part XIC factors generally.</p>	<p>Principle 5: Regulation should take into account the commercial context</p> <p>There are a number of procedural issues that the ACCC should take into account when considering whether and how to regulate service standards:</p> <ol style="list-style-type: none"> a. any proposed changes to service standards should take into account the overall commercial framework in which they operate, noting that the WBA reflects a commercially negotiated compromise between nbn and RSPs, and that service standards are not stand-alone elements; and b. any proposed changes to service standards should not redefine the underlying scope of the service (as declared in the WBA or SAU), but merely constitute modifications to their terms and conditions of supply. <p>The ACCC has recognised in its first discussion paper that regulated terms and conditions must be readily applicable in a commercial setting and "fit" with contractual arrangements. The ACCC should take a similar contextual approach when considering the issues raised in the Second Discussion Paper, in particular the liability provisions which are part of a large, complex and fully negotiated liability scheme. One or two single issues</p>



Key relevant Part XIC factors	nbn suggested Guiding Principle
	<p>cannot be considered without considering the impact on the overall liability scheme established under the WBA.</p> <p>Further, the ACCC's role under section 152BC of the CCA is limited to determining terms and conditions or the application of the SAOs or any other matter relating to access to a particular declared service. The ACCC cannot extend the definition of the service beyond the scope of the declaration of the service (under the WBA SFAA or SAU).</p>

1.2.3 Implementation of Guiding Principles

nbn expects that its commercial negotiations with RSPs in the context of WBA4 will result in improvements to service standards in some of the areas mentioned in the ACCC's Second Discussion Paper, as well as reflecting the Guiding Principles. This reflects our previous experience with WBA negotiations, where each previous version of the WBA has brought about iterative improvements to service standards. It also reflects the fact that the service levels achievable by each of our products improve as they mature and process improvements are made, allowing us to make stronger commitments in relation to them. In addition, and as noted by the ACCC, the very existence of the Second Discussion Paper will clearly provide these issues with sharper focus during the commercial negotiations. Finally, **nbn** is looking at its own proactive measures to address specific issues. An iterative commercial negotiation approach should result in a more efficient and effective outcome, with targeted and focussed delivery of improvements to service standards that are: (a) considered most essential to RSPs, and (b) feasible and deliverable by **nbn** taking into account our financial framework.

In respect of some of the areas identified in the ACCC's Second Discussion Paper, commercial negotiations between parties may determine that amendments are not necessary or efficient to deliver CX improvements. This should not in itself be viewed as a failure of the commercially determined outcome that necessitates ACCC regulatory intervention.

[Commercial-in-Confidence]

1.3 **nbn** has demonstrated ongoing performance improvements

As discussed extensively in our March 2018 Submission, **nbn** has made significant improvements in performance since mid-2017. These performance improvements have continued since last year, and reflect **nbn**'s underlying incentives to deliver improved outcomes for RSPs and end users. However, we acknowledge that there will continue to be challenges faced by **nbn** in delivering the outcomes we are seeking to achieve. We have periodically encountered issues with specific technologies (for example, the "HFC Pause" issue discussed in our March 2018 Submission). This may result in temporary adverse performance outcomes. This does not detract from the overall performance improvement that **nbn** has been able to achieve while continuing to deploy its network across the country. Rather, the relevant point here is **nbn**'s response to any temporary issues that arise, and our willingness to ensure that we remain on a long-term path to improved performance.

[Commercial-in-Confidence]

nbn has implemented various measures designed to improve performance that go above and beyond our contractual terms, including measures which we know are valued by RSPs and end-users such as Right First Time, and long tail reductions. Other recent examples include:

- Announcement of an additional \$800 million in fixed wireless capacity upgrades;⁹

⁹ <https://www2.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-co-unveils-new-plans-for-fixed-wireless-network>



- **nbn** and RSPs working together to complete installations more efficiently;
- Improving the ability to install **nbn**TM equipment correctly the first time through better customer communications and in-field training;
- Introducing new tools to help better diagnose and understand the cause of faults on the network;¹⁰ and
- Trials of in-home re-wiring which have delivered significant speed improvements to end users.¹¹

nbn has strong economic incentives to continue to improve our service levels through these kinds of initiatives. **nbn** outlined these incentives in detail in section 1.3 of our March 2018 Submission. In particular, there are competitive alternatives to **nbn** services in a number of markets and geographies, which will only grow over time as technologies such as 5G fixed wireless are introduced. As **nbn** has highlighted in our Monthly Progress Reports, these improvements have taken place at the same time that the number of active service services on our network has grown by 100% in the last nineteen months (from 2.4 million to 4.8 million¹²).

The ongoing improvement in **nbn**'s performance is also evident in TIO complaint information. Even as the number of active **nbn** services continues to grow, the absolute number of complaints to the TIO about services provided over the **nbn** reduces. **nbn** is confident that the next TIO update will continue to show the significant decline in complaints about services delivered over the **nbn** network since July 2017, even though the total number of activated premises on the **nbn** has increased by more than 2 million in this same timeframe. Given the time lag in TIO reporting, many people have not realised how much better the industry is performing in managing complaints about services delivered over the **nbn** network, even though the improvements that **nbn** and RSPs have already made are having a tangible and positive impact on end-users.

[Commercial-in-Confidence]

1.4 Enhancements committed to in **nbn**'s Voluntary Undertaking

In addition to the improvements in performance described in section 1.3 above, **nbn** has offered enhancements to the terms of WBA3 in the form of a voluntary undertaking to the ACCC, which was accepted under section 87B of the CCA on 11 September 2018¹³ (**Voluntary Undertaking**). This Voluntary Undertaking responded to concerns identified by the ACCC in the first phase of their Inquiry, and came into effect on 11 December 2018.

These enhancements are a relevant part of any consideration of the need for any regulatory intervention on the part of the ACCC, as they addressed previous concerns of industry, as well as demonstrating that there are avenues others than direct regulation open to the ACCC.

The key commitments contained in the Voluntary Undertaking include:

- a new rebate of \$25 per appointment, payable to RSPs for all missed connection, assurance and professional splitter installation appointments;
- **nbn** will now pay RSPs a rebate for each instance where **nbn** does not meet the service connection and fault restorations times agreed with RSPs under the WBA (previously the rebate was only paid when **nbn** fell below a 90% performance objective);
- restrictions to the circumstances in which **nbn** is able to suspend measurement of its performance ("stop the clock");
- the requirement on RSPs to provide forecasts of expected connections in order to receive the connection rebate was removed;

¹⁰ This and the previous two points are described here: <https://www2.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-co-responds-to-tio-annual-report>

¹¹ Communications Day, 19 February 2019, "How a ten buck splitter can boost **NBN** speeds by 11Mbps"

¹² As at 14 February 2019, the number of premises activated was 4.838 million. As at 30 June 2017, the number of premises activated was 2.443 million. <https://www2.nbnco.com.au/content/dam/nbnco2/2018/documents/weekly-progress-reports/14022019.pdf>

¹³ <https://www.accc.gov.au/public-registers/undertakings-registers/nbn-co-limited>



- enhancements to the monthly performance reports provided to RSPs; and
- several additional and enhanced fixed wireless reports to the public, RSPs and the ACCC related to the performance of individual services, performance of cells within the fixed wireless network generally and upgrade plans for the fixed wireless network.

In addition to these enhancements, the Voluntary Undertaking also introduced changes to the WBA which required RSPs to take reasonable steps to pass through a fair value benefit of the rebates to affected end users. This was an important step taken to shift the focus of rebates from a transfer of value from **nbn** to RSPs to one which elevated the interests of end users. This change provides an example of how commercial arrangements can be used to better align the roles of **nbn** and RSPs to deliver benefits to end users.



2. Rebates

2.1 Introduction

As noted by the ACCC, **nbn** has provided an enforceable undertaking to the ACCC on a voluntary basis, which includes a number of significant improvements in relation to the rebate arrangements in WBA3 (see section 1.4 for details). These improvements are consistent with **nbn**'s incentives to improve its service standard offering as and when it is able to, as described in our March 2018 Submission.

nbn continues to consider the appropriate structure and quantum of its rebates, as part of its ongoing discussions with RSPs in relation to the WBA, and as part of its broader program of customer experience improvement initiatives. **nbn** expects that the nature and scope of rebates will continue to evolve, and is open to working collaboratively with RSPs to determine how to optimise them as part of the WBA4 negotiations. However, this should be done as part of a broader commercial conversation, which includes the setting or resetting of the responsibilities of RSPs who have an equally important role to play in ensuring the optimum level of CX for end users over the long term.

2.2 Purpose of rebates

Any given rebate can serve a variety of purposes, and will be viewed differently by supplier, retailers and end users. In this section, **nbn** outlines some of the key principles that we believe are relevant when considering the multiple purposes that rebates can play. As any new rebate arrangements are being developed, **nbn** believes that these principles should form part of their assessment.

2.2.1 Incentive effect of rebates should not be over-stated in **nbn**'s context

The ACCC has identified a number of purposes served by **nbn**'s rebates, and considers that these rebates should provide strong financial incentives on **nbn** to meet our service levels. **nbn** agrees with the ACCC that rebates can play a variety of roles, and provide a degree of incentive for **nbn**, but considers that this incentive value should not be over-stated. At best, rebates should be seen as having a *complementary* incentive effect to **nbn**'s pre-existing incentives.

It is essential to recall that **nbn** has several broader and more powerful economic and other incentives to meet its service level commitments. These are amply described in our March 2018 Submission (see, for example, section 1.3). In summary, these economic and other incentives include:

- (1) **nbn** is a wholesale-only entity that has obvious and strong incentives to increase take-up and retention of its services, including through improved service standards and performance (including because **nbn** faces competition and bypass risks in some markets and geographies);
- (2) **nbn** facing regulatory oversight, as well as ongoing scrutiny and accountability as a current government owned enterprise; and
- (3) consequences already built into the existing service standards framework.

In responding to these broader incentives, **nbn** has already made commitments aimed at improving performance outcomes that have financial impacts which are materially greater than any rebate arrangements. These commitments also relate to performance issues which are not "covered" by rebates, and hence the incentives to address the issues clearly are not derived from any incentive effect generated by rebates. Examples of these commitments include:

- The decision to pause connection of HFC services until underlying service issues could be analysed and rectified, to ensure that end users were provided with a high-quality service. This resulted in **nbn** deferring connections for over six months, thus foregoing the potential revenue that could have been generated from those connections.¹⁴ Having identified the issue, taken accountability for the network

¹⁴ See section 5.6 of our March 2018 Submission.



factors in our control, and put end user outcomes first, **nbn**'s approach is a clear practical demonstration of our incentives acting to deliver outcomes in the interests of end users and RSPs;

- Making a commitment to invest an additional \$800 million into fixed wireless network capacity upgrades to accelerate addressing cells performing below our network design criteria; and
- Developing targeted approaches to managing "aged" connection orders and fault tickets to significantly reduce the incidence of these "long held" issues, in the absence of any specific contractual requirement to do so.¹⁵

As noted in our March 2018 Submission, **nbn** considers that another purpose of commercial rebates paid under the WBA is to compensate RSPs for the diminution of value they have received if we do not meet a service level commitment. In our experience, this is typical of many supply contracts, including the WBA. This is especially appropriate in the wholesale context, where we supply services that are acquired, transformed and added to by an RSP for on-supply to an end user. Under this approach, the calculation of the rebate is an attempt to quantify the diminution of the value of the service to the RSP relative to the charges for the service paid by the RSP (i.e. somewhere between 0% and 100% of the service charges paid). In this way, the rebate paid by **nbn** to the RSP is relative to the charge paid by the RSP to **nbn**.

2.2.2 Benefits of rebates should be delivered to end users

In addition to the points identified by the ACCC, **nbn** considers that improving end user experience should be central to any discussion on the appropriate role played by rebates. Any rebate benefit provided by **nbn** to reflect the diminution in the value of **nbn**'s service to the RSP should ultimately result in RSPs providing a benefit to end users (either directly, or through other forms of compensation, e.g. provision of interim services while the service is unavailable), rather than simply being a value transfer from **nbn** to RSPs.

One of the significant changes to the rebate arrangements that **nbn** committed to as part of the Voluntary Undertaking was the inclusion of a requirement that RSPs take reasonable steps to ensure that affected end users received a fair value benefit of those rebates. This condition further recognises that, in most cases, it will be end users who experience the consequences of **nbn** not meeting its service performance targets.

nbn submits that, should the ACCC decide to impose changes to **nbn**'s rebates, the ACCC should carefully consider specific mechanisms for pass-through of rebates by RSPs to end users.

As the ACCC pointed out in its first consultation paper, it finds little evidence of RSPs contractually agreeing to pass-through such rebates to end users as part of their standard terms of supply, especially in the residential or consumer market. As far as is appropriate, **nbn** is doing its part by compensating RSPs in a manner consistent with the underlying and stated purpose of its rebates. **nbn** also notes that the majority of RSPs also require end users to waive their rights to CSG compensation as a condition of acquiring a service, further limiting the potential compensation available to end users.

2.2.3 Rebates should consider accountability, costs and their wider context

nbn agrees with the ACCC that rebates should appropriately allocate risk and responsibility between **nbn** and RSPs and provide incentives for all parties to work together to achieve good end user outcomes. Otherwise, the rebates would neither incentivise **nbn** nor result in any improvement in service standards for end users. To the extent any new rebates are imposed on **nbn**, this should only be to the extent that **nbn** has responsibility for the problem leading the possible rebate and that no reasonable mitigating action can be taken by RSPs to reduce the problem for end users. To the extent that RSPs are able to take reasonable mitigating action to reduce the burden of problems leading to rebates, then RSPs should do so.

Clearly, any rebates that **nbn** is required to provide impose costs on us that divert resources from activities that **nbn** could undertake to address the underlying performance issues. **nbn** believes that this cost impact must be considered as a factor when determining whether to impose rebates and the level of those rebates.

¹⁵ See sections 5.4 and 5.5 of our March 2018 Submission.



2.3 Rebate structure

nbn agrees with the ACCC that the design of any rebate framework is critical to ensure that it meets its intended purpose. We do not believe that any rebate framework should be a “set and forget” activity, but rather should be subject to ongoing discussion between suppliers and their customers, taking into account the outcomes for end users. Thus, **nbn** sees discussion about the rebate framework as forming an important part of the re-negotiation of the WBA terms, as part of a wider consideration of the overall service delivery arrangements, including the role that both **nbn** and RSPs can play in achieving a good end user experience.

The principles described in section 2.2 above are particularly relevant to any consideration of the structure of future rebates. In considering new rebate *structures*, **nbn** believes that the following key principles can be distilled from the principles discussed in section 2.2, which are directly relevant here:

- 1) Rebates should be seen as compensating for the diminution in value of the service, rather than a penalty. The quantum of rebates should not exceed the wholesale charges of the activity in question.
- 2) If the same event gives rise to multiple consequences and potential rebates, then only a single rebate (of the greatest value) should apply.
- 3) There should be a focus on ensuring a fair value of any rebate is transparently provided to end users rather than being wholly consumed by RSPs.
- 4) The rebate arrangements should be seen as part of the wider package of supply arrangements and commitments made by both **nbn** and RSPs. This must include their interaction with the role played by the Liability and Indemnity framework discussed in section 6.

[Commercial-in-Confidence]

2.4 WBA4 Connection rebates

The ACCC asks whether connection rebates should also be available to standard connections where the service level is one business day. At the time **nbn** formulated its approach to rebates, we formed the view that Standard Connections that had a one Business Day service level would not be included in the Standard Connection Rebate as these services are already connected to the **nbn** network and the connection is a logical connection (only requiring a remote IT switch, rather than any physical changes).

nbn has been able to deliver a high level of achievement of the one-day service level [Commercial-in-Confidence]. As a result, and in accordance with an evidence-based approach to determining whether regulation is required, **nbn** does not consider that this is a material issue in the overall consideration of our service standards, and that a compelling rationale for regulatory intervention has not been demonstrated.

[Commercial-in-Confidence]

2.5 Pass through of rebate benefit to consumers

As described in section 2.2.2 above, **nbn** considers that it is appropriate that any rebate benefit provided by **nbn** should ultimately result in a benefit to end users, rather than simply being a value transfer from **nbn** to RSPs. This view is driven by consideration of the Part XIC factors and the Guiding Principles, where a key tenet is the focus on delivering benefits to end users. If the ACCC starts its consideration of “pass through” in this light, it is clear that any discussion about rebates should have end users at their heart, and that the focus should be on ensuring that this actually occurs. From **nbn**’s perspective, if rebates simply represent a transfer of value from **nbn** to RSPs, the rebate regime has not achieved one of its core purposes, which is to ensure that end users receive some benefit from them. This was a key consideration for **nbn** including in the Voluntary Undertaking the notion of a pass through of a fair value benefit of any rebates to end users. This provision in the Voluntary Undertaking puts end users into the overall rebate framework for the first time.

In examining this issue, **nbn** encourages the ACCC to consider the interests of all parties, including RSPs, but with a focus on the outcomes achieved for end users. Rather than asking what processes RSPs expect to apply or what records are needed, **nbn** suggests that the more relevant initial question is what benefit end users should expect to receive as a result of **nbn** paying rebates when service levels are not met.



nbn has only limited comments in relation to the ACCC's questions 5 and 6, as it is ultimately up to RSPs how they choose to flow through benefits to end users. There may be some utility if RSPs outlined their approach to end user rebates in their Critical Information Summaries, so that end users have transparency about what their expectations should be for any pass-through of rebates, and make informed decisions about their service provider. This could, for example, include RSPs identifying how they will define "fair value benefit", and how it relates to any rebates paid to them by **nbn**.

In relation to the ACCC's question about what additional wholesale measures may be required to support RSPs, **nbn** notes that RSPs already have access to information that supports them in identifying and passing through fair value benefit from rebates to affected end users. RSPs have access to their Billing Event File (BEF) that provides a line-by-line breakdown of the rebate applied against a specific AVC. RSPs are then able to use this detail to identify who their end user is and to build an automated system (if they wish to) to pass on the fair value benefit to end users. **nbn** has also developed a customised Missed Connection Rebate report to support the new Missed Connection Rebate, that provides details that RSPs can use to reconcile the line level Missed Connection Appointment rebate applied to their invoice. The report will also provide RSPs with specific end user details they need to pass on the fair value benefit to the end user and to build an automated pass through solution (should they choose to do so).

nbn therefore considers that RSPs already have access to the information they need to pass through an appropriate fair value benefit of the rebates that **nbn** pays to RSPs.

nbn recognises that this is a relatively new regime, and that as RSPs and **nbn** gain more experience with its operation, it is appropriate to review how to ensure it works most effectively. We anticipate that this will result in changes being made to enhance the implementation of pass-through of rebates during the negotiation of WBA4, based on feedback from RSPs during that process.

2.6 Answers to specific questions

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

Any given rebate can serve a variety of purposes, and will be viewed differently by supplier, retailers and end users. Any new rebate arrangements need to take into account the accountabilities of each party, the costs imposed and the wider context of incentives and other service levels that already exist. Improving end user experience should be central to any discussion on the appropriate nature of rebates. **nbn** considers that any rebate benefit provided by **nbn** should ultimately be received by end users (either directly, or through other forms of compensation), rather than simply being a transfer of value from **nbn** to RSPs.

2. How should rebates be structured to ensure that they provide the right incentives to NBN Co and RSPs to contribute to good end user experiences?

In considering any restructure of current rebate arrangements, **nbn** believes that the principles described in sections 2.2 and 2.3 and summarised in response to question 1 should be taken into account. In particular, **nbn** submits that rebates should be seen to be compensating for the diminution in value of a service rather than as a penalty, that a single rebate should apply to the same event, and that end users should receive a fair value benefit of any rebate paid by **nbn**. It is also important to consider the structure of rebates in the context of the wider package of supply arrangements, including the interaction of the rebate arrangements with the Liability and Indemnity framework. [Commercial-in-Confidence]

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

See response to question 2.



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

nbn does not consider that this is a material issue, as we have consistently delivered a high level of achievement of the one-day service level, and that there is no compelling case for regulatory intervention. [Commercial-in-Confidence]

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

Not applicable to **nbn**.

6. What records will RSPs keep to demonstrate compliance with the pass through requirement? Would there be benefit in requiring RSPs to publish how they intend to pass through a benefit?

It may be of benefit to end users if RSPs outline their approach to passing through rebates in their Critical Information Summaries.

7. Are there any additional wholesale measures required to support RSPs in identifying and passing through fair value benefit from rebates to affected end users?

nbn considers that RSPs already have access to the information they need to pass through an appropriate fair value benefit of the rebates to affected end users. We expect that this will be reviewed as RSPs gain experience with the operation of the regime, and that this could lead to changes during the negotiation of WBA4.



3. Service speed and performance

3.1 Introduction

nbn supports the principle that RSPs should have access to information that they need to appropriately manage their responsibilities and relationships with end users. This is consistent with **nbn**'s incentives to ensure that RSPs are in a position to be able to promote and sell **nbn** services, as well as to ensure that end users have a positive experience of using those services. That is why **nbn** already provides information on a non-discriminatory basis to RSPs to allow them to manage issues associated with service speed and performance.

On the face of it, providing even more information to RSPs would appear to be a benign proposal. However, the creation, dissemination and use of information is not costless, and it is important to ensure that the utility and benefits of providing additional information exceed the cost of producing it. Each additional item of information provided to RSPs comes at the cost of processes and people to develop systems, controls, review mechanisms and oversight to ensure that **nbn** is able to deliver information which it has an appropriate degree of confidence in. Likewise, if RSPs are to use information provided by **nbn**, they will need to develop processes and systems to incorporate that information into their commercial processes and ensure they are using it in an appropriate manner to manage their responsibilities. To do so, RSPs will need to ensure they have provided appropriate training to their own staff to correctly interpret and use that information. For example, the vectored VDSL2 network used by **nbn** has fundamental differences to ADSL2+ services that have traditionally been supplied by RSPs, and it is important that RSP staff have been sufficiently trained to understand the important operational differences in **nbn**'s network.

The information that **nbn** already provides has been developed in the context of ensuring that we are able to provide RSPs with information that is both relevant to their needs (consistent with our incentives to support them selling our services) as well as being reliable and useful. As described below, there are inherent limitations in **nbn**'s ability to provide information that is relevant and useful to RSPs, given the characteristics of our networks. Requiring **nbn** to provide additional information that is not reliable or useful may introduce additional costs to **nbn** (and RSPs), without providing any meaningful benefits to RSPs or end users.

nbn is willing to consider additional information that is of benefit to RSPs, but this should be done while taking into account the cost, reliability and usefulness of the information, as well as the value placed on it by RSPs.

3.2 Appropriate service speed information is already available to RSPs

nbn agrees with the ACCC that RSPs require appropriate information about typical service speeds to support their sales and marketing activities, and it is also in **nbn**'s interests to ensure that they have that information, to allow them to more effectively promote and sell **nbn** services. In this context, **nbn** notes that the focus of the ACCC's concerns appear to relate only to information provided in relation to **nbn**'s FTTN/B and Fixed Wireless networks. **nbn** considers that this information is already available to RSPs, within the limits of what useful information is actually possible to provide, as discussed below.

As the ACCC has noted in their *Broadband Speed Claims-Industry Guidance* document:¹⁶

[other] RSPs can access speed and performance related information in respect of the network access services that they acquire, either by way of online tools or portals, or via periodic reports that the network operator provides. In this respect, in relation to representations to consumers, they are in the same position as the larger providers.

¹⁶ ACCC *Broadband Speed Claims-Industry Guidance*, August 2017, page 6.



Once a service has been activated on the **nbn**TM fixed wireless network, or the **nbn**TM FTTN or FTTB networks, test and diagnostic tools and weekly reports are provided to RSPs in relation to their end-user connections,¹⁷ which allows RSPs to manage their existing customers.

As noted by the ACCC, there are many factors that contribute to the actual speeds experienced by end users of services provided over the **nbn** network, including decisions made by RSPs (e.g. CVC dimensioning) as well as matters within the control of end users such as in-home wiring. In this section, we only address factors specific to **nbn**'s FTTN/B and Fixed Wireless Networks.

FTTN/B Networks

It is important to highlight here that RSPs already have access to diagnostic tools provided by **nbn** that allow them to conduct live DSL Performance tests on their FTTN and FTTB AVCs, allowing them to manage any end-user issues that arise. These tools, in conjunction with the weekly reports,¹⁸ provide RSPs with appropriate information on the wholesale network component of their end-user service speeds. However, related to the point made above, without appropriate training, RSPs may not be able to effectively use the full capabilities provided by **nbn** in our service portal.

In relation to the issues raised about the co-existence period for the FTTN/B networks, **nbn** considers that existing information available to RSPs provides sufficient visibility in relation to services affected by co-existence. **nbn** provides this information to RSPs with the site qualification information available to RSPs for their point of sale activities, via **nbn**'s Service Portal and B2B systems. **nbn** continues to consider enhancements to this reporting, based on our ongoing engagement with RSPs. However, given the circumstances of the copper network used by **nbn** for these services, there will always be limitations to some information that RSPs might wish to have access to. An obvious example is the forecast date for the end of the co-existence period for each region. The co-existence period cannot end until all interfering legacy copper services have been migrated to alternative services. This migration timeframe is not within **nbn**'s control, and is subject to the actions of other parties.

Related to this, there are a number of factors, many of them outside **nbn**'s direct control, that make it difficult to produce accurate estimates of attainable line speed before a service is activated.¹⁹ The factors that impact on service speeds (many of which cannot be known until after a service is activated) include: quality of copper pairs, interference from other services, interference from other devices (including devices external to the copper network), the quality, condition and configuration of in-premises wiring beyond the **nbn** network boundary, as well as the end user modem and other end user equipment and how proactive other network providers or RSPs are in migrating end users off interfering legacy services. The impact that poor in-home set-ups can have on overall performance outcomes cannot be overstated. It is critical that RSPs work closely with their end users to assess and address these issues which are beyond **nbn**'s control, using the diagnostic tools that **nbn** has provided. **nbn** continues to work closely with RSPs to ensure these tools are enhanced to meet their needs.

Fixed Wireless Network

We first note that a fixed wireless service will not be provisioned at a premises unless there is a radio signal strength that is capable of supporting a peak wholesale network speed of at least 25/5 Mbps at the time of the pre-installation site service qualification. However, before a service is connected, it is not possible to say with certainty which cell a service will be connected to until a technician has visited on-site and determined the radio signal strength at that location, which can be affected by distance from the tower, terrain, vegetation, artificial structures, radio interference and other environmental factors. Due to the characteristics of the fixed wireless network, it is not possible to be definitive about the maximum attainable fixed wireless network speed at a given location, except at a specific point in time, which does not provide guidance about likely ongoing

¹⁷ RSPs are provided with a weekly list of their services which are connected to Fixed Wireless cells performing below the network design threshold, and what is being done to improve the performance of those cells.

¹⁸ These reports are issued to RSPs and set out AVC details together with the actual and attainable rates of the service.

¹⁹ Note that "attainable line speed" is theoretical and does not take account of the headroom applied by RSPs, and the impact of end user equipment.



experience. This is because capacity on a fixed wireless cell is finite and shared between active users on a cell, resulting in varying cell speeds (and thus end user speeds) dependent on a large number of factors including concurrency, activity and demand of active users at the time of the measurement. This does not take into account factors outside **nbn's** control such as RSP capacity dimensioning or end user equipment. The initial speed check is only valid at that point in time, as it may change over time for the reasons just discussed.

As noted by the ACCC, **nbn** provides detailed weekly reporting to RSPs on the busy hour performance of all fixed wireless cells, and identifies the individual services for each RSP that are supplied by cells that are below **nbn's** network design threshold of 6Mbps downlink speed. This 30-day average 6Mbps busy hour downlink throughput across the cell is the current design engineering standard used by **nbn** as the threshold in assessing the need for a priority upgrade for a fixed wireless cell. The performance of a cell against this threshold does not necessarily equate to a poor end user experience for all users in that cell as there are several other factors (including end user applications, demand and end user behaviour, weather and radio conditions) that could influence the actual end user experience.

The current metric is assessed as a 30-day average across all end users active on the fixed wireless cell in the busiest hour of the day (being the hour with the highest average number of concurrent active users, which can vary from day to day) and some end users will experience speeds above 6 Mbps even though they are located within a fixed wireless cell below the design threshold. In addition, only the end users demanding consistently greater than 6 Mbps may potentially have degraded end user experience. **nbn** measurements reflect average performance during the busiest hour for each cell and users should experience better speeds outside the busy period (typically from 7pm to 11pm). As such, the current metric only provides a guide for understanding actual end user experiences.

The ACCC suggests that RSPs may benefit from having access to additional information about the potential speed available to *prospective* customers, and in particular whether a service is likely to be located in a cell which is below our network design criteria of an average of 6Mbps busy hour downlink throughput.

[Commercial-in-Confidence]

There are similar challenges in relation to assessing which specific fixed wireless cell will be used to supply a service to a particular end user. In many cases, there can be a number of potential fixed wireless cells within range of an end user's premises. While **nbn** continues to refine its 'desktop models' used to estimate the most suitable cell for each premises to connect to, a precise assessment of which cell actually has the best signal strength cannot be made until a technician goes on site to the end user's location as part of the installation process. These measurements of actual signal strength, the number of users already connected to the cell and other factors are used to establish which cell is most appropriate to connect the premises.

While it is ultimately RSPs who manage the relationship with end users, and are responsible for ensuring that end users are provided with appropriate information to set their expectations for the service, **nbn** recognises it also plays a role in being able to provide RSPs with support in this task. This reflects **nbn's** underlying incentives to ensure that RSPs are placed in as good a position as possible to promote **nbn's** products. **nbn** also considers requests for other operational information from RSPs on an ad hoc basis, to address specific needs of RSPs.

It is also important to remember that the performance of **nbn's** fixed wireless network is dynamic (as noted above). Not only will the speed of an individual service be affected by external factors such as interference and weather events and the number of concurrent users on a cell at any moment, **nbn** is engaged in an ongoing program of upgrading the fixed wireless network on a cell-by-cell basis as demand grows across the network. A "point estimate" of potential throughput on a service will only be valid (to the extent of all the caveats above) at that point in time, and the actual performance will change throughout the day, as well as over the lifetime of the service, in both a positive and negative direction. As the ACCC will recognise, fixed wireless is comparable to mobile services, as they have the same underlying technology. We note that currently, the ACCC's Broadband Speed Guidelines do not apply to mobile services and that there is no intention to bring them within the scope of the Guidelines. Because of this, **nbn** submits that the approach for marketing of fixed wireless plans should be the same as it is for mobile services.

Thus, **nbn** confirms that we are looking to provide more fixed wireless related information to RSPs. We are already providing more detailed weekly reporting which should provide RSPs with additional insight, and are



considering how to implement tools that provide some guidance on outcomes for end users not already connected to the network. However, there are practical limitations to how much additional information can be provided that is reliable and useful, given the range of factors that impact on the speeds of services provided over this network. The balance between cost of information and benefits gained from its provision is particularly important to fully consider here.

3.3 A Fixed Wireless rebate is not warranted

The ACCC considers that the provision of a rebate that would be payable to each end user on a cell which is below our network design criteria of a 30-day average 6Mbps busy hour downlink throughput would incentivise **nbn** to ensure there is sufficient capacity on the fixed wireless network on an ongoing basis. However, as the ACCC notes, **nbn** already has a significant network investment program in place, which is specifically targeting upgrades to network capacity on the fixed wireless network. In August 2018, **nbn** announced an additional \$800 million investment in fixed wireless capacity upgrades, which will continue over the course of 2019 to uplift the performance of cells that are currently, or are forecast to be, performing below **nbn**'s design threshold. During 2018, as a result of this and pre-existing investments, over 3,300 fixed wireless cells had capacity upgrades completed.²⁰ This magnitude of this capital investment highlights the high level of commitment that **nbn** places on delivering fixed wireless network capacity. [Commercial-in-Confidence]

nbn rejects the premise of the ACCC's question 11, which implies that a fixed wireless rebate would provide additional incentives to **nbn** to address network capacity issues. The fact that we are already investing an additional \$800 million for capacity upgrades demonstrates that we already have, and are responding to, our incentives to deliver improved outcomes for end users. As the ACCC would appreciate, our fixed wireless network upgrade program has significant lead-times associated with it, and we have already scoped out an upgrade program over time, based on current and projected usage of the network.

A key factor in **nbn**'s prioritisation of fixed wireless upgrades is to target cells with the lowest busy hour performance, which are typically those cells with the greatest number of end users impacted. This approach means that **nbn** prioritises the greatest volume of end users on the worst performing cells, which produces a result that is presumably aligned with what the ACCC is seeking to achieve in proposing an incentive-based rebate. However, if a Fixed Wireless rebate along the lines suggested by the ACCC were to be implemented, **nbn** would have little ability to respond to any incentive properties of the rebate for a considerable period, given the lead-times associated with the network upgrades required, and which are already in progress. This would make any such rebate a penalty without a possibility for **nbn** to stand up activities to mitigate imposition of that penalty (which may have the effect of diverting available funding for network investment) rather than an incentive.

nbn has committed to public reporting on the level of fixed wireless network performance, which commenced in December 2018, providing additional transparency around **nbn**'s progress in addressing the issues raised by the ACCC. This is in addition to more detailed weekly reporting on the performance of individual cells, their planned upgrades and the services connected to those cells provided to RSPs and to the ACCC.

In addition, **nbn** has recently described²¹ how changes to our spectrum and apparatus licences will result in **nbn** making changes to the Fixed Wireless network in early 2020 to reallocate more capacity to downstream traffic, resulting in better utilisation of our existing spectrum. These changes should help to further address network capacity issues, as our experience has shown that the demand for download traffic is significantly greater than for uploads.

With the ongoing significant investment in Fixed Wireless network capacity; prioritisation of upgrades to improve the worst performing cells with the greatest number of connected end users; increased visibility of **nbn**'s performance in addressing network capacity issues; and the network changes that will come into effect early next year, **nbn** considers that there is no strong basis for the introduction of a Fixed Wireless rebate.

²⁰ 18 December 2018 - <https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-co-unveils-new-plans-for-fixed-wireless-network> – see Note 5.

²¹ 18 December 2018 - <https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-co-unveils-new-plans-for-fixed-wireless-network>



Such a rebate would artificially skew **nbn**'s funding of initiatives, potentially leading to lower net end user benefit and/or diversion of funds from **nbn** to other parties at a time when **nbn** is investing significantly in the network. It would also divert resources into building and validating rebate systems rather than addressing fixed wireless network performance issues.

It is also relevant to note that Fixed Wireless is a loss-making service provided by **nbn** to support Government policy objectives to deliver a public benefit, and which is cross subsidised by **nbn** fixed line services. In that context, it is unclear how **nbn** could fund significant additional investments in network capacity beyond our existing \$800 million capital expenditure program without significantly raising prices for all services or obtaining new funding from the Government.

nbn welcomes ongoing engagement with industry, consumer groups and regulators on these issues to help shape the development of our program of works beyond 2020, recognising that there is a large pipeline of work already in place in relation to **nbn**'s fixed wireless capacity upgrade program, the introduction of Fixed Wireless Plus, withdrawal of the 25-50/5-20 Mbps speed tier, and the implementation of the network changes to meet the ACMA's changes to our spectrum and apparatus licences. Fixed Wireless Plus will have a different product construct from previous offerings, and will not include a specified peak speed, but rather will operate at whatever the best attainable speed of the fixed wireless network is at any point in time.²² Once these significant changes have been made, and their outcomes known, the need for any further changes could be considered on a more informed basis.

A rebate would override the PIR concept

Of relevance to any consideration to impose a rebate in relation to the busy hour performance of the Fixed Wireless network is that the fixed wireless services currently sold by **nbn** are Peak Information Rate (PIR) services only. **nbn** has made no representations in the WBA about the busy hour performance of these services, and in our view, this does not form part of the declared service. The 6 Mbps downlink design standard is a capacity planning standard that **nbn** builds and maintains its network to - it is not a committed information rate for services provided over the network.

The PIR concept encourages efficient investment in infrastructure by **nbn**. **nbn** considers that imposition of a rebate that overrides that concept would be inconsistent with the Part XIC factors (in particular, sections 152BCA(1)(a) and 152BCA(1)(g) of the CCA), as it would lead to inefficient investment by **nbn** that would ultimately drive up prices for end users and would not be in the LTIE.

nbn would have concerns if regulatory intervention to impose a rebate on this characteristic of the product's performance amounted to an attempt to either re-price the existing product, or to change the nature of the product that has been declared. This would go beyond the scope of the terms and condition of supply of the service.

3.4 FTTN copper lines in co-existence with legacy copper services

The ACCC raises concerns about the situation where FTTN services are in co-existence with legacy copper network services, and are therefore not capable of delivering the ordered PIR or CIR.

As noted in section 3.2 above, there are specific factors in relation to our FTTN/B networks that impact on service speed beyond co-existence. Even after all legacy copper-based services are migrated in an area, a number of these factors still exist. **nbn** only has control over its copper access network, and there will always be factors outside **nbn**'s control.

While **nbn** has an active program in place to end co-existence as and when we are able to, we are unable to do so until all remaining legacy services that are carried over **nbn**'s network that cause interference are removed. We are able to encourage, but not require, some of these services to be migrated to alternatives. However, this issue is only relevant where copper-based services are unable to achieve 12/1 Mbps during co-existence, which is limited in scale.

²² <https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-co-unveils-new-plans-for-fixed-wireless-network>



In the case of services which are unable to achieve this speed, there is a process in place to address the issue. RSPs lodge a fault in relation to the service, and **nbn** seeks to address this within our service level timeframes. **nbn** is currently conducting a Speed Assurance Trial in relation to FTTN services in co-existence for services performing above 12/1 Mbps, which will also result in improved performance outcomes for these end users.

During co-existence, **nbn** expects that RSPs (in alignment with the requirement of and guidance from the ACMA and ACCC) should place FTTN services on the appropriate speed tier best aligned with the service capability, retail offering and consumer expectations during the co-existence period. Excluding Remediation cases below 12/1 Mbps there should always be a suitable FTTN speed profile with a built in reduction in AVC cost to the RSP which can be passed on to the consumer. Thus, if a service is not capable of achieving 25/5 Mbps during co-existence, the RSP should offer to move the end user to an alternative speed tier offering if available, and **nbn** enables the RSP (should they choose to) to create a retail offering aligned with a 12/1 Mbps performance commitment during the co-existence period, and only charge for that speed.

In circumstances where **nbn** is faced with external factors beyond its ability to influence, it would be inconsistent with s152BCA(1)(g) of the CCA for rebates to be imposed on **nbn** for these services – they would have limited incentive effect, as **nbn** is not in a position to respond to fully mitigate the issue, although we continue to develop options for migration of interfering services. See **nbn**'s Guiding Principle 3 (Accountability should follow responsibility) for further discussion on this point.

In considering this issue, **nbn** would also highlight to the ACCC that these products are Peak Information Rate (PIR) products, and do not guarantee a particular speed will be achieved in all circumstances. **nbn** would have concerns if the imposition of additional wholesale commitments on **nbn** amounted to an attempt to change the nature of the declared product itself. See **nbn**'s Guiding Principle 5.

3.5 Remediation rebates

The ACCC identifies a concern that **nbn** may continue to charge for the higher speed products during remediation, for lines that are not capable of supporting that speed. The ACCC appears to have formed the view that the introduction of rebates would provide **nbn** with incentives to undertake remediation where we are not already doing so.

As noted above, from the perspective of an end user, if a service is not capable of achieving a contracted speed during a period of remediation, the RSP should offer to move the end user to a lower speed service and only charge for that lower tier service.

To support this at the retail level, an RSP can modify the wholesale service that they order from **nbn** to a lower speed tier that matches the line rate at the premises, or even cancel the **nbn** service and move the end user to an alternative service (e.g. wireless).

Remediation covers scenarios where the work that is required for the line speed at a premises to meet the PIR or CIR objective (as applicable) can't be reasonably completed within standard ticket of work timeframes. These complex cases can sometimes take time to rectify. For example, before Remediation commences, there is an assurance process that needs to be gone through to ensure that the issue is an actual Remediation issue, rather than a factor such as internal wiring, end user equipment, or a standard assurance fault. As discussed above, there are many factors outside **nbn**'s control in relation to performance outcomes for end users – on completion of the Remediation activity there may still be some contribution to network performance as a result of these factors.

In that context, it would not be economically efficient to impose a rebate obligation on **nbn** while it is attending to such complex issues when there are existing remedies available to end-users at the retail level and RSPs at the wholesale level (see section 152BCA(1)(g) of the CCA and Guiding Principle 2).



3.6 Answers to specific questions

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

nbn considers that this information is already available to RSPs, within the limits of what useful information is actually possible to provide. The costs as well as the potential benefits of providing any additional information must be considered if additional information requirements are imposed.

9. Please indicate what, if any, additional fixed wireless performance information is necessary to enable RSPs to better set consumer expectations for current and prospective customers.

nbn does not consider that there is any additional Fixed Wireless performance information available that would provide reliable and meaningful support to RSPs to allow them to better set consumer expectations for current and prospective customers. [Commercial-in-Confidence] Again, the costs and potential benefits of any additional information would need to be considered.

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

nbn does not consider that any additional wholesale commitments are required in relation to these services. The TC-4 products supplied by **nbn** are PIR, not CIR products. For both FTTN and fixed wireless services, there are a range of factors beyond the direct control of **nbn** which can impact on end user speeds. In the case of FTTN services, if a service is not capable of achieving 25/5 Mbps during co-existence, RSPs should offer to move the end user to a 12/1 service and only charge for that speed. In the case of fixed wireless products, **nbn** is already investing significant amounts into capacity upgrades, which demonstrates that we are responding to our existing incentives.

11. If a fixed wireless rebate was introduced, how should it be structured to ensure that it provides the right incentives to NBN Co and RSPs and contributes to good end user experiences?

nbn rejects the premise of this question, and submits that we already have, and are responding to, our existing incentives through the additional \$800 million fixed wireless network capacity upgrade, the introduction of a new offering better aligned to the capabilities of the fixed wireless network, changes to our network spectrum configuration and increased transparency of our performance outcomes. **nbn** has already committed significant financial and organisational resources to address capacity issues, and is providing RSPs and the ACCC with detailed weekly performance and forecast information on this, as well as publishing monthly metrics on overall cell performance. Any rebate scheme introduced would have limited additional incentive value, given the time-frames required for the already in-place infrastructure investment program.



4. Retail consumer safeguards

4.1 Priority Assistance

4.1.1 Introduction

nbn agrees with the ACCC that Priority Assistance (PA) is an important consumer safeguard and that the individuals it is designed to protect should be provided the most urgent of attention and technology solutions by the industry. As the industry structure has shifted so markedly from the time that the PA regime was introduced in 2002, from a model with a vertically integrated provider of voice services to one with a wholesale provider of an access network with a range of retailers providing end-to-end voice and/or broadband services over it, it is critical to ensure that the roles and responsibilities of each party are appropriately assigned. It is also important to ensure that any proposed changes are focused on actually delivering appropriate outcomes for this group of end users, rather than simply attempting to set up penalty and incentive schemes.

In addition, as **nbn** is engaged in the deployment of a new national network, it is not practical to have wholesale PA arrangements that apply to all PA connections, particularly in the absence of physical infrastructure to an end user's premises. There are better solutions now available that should result in improved outcomes for end users.

In assessing the current operating model for PA, it is helpful to outline the three significant challenges that need to be solved for, and to assess the extent to which the processes, regulations and rebate mechanisms are sufficiently addressing the requirements of PA end users. Solutions for each of these challenges can be identified, and when this is done, it can be seen that there are common elements to the solutions that address these three challenges.

4.1.2 Challenge 1 - End users living in a home that does not have a physical nbn connection yet and need connection as soon as possible

There is sufficient evidence (for example, as noted in Telstra's response to ACCC in the initial phase of the Inquiry) that where there is an *existing* physical **nbn**TM network connection to a premises, **nbn** exceeds the SLAs within the regulated KPIs and under our WBA service connection and restoration contractual obligations (refer table below).

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

SOURCE: Telstra submission to ACCC Inquiry into NBN Wholesale Service Standards, Public version, March 2018, Page 26

Where a physical connection does not exist, turn-around times of 1-2 business day are simply not achievable by **nbn**. This problem is not unique to **nbn** or telecommunications infrastructure. It also exists in other industries such as electricity, where connection time SLAs are extended where no existing physical connection is in place.²³

A regulatory environment that applies a penalty regime in an attempt to drive faster physical connections is unlikely to result in actual improvements for end users. Physical infrastructure builds simply cannot be made substantially faster in many cases, due to the need to schedule crews, complete civil works and back-end network changes and create new records in IT systems to make services over the new infrastructure orderable.

²³ For example, refer to <https://www.essentialenergy.com.au/about-us/customer-and-regulatory-information/summary-of-customer-rights>



In fact, penalties only serve to add administrative complexity, which provides little end user benefit in terms of getting them a working voice service when they need it.

While **nbn** is in the process of complex and large-scale deployment and physical connection of premises across Australia, an alternate solution needs to be considered for these end users.

Proposed solution

In **nbn**'s view, the best solution for rapid provisioning of voice services where there is no existing connection lies in RSPs providing customer premises equipment (CPE) to Priority Assistance-eligible end users that is equipped with an inbuilt mobile network module and battery that can be used as a fall-back for voice and data in the case of a power or network outage, or indeed, as a temporary service until physical infrastructure is in place.

This solution effectively eliminates the "lack of physical connection" problem, because it provides an interim wireless connection medium immediately.

4.1.3 Challenge 2 - End users who have a reliance on high availability services, despite no single network being able to guarantee uninterrupted service

The challenge with any single infrastructure network service – including home phone services – is that they are and have always been susceptible to outages. This is not unique to the **nbn**TM network, and guarantees of 100% service availability have never been provided by networks past or present, locally or globally.

The current Priority Assistance regime attempts to apply the highest practicable level of service restoration, but this was designed in an era when mobile networks were far less ubiquitous, the CPE hardware landscape was entirely different, and voice calls over landlines were the primary form of communication for most people.

The current wide availability of mobile network coverage and low-cost equipment that can handle failover to mobile if needed, presents the opportunity to develop a solution that mitigates the risk of network outages from the outset, rather than relying solely on accelerated service restoration, and should deliver superior end user outcomes.

Current service restoration mechanisms used for PA services include:

- **Discretionary Interim Service:** When the fault or planned outage occurs, the RSP will provide an interim service at their discretion, such as a mobile phone or satellite phone (usually when no other secondary alternative exists).
- **Discretionary PA Service Maintenance Service Levels:**
 - **Faults:** At the instigation of the RSP, **nbn** may be requested to restore the service of a PA end user under WBA PA service level timeframes.
 - **Planned Outages:** **nbn** notifies the RSP of a planned outage event in advance of the outage. The RSP has the responsibility of notifying their PA end users.
- **nbn Cost Recovery:** RSP requesting cost recovery from **nbn** for providing an interim service.

Of interest is that the 'test' for providing a PA end user with an interim service is that no other fixed, mobile or satellite options exists. Clearly, a better and more user-friendly solution would be to focus on making sure that an alternate solution is *always* available to the user, so a separately provisioned interim service is not needed.

As at February 2019, Telstra already offers a product called the Telstra Smart ModemTM Gen 2 that uses both the **nbn** & Telstra mobile networks, allowing end users to: ²⁴

- *Get online, and use your home phone if you're on the **nbn**TM network, even before your home network has been activated. Using its inbuilt, pre-activated SIM, it connects to our mobile network right out of the box.*

²⁴ <https://www.telstra.com.au/broadband/extras/modem>



- *Keep using the internet, and your home phone if you're on the **nbn**TM network, if there's a problem with your home broadband. Your modem will automatically switch to our mobile network if required, then switch back once the issue is resolved.*

Proposed solution

In **nbn**'s view, the best solution for fast service restoration is in RSPs providing customer premises equipment (CPE) to Priority Assistance-eligible end users that is equipped with an inbuilt mobile network module and battery that can be used as a fall-back for voice and data in the case of a power or network outage.

4.1.4 Challenge 3 - End users' need for telecommunication service continuity during power outages despite nbn infrastructure and RSP consumer premises equipment relying on power availability to operate.

Perhaps the most challenging of issues for dependant and medically vulnerable customers is the impact that power outages have on life-support devices and customer premises equipment, including network termination devices (NTDs), modems, home phone base stations, medical alarms and mobile phone chargers.

4.1.4.1 nbn Battery Back-Up

Currently, PA users are required to have "battery back-up" installed when **nbn** is connected if their technology type is FTTP. This provides up to 5 hours of power in a power outage.²⁵ The battery backup powers voice services provisioned through the **nbn** FTTP NTD's UNI-V port, providing the customer is only using a standard corded phone that does not have a power supply requirement. However, this battery backup option is only supplied by **nbn** on our FTTP network.

At a minimum, any customer that identifies to an RSP that they are dependant or medically vulnerable, should have the **nbn** battery back-up installed at connection when supplied with a FTTP service.

It is, however, worth noting that few RSPs provision voice services through the UNI-V port any more, as they generally prefer to provision voice services through their own gateway/routers for administrative simplicity and to provide network-proprietary value added features such as higher audio quality for on-network calls. Additionally, given the prevalence of cordless phones and the fact that very few cordless phone base stations have battery backup, **nbn** battery backup unit is likely to be of limited utility in the cases where powered end user equipment is in place.

4.1.4.2 Uninterrupted Power Supply (UPS) units

End users may consider buying an uninterrupted power supply (UPS) unit, or this may be provided to them by their RSP. This can provide power for a period of time to their modem and any other devices plugged in to the UPS. **nbn**'s public statement on network availability during power outages is that devices connected to the **nbn** network won't work during a power outage, so we do not suggest to customers that UPS devices are a helpful solution as we cannot guarantee the network will be available even if the end user has continuous power to their customer premises devices.

Proposed solution

In **nbn**'s view, the best solution for power outages is in RSPs providing customer premises equipment (CPE) to Priority Assistance-eligible end users that is equipped with an inbuilt mobile network module and battery that can be used as a fall-back for voice and data services in the case of a power outages.

²⁵ Note – when approximately 40% of the battery charge remains (after 3-3.5 hours), the power supply automatically cuts off to preserve remaining charge for emergency use. The end user will need to press the emergency reserve button to continue operating the service. See <https://www2.nbnco.com.au/content/dam/nbnco/documents/nbn-fibre-user-guide.pdf> page 17.



4.1.5 Overview of proposed Future Mode of Operation: Modems with mobile network module and battery backup

As outlined above, after exploring the key challenges faced in ensuring that PA end users are provided with the highest levels of service, **nbn** suggests that there are better solutions available than just addressing any issues at the wholesale access network level. Simply addressing that element of the end-to-end service delivery change may not make a material difference to the experience of end users requiring PA services.

Whilst not in-market to retail consumers currently, it could be feasible for RSPs to request device manufacturers provide modems with battery back-up, similar to wireless modems used over mobile networks today to provide continuity of voice and data services in the event of a power or network outage.

Additionally, the medical alarm industry has moved to supplying devices with both mobile network connectivity and batteries.

In **nbn's** view, the best solution for fast service provisioning where there is no infrastructure, restoration of network faults and protection against power outages is in RSPs providing customer premises equipment (CPE) to PA-eligible end users that are equipped with an inbuilt mobile network module and battery. This would reduce, if not eliminate, the need for interim service, as well as significantly increasing the level of service continuity for these end users.

4.1.6 Issues raised in Second Discussion Paper

While **nbn** believes that the issues raised in the previous sections represent the appropriate way of thinking about Priority Assistance arrangements going forward, it is also necessary to respond to the issues raised in the ACCC's Second Discussion Paper, as **nbn** does not consider that they accurately represent the current state of play.

As noted by the ACCC, Telstra claims that **nbn's** service levels for Priority Assistance connections do not allow Telstra to meet its priority assistance obligations. However, as recognised by the ACCC,²⁶ the 24-hour and 48-hour Priority Assistance timeframes for Telstra do not apply when Telstra has to rely on infrastructure or other services being provided by another network owner (for example, **nbn**). Thus, the commitments already offered in the WBA exceed current regulatory obligations of RSPs, and reflect **nbn's** willingness to support these important consumer safeguards.

In circumstances where Telstra is unable to meet its *desired* (but not *regulated*) priority assistance timeframes for services supplied over the **nbn**TM network, we note that it is open to Telstra to provide an interim retail service to the relevant end user (e.g. a mobile phone).

Claiming the Interim Service Amount, **nbn** believes, is a relatively simple process whereby both parties agree on the Interim Service Amount and the period for which the Interim Service Amount will apply. However, we note that **nbn** will not pay any claim for an Interim Service Amount to the extent that Telstra has charged the end user for that interim service. [Commercial-in-Confidence]

Under the current legislative framework, the Telco Act²⁷ provides that CSPs other than Telstra may choose to offer priority assistance for people of life threatening conditions as long as they comply with the terms set out in the *C609:2007 Priority Assistance for Life Threatening Medical Conditions*; or they must advise end users prior to selling them a standard telephone service that they don't offer priority assistance as a condition of their own service but also inform the end users of a provider who does.

It is important to note that, despite the ability for other RSPs to offer Priority Assistance to their customers on either legacy networks or a service over the **nbn** access networks, **no other service provider chooses to do so**.

Given the only provider to take up **nbn's** WBA PA service standards is Telstra and, as noted above, we already offer timeframes which support Telstra's mandatory obligations under their Licence Conditions, **nbn** submits

²⁶ ACCC, Second Discussion Paper, page 15.

²⁷ Telecommunications Act, Schedule 2, Part 6.



that we already offer appropriate wholesale PA service standards. Furthermore, Telstra can easily comply with its obligations by supplying an interim service.

4.2 Customer Service Guarantee

The ACCC correctly notes that there are “*considerable practical issues associated with applying the current CSG standard in an NBN context*”. This is inherent given the origins of the CSG, and the role that **nbn** now plays in the overall delivery of a service to end users.

The current arrangements in the WBA ensure that to the extent that **nbn** contributes to an RSP’s delay in meeting retail CSG performance standards, the RSP is able to claim CSG Compensation under the WBA CSG Compensation claims process for Accelerated Connections, End User Fault Rectification, and Appointments for both End User Connections and End User Fault Rectification.

As previously described in **nbn**’s March 2018 Submission (section 3.4.10), the WBA CSG Compensation claims process offers a material improvement over the statutory Federal Court process.

nbn recognises that the current process presents challenges to RSPs, as there is a considerable amount of operational detail required to allow accurate apportionment of responsibility for CSG compensation. There may well be simpler approaches which are less onerous for both RSPs and **nbn**, which would allow a reasonable apportionment of responsibility to be made more quickly. However, such a simplification would need to appropriately reflect the needs of RSPs and **nbn**, as it is likely that trade-offs between accuracy and simplicity would be required. To ensure any such simplification delivers workable and fair outcomes, **nbn** believes that a commercially negotiated approach is required. Without such an approach, there is the risk that a solution is imposed which could be more difficult to manage than the current process, or drive additional costs into **nbn** and/or RSPs.

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4.3 ACMA Instruments

In this section, **nbn** describes how it has responded to the new ACMA instruments and in particular how **nbn** has implemented steps to proactively provide ‘reasonable assistance’ for RSPs to meet their own obligations under the ACMA’s *Telecommunications (NBN Continuity of Service) Industry Standard 2018* (Service Continuity Standard) and the *Telecommunications Service Provider (NBN Service Migration) Determination 2018* (Service Migration Determination) where they rely on information from **nbn** to do so.

As the ACCC has noted,²⁸ the ACMA’s 2018 Service Continuity Standard and Service Migration Determination have only recently been released. It should also be recognised that industry was given three months between the date the final instruments were published (22nd June 2018) and the commencement date (21st September 2018). As a result, all parties in the migration supply chain had to act extremely quickly to prepare for their obligations as at 21st September and implement ‘work-arounds’ where required. At this stage **nbn** does not believe additional wholesale measures are required. Should it become apparent that additional support from wholesale providers within the supply chain is needed, industry should be given the opportunity to discuss these support needs with **nbn** via our customer engagement channels. **nbn** submits there has been limited opportunity for **nbn** or RSPs to review whether further improvements to meet the terms of the instruments are warranted and therefore it is too soon to consider additional regulatory measures being introduced.

nbn focused its compliance program on enhancing its existing systems and connection processes in order to be able to provide the reasonable assistance to RSPs’ new obligations within the limited timeframe allowed before commencement of the Standard and Determination began.

After the instruments were published, **nbn** engaged with a number of RSPs via a Comms Alliance forum to seek feedback on what operational steps RSPs might require from **nbn** to support their particular new obligations.

²⁸ ACCC, Second Discussion Paper, page 18.



nbn's project team reviewed the RSP feedback received, and incorporated requests for additional information through the order process into the enhancements we built.

nbn's program included the following activities:

- [Commercial-in-Confidence]
- internal SLAs for particular steps within **nbn's** connection processes were reviewed. Where necessary these were adjusted to ensure order information could be updated within the timeframes needed for RSPs to comply with steps they are required to respond to in both the Service Continuity Standard and Service Migration Determination. For example:
 - **nbn** will update an order if the connection was not able to be successfully completed within one business day of a migration attempt so that **nbn** can comply with section 8(2)(b) of the Standard in advising when a migration attempt was not successful.
 - **nbn** continues to place an order in a held or pending status if additional activity is required to the premises or to the order itself in accordance with our operational procedures under WBA3. However based on industry feedback significant activity has been completed to review and enhance the supporting information provided to give greater transparency on the underlying root cause and resolution timeframes of the encountered issue, enabling RSPs to better manage consumer expectations and associated requirements for the provision of interim services.
 - **nbn** will provide a Planned Remediation Date (PRD) update within 3 business days of a migration attempt for all technologies. It is intended that this will provide greater visibility of the extent of an order delay and assist RSPs to determine if they need to take steps to offer an alternative or interim service or reinstate a legacy service before a migration can be completed as required under section 11 of the Service Continuity Standard or section 9 of the Service Migration Determination.
 - Over 200 'order update' templates have been augmented or created to provide more complete and consistent order status updates through the order process. This information is provided from initial triage to held order status and PRD information updates, and advises RSPs:
 - The reason why the service is impacted;
 - What activities **nbn** is undertaking to resolve the issue;
 - Where relevant, what additional information **nbn** may need an RSP to take to progress an order;
 - A target date for activity completion or next communication where the required activities are still being scheduled;
 - These additional templates have been designed to provide RSPs with greater visibility of the progress of an individual order; and proactively provide sufficient information about any **nbn** activity an RSP may need to rely on to fulfil their obligations under section 23 of the Service Standard and section 16 of the Service Migration Determination.
 - [Commercial-in-Confidence]
 - an operational bulletin was sent to RSPs advising of these changes prior to the commencement date.

Since commencement of the ACMA's instruments, **nbn's** RSP engagement management teams have proactively sought verbal feedback from their access seeker customers on the steps we have taken during the normal course of interactions. To date, despite having asked the question, no negative feedback has been supplied to **nbn** on the operational procedures and additional information provided through the Held and Pending order status notes. **nbn** remains open to receiving feedback from RSPs at the account management and operational engagement level should RSPs wish to do so.

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4.4 Answers to specific questions

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

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

As described in sections 4.1.2 to 4.1.5, **nbn** considers that the challenges of delivering appropriate connection and fault rectification performance for PA customers should also include a review of the role that could be played by customer premises equipment rather than just a simple focus on the access network element of the end-to-end service. If the focus is on ensuring that PA customers actually experience minimal interruption of service continuity, this cannot be solved by the access network alone. There are effective options available to RSPs now that were not available when the PA regime was first put into place. If these options were employed, they should address issues associated with service provision where physical network is not available, or where there are network or power outages.

However, as discussed in section 4.1.6, **nbn** considers that its current service levels for PA connections and fault rectification support Telstra's existing "obligations", noting that the PA time frames do not actually apply to Telstra when supplying services over our network. Where **nbn** does not already have network infrastructure in place, we are simply not able to provide a service within 1-2 business days, and there are more efficient options available via the Interim Service arrangements which address the immediate need for a service.

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

The current contractual arrangements in the WBA are materially better than the statutory Federal Court process that would otherwise apply, but **nbn** recognises that RSPs are seeking simplification of this process, and we are willing to continue to work with RSPs to identify improvements that can be made. This should be a commercially-developed solution, reflecting the specific operational issues faced by **nbn** and RSPs.

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

nbn considers that it is too soon to introduce additional measures at the wholesale level to support them. We are satisfied that we have taken proactive and reasonable measures to ensure RSPs have sufficient information from **nbn** where they may rely on connection order information to meet their own obligations under the instruments. **nbn** is continuing to enhance our systems and processes to assist RSPs to meet their new obligations, and is open to hearing feedback from RSPs to determine what further operational support RSPs might require. To date, **nbn** is not aware of what these additional operational steps might be.



5. Measurement and reporting of operational performance

5.1 Measurement of service levels

5.1.1 “New Service Never Worked”

The ACCC raises the treatment of failed installations defined as “new service never worked” as being an area of potential concern for stakeholders. **nbn** does not consider this to be the case. The “New Service Never Worked (NSNW)” classification relates to services that have been connected to our network, but do not function as expected from a connectivity standpoint. These service incidents are flagged as such by the RSP upon submission to **nbn** and are treated as Trouble Tickets with a higher operational priority than other fault types. **nbn** also classifies service faults lodged within 10 days of activation under the NSNW category. That is, **nbn** will also classify, and prioritise, services that have worked at some point in the first 10 days as being ones that require particular attention for resolution. The NSNW process requires a home appointment whenever a field visit is required at a higher priority for the field workforce to ensure we can deliver improved outcomes for the end user.

The ACCC is correct in its description of the NSNW cases being classified as successful connections (but with a connection rebate still applicable if the connection timeframe has not been met). However, by prioritising these cases (and those which have faults in the first 10 days), **nbn** is attempting to address these issues as soon as possible. Importantly, any service fault rebates that apply in relation to relevant Trouble Tickets are in addition to any rebates that arise from missed appointments or connection timeframes not being met (where applicable).

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nbn notes the Service Continuity Standard and the Service Migration Determination both state that, with certain caveats, an RSP must not charge a consumer for their **nbn** service until it is operational. It is important to take into account that there are a number of steps an RSP must take under the new regime to confirm that the end user’s retail **nbn** service is operational, in addition to the wholesale service migration component that **nbn** is responsible for.

‘Operational’ is defined under both instruments as meaning “in relation to a carriage service, that the service is working and can be used by a consumer who has entered into a consumer contract with a carriage service provider for the supply of that service”.

Successful connection of an access service on **nbn**’s part is just one of a number of steps needed to establish an operational **nbn** service. For example, the RSP will also need to establish their retail component of the service, including any voice service provided over the **nbn** Ethernet access service.

Under the Service Migration Determination, RSPs are required to conduct a post-migration test to confirm both voice and broadband services are operational once they become aware that migration has been successful. The Determination provides a caveat that this post-migration testing obligation will not apply if:

- RSPs are unable to perform testing due to the consumer supplying their own modem on the **nbn** service; or
- if the consumer has not taken the steps they need to take to activate the service.

This caveat acknowledges that end users also have a part to play in establishing an operational service over the **nbn**TM network.

Under section 8 of the Service Continuity Standard, **nbn** is obligated to:

- a) “not advise an NBN CSP, legacy CSP or legacy network carrier that the migration at the consumer’s premises is complete until it has taken all reasonable steps to ensure that successful migration at the premises has occurred; and



- b) Where the migration at the consumer's premises has been unsuccessful – take all reasonable steps to notify the consumer's NBN CSP that migration to the NBN service has not been successful, within one working day of becoming aware of that fact."

To fulfil its obligations under this section of the Service Continuity Standard, **nbn** takes all reasonable steps not to complete the order until testing can be conducted. As noted in its response to question 14 above, **nbn** has engaged with its Delivery Partners to ensure its testing instructions are carried out before a connection order can be closed and a completion notice issued.

Despite all efforts, where there are instances of orders being incorrectly completed without a migration having been successful, or if a service becomes non-operational after a completion notice to an order is sent, **nbn** has requested RSPs' assistance in identifying these faults as "New Service Never Worked" so the appropriate investigations can be conducted by **nbn**.

As noted above, **nbn** has also taken steps within its current held and pending order processes for connect orders to notify the RSP of the status of the order; why progress on the order has been delayed; and the steps **nbn** intends to take to resolve the issue. Similar information is included in trouble ticket updates in response to 'New Service Never Worked' categories of faults.

5.1.2 Trouble ticket lodgement

The ACCC has noted potential concerns in relation to **nbn** generally commencing the timeframes for end user fault rectification from the time that **nbn** has *accepted* a trouble ticket from an RSP, rather than the previous practice of commencing the timeframe once the trouble ticket was *acknowledged* by **nbn**. The ACCC does not consider that this approach is justified. However, **nbn** considers that this arrangement appropriately reflects the underlying responsibilities of each party, consistent with section 152BCA(1)(g) of the CCA – see **nbn**'s proposed Guiding Principle 3 (Accountability should follow responsibility). **nbn** submits that it would be unreasonable for **nbn** to be held to account for operational activities that are solely in the RSP's domain. While the ACCC considers that "*commencing fault rectification from trouble ticket acknowledgement is preferable to the current process as it would more closely align with the end user's experience of the fault*", this opinion does not take into account that if **nbn** is not provided with necessary information by the RSP to action the fault, then the end user will not get an improved outcome in practice. The current approach taken by **nbn** is designed to achieve the best actual outcome for end users, by appropriately allocating accountability and responsibility between RSPs and **nbn**. Changing the measurement of the metric in the manner suggested by the ACCC would cut across those accountabilities, and not lead to any improvement in actual outcomes for end users, but rather may have the opposite effect.

Acknowledgement of a Trouble Ticket is an automated process that does not involve **nbn** assessing whether the RSP has correctly submitted all of the information required for **nbn** to begin rectifying the End User Fault. This evaluation is performed *after* acknowledgement of the Trouble Ticket and, if the information submitted by the RSP is sufficient, **nbn** will "accept" the Trouble Ticket. Given that accurate and complete information is required in the Trouble Ticket to commence the End User Fault rectification process, it is reasonable that the service level timeframes only commence upon acceptance of the Trouble Ticket.

Moreover, to incentivise **nbn** to accept Trouble Tickets within a rapid timeframe, WBA3 contains a new service level on **nbn** requiring the acceptance or "More Information Required Notification" to be issued within 2 operational hours of **nbn** acknowledging the Trouble Ticket. [Commercial-in-Confidence]

One particular issue that impacts on overall outcomes for end users is in relation to fault incidents submitted to **nbn** by RSPs which require an appointment at an end user's premises to rectify. If RSPs do not include an appointment request when they raise the incident, this means that **nbn** is not in a position to respond to the incident. **nbn** has been working closely with RSPs to reduce the occurrence of this issue.

[Commercial-in-Confidence]



5.2 Reporting of service level performance

nbn acknowledges the issues raised by the ACCC in their discussion of the level of granularity provided to RSPs in monthly performance reports, and has already responded to these issues. At the same time as the changes made to monthly reports in December 2018 to deliver them within 10 business days rather than the previous 20 business days, **nbn** implemented more granular reporting to RSPs. While in a different format to that which had previously been provided to RSPs, **nbn** considers that the updated monthly reports provide at least the same level of detail as previously, but in a more accessible manner. This more granular information is provided in the form of a supplementary report to the monthly performance report, and provides a more detailed drill-down into performance metrics, rather than RSPs needing to perform their own analysis on their services.

nbn also provides RSPs with detailed information at the individual line level, should they require this level of detail. **nbn** has recently updated this line level information to include additional information to assist RSPs with the management of their services. The additional information includes the LOC ID for the service, the Product Instance Identification (PRI), CSA ID, and Service Provider Reference ID (which identifies the various business areas/brands within an RSP).

In this way, **nbn** provides RSPs with information at a variety of levels – from the summary information in the Monthly Performance Report, the more granular performance information in the supplementary report, as well as the details relating to every individual service.

nbn introduced these changes following feedback from RSPs as part of our ongoing engagement with them. This proactive change represents **nbn**'s incentives acting as intended, and our expectation is that the level of detail provided in these monthly reports will continue to evolve over time as RSPs identify other metrics that become important to them as they deliver services to end users.

As part of our negotiations with RSPs on WBA4, we will review whether there is a need for any additional commitments in relation to reporting to be included in the WBA.

5.3 Availability of operational information

nbn accepts that providing RSPs with appropriate and timely operational information will allow RSPs to better manage their responsibilities in managing end users' experience, particularly in relation to the management of time-sensitive matters. This is an active area of development within **nbn**, as discussed below. We note that real-time updates for fixed-line services are already provided by our Service Delivery Partners (SDPs), which are available to RSPs through our B2B interface and service portal. In **nbn**'s view, the evolution of this operational information is a process that is best suited to commercial and operational engagement between **nbn** and RSPs, rather than attempting to impose regulated outcomes. Changes will have operational and cost implications for RSPs and **nbn**, and it is important that new approaches be developed in a manner that ensures the benefits achieved are not outweighed by the cost of implementing them.

However, it is also important to reflect that the current operational arrangements do provide RSPs with a reasonable degree of visibility of some of the issues described by the ACCC. In relation to missed and rescheduled appointments, **nbn** provides updates to its Service Portal and B2B (Business-to-Business interfaces) as follows:

- When an Appointment is confirmed to be missed, the SDP will notify **nbn** who will update the work order in **nbn** systems with the reason why the Appointment was missed. This will in turn update the Service Portal and B2B by providing the RSP with the details and the next action required.
- Where an Appointment is rescheduled before the day of the Appointment by the RSP, the Service Portal and B2B interactions will update **nbn**'s internal systems which will send an update to the SDP's systems with the change in Appointment details.
- Where **nbn** Reschedules Appointments with the end user in accordance with the Operations Manual, the Appointment will be rescheduled based on the end user's requirements and **nbn** will notify the RSP



within 1 hour of the rescheduling of the Appointment. The Service Portal and B2B will be updated accordingly with the changes. The SDP will also be notified of the Rescheduled Appointment.

- In circumstances where **nbn** misses an Appointment or needs to Reschedule Trouble Ticket Appointments, **nbn** will notify RSPs as soon as practicable and will amend the Appointment or Trouble Ticket Appointment.

nbn is currently assessing options to improve RSPs' access to relevant operational information. [Commercial-in-Confidence] These proposed changes should result in better outcomes for end users, and well as ensuring that SDP resources are able to be best directed to address connection and assurance events rather than being sent to premises where end users are not in attendance.

These potential changes will be developed in consultation with RSPs, to ensure they will actually deliver improved end user and RSP outcomes, and are able to be readily implemented by RSPs.

5.4 Answers to specific questions

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

The introduction of the "New Service Never Worked" classification is intended to ensure that these services are treated with a higher operational priority than other fault types, to ensure they are resolved as quickly as possible. This also applies to service faults lodged within the first 10 business days of activation. These faults are subject to the fault rectification timeframes, and rebates are applicable if these timeframes are not met.

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

If **nbn** is not provided with necessary information to action the fault, which is in the accountability of the RSPs, there will be no change to the "end user's experience of faults". The current approach appropriately allocates accountability and responsibility between **nbn** and RSPs. Changing the measurement metric as suggested by the ACCC would cut across those accountabilities.

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

nbn does not believe that there is a need to attempt to codify a "baseline level of reporting" in the WBA. Rather, the recent proactive change to introduce additional granularity to our monthly performance reports represents **nbn's** incentives acting as intended. Our expectation is that the level of detail provided in these monthly reports will continue to evolve over time as RSPs identify other metrics that become important to them to assist their deliverer of services to end users.

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

Current operational arrangements provide RSPs with a reasonable degree of visibility of a number of issues described by the ACCC. **nbn** is currently assessing options to improve RSPs' access to relevant operational information, which should provide RSPs with improved tools allowing them to play a greater role in managing end user appointments. Further consultation with RSPs is required to ensure these changes will actually deliver improved end user and RSP outcomes.



6. Liability and indemnity framework

6.1 Introduction and executive summary

The liability and indemnity framework in WBA3 includes a set of complementary mechanisms designed to achieve two key objectives:

- to incentivise each party to avoid commercially avoidable risks (by allocating liability to that party if they do not take all commercially feasible measures to avoid the risks); and
- to the extent that a risk cannot be commercially avoided, to allocate liability for the resultant losses to the party best able to manage and mitigate those losses.

nbn agrees with the ACCC that liability should be allocated according to the principle that the party best placed to manage a risk should bear it. This is consistent with section 152BCA(1)(g) of the CCA (see **nbn**'s proposed Guiding Principle 3). Allocating risk in line with this principle promotes the economically efficient use of, and investment in, **nbn**'s infrastructure. Moreover, by ensuring that risks are managed at the lowest possible cost, allocating risk in line with this principle is in the long-term interest of end-users.

However, as further explained in section 6.2, this principle requires analytical clarity to be properly applied. In particular:

- allocating risk to the party that is best able to manage it is not compatible with the view (expressed in the Second Discussion Paper) that parties should bear liability for all losses that they cause or contribute to – this principle would lead to a highly inefficient and commercially unworkable allocation of risk; and
- risk should instead be allocated based on the level of control that a party has over the relevant loss, the costs that the party would incur to manage the risk (acting efficiently) compared to other parties, the effect that managing the risk would have on innovation and the economic benefit that the party derives from taking on the risk.

nbn considers that the level of information required to apply these principles means that risk allocation is best determined through commercial negotiation rather than regulation. The negotiation process allows parties to effectively assess the scope of a given risk, including the relative costs and benefits of bearing a risk to each party. Commercial negotiation also allows risks to be assessed holistically, with the parties agreeing on the most efficient risk allocation mechanism in light of all the surrounding circumstances. It must also be remembered that the liability arrangements were developed as part of an overall package of commercial terms, reflecting trade-offs and interconnection with other parts of the WBA. No single issue can be taken in isolation from the overall package of service levels and other WBA terms and conditions.

As described in our March 2018 Submission, **nbn** submits that the presence of large, sophisticated RSPs with deep understanding of telecommunications networks, service standards and risks means that there is more evenly distributed bargaining power than can often be the case in these contract negotiations. The existence of this comparable degree of bargaining power provides an appropriate basis for parties to achieve an appropriate allocation of risk.

Regulatory intervention in respect of liability and indemnity in these circumstances is less likely to deliver an efficient outcome, particularly if it removes the power of commercial actors to make rational risk assessments.

In its Second Discussion Paper, the ACCC specifically focuses on three aspects of **nbn**'s liability regime: the annual liability cap, the Material Service Failure regime (**MSF Regime**) and the third party claims protection. **nbn** considers that each of these three aspects work together alongside other elements of **nbn**'s liability regime to allocate risk in an efficient manner, as part of an integrated, commercially negotiated solution. Our explanation of how each of these aspects of the liability framework reflects the principle of efficient risk allocation is summarised below and explained in greater depth in sections 6.3 to 6.5.

Our answers to the ACCC's specific questions in respect of the liability framework are set out in section 6.6.



Liability caps – section 6.3

- The annual liability cap in WBA3 (up to \$200 million) only applies to losses that are unforeseen and do not directly relate to service delivery and network construction. In those areas that directly relate to service delivery and network construction, such as service level breaches, or acts contributing to death, personal injury and property damage, **nbn** accepts uncapped liability (in the latter categories, on an indemnity basis). Consequently, changing the amount of the annual liability cap would not incentivise **nbn** to maintain or improve its service delivery.
- Accordingly, increasing the WBA liability cap would simply result in an increase in **nbn**'s costs (e.g. through additional insurance) without providing any additional incentive to **nbn** to maintain and improve service delivery or network construction.
- Moreover, **nbn**'s annual liability cap is already more generous than those of **nbn**-equivalent operators in the United Kingdom, Singapore and New Zealand.

Material Service Failure regime (MSF Regime) – section 6.4

- The MSF Regime was introduced in WBA3 to provide additional protections in respect of significant service failures that affect multiple premises. It operates over and above **nbn**'s general liability for service failures (in the form of commercial rebates, CSG Compensation, section 118A damages and Corrective Action obligations).
- The events that can give rise to Material Service Failures have been identified and settled through negotiation with RSPs as being the agreed key risks to service continuity. The Service Restoration Targets that form part of the MSF Regime were designed by reference to detailed engineering assessments and are based on the time that it would take **nbn** to recover from a relevant failure if **nbn** acts efficiently. Accordingly, the MSF Regime incentivises **nbn** to act efficiently and in line with good engineering practice when resolving foreseeable significant service faults that affect a large number of premises.
- The MSF Regime is unparalleled when compared to international benchmarks, with similar wholesale operators in Singapore, the United Kingdom and New Zealand not offering any such additional liability stream for significant service failures. **nbn** is already unique in offering an MSF Regime and regulatory intervention to impose greater liability on **nbn** in respect of Material Service Failures would be unjustified and highly unusual compared with international benchmarks.

Third party claims – section 6.5

- The third party claims protection in WBA3 protects **nbn** from liability in respect of pure economic loss and predominantly affects business end-users, who are most likely to suffer economic loss due to interruptions in **nbn** services.
- Compared to **nbn**, business end-users are significantly better placed to manage business continuity risk, as they have the greatest level of information about the specific impacts that service interruptions would have on their business and are best placed to determine how to respond in a proportionate and efficient manner (e.g. through fibre backup services, mobile hotspots or business continuity insurance). Accordingly, the third party claims protection reflects the principle that the party best placed to manage a risk should bear it.
- Transferring business continuity risk from end-users to **nbn** would result in this risk being managed at a higher overall cost. This would also lead to higher prices for **nbn** services and/or divert resources away from network construction and service delivery. This risk allocation would effectively require all end-users (including residential end-users) to cross-subsidise the business continuity risks of large enterprise and government end-users.
- The business continuity risk borne by business end-users is a type of consequential loss and excluding it is in line with standard commercial practices in telecommunications and other industries. The exclusion or limitation of third party claims is also a standard feature of **nbn**-equivalent operators in the UK, Singapore and New Zealand.



- Importantly, the third party claims protection does not result in business end-users bearing all risks associated with service interruptions. **nbn** retains liability for those risks that it is in a better position to manage, such as ensuring that it designs and operates its network in a manner that minimises faults and disruptions (through the operation of service rebates, section 118A damages, the MSF Regime and Corrective Action obligations). **nbn** also retains uncapped liability for property damage, death and personal injury.
- The third party claims protection never requires RSPs to bear any of the end-user's economic losses beyond that which they might, acting rationally, agree with end-users to bear. To the extent that RSPs voluntarily do not pass on the full extent of the third party claims protection (e.g. in retail contracts with of large enterprise end-users), this reflects a commercial decision for which RSPs would (acting rationally) obtain a commercial benefit (e.g. in the form of higher prices or volume commitments). RSPs voluntarily bearing liability for business continuity losses, whether due to their own conduct or **nbn**'s conduct, is purely a commercial decision for RSPs and does not indicate any market failure.
- The third party claims protection seeks to preserve maximum flexibility for RSPs, by providing them with a range of options to implement the protection. The option of a model undertaking or **nbn**-agreed alternative terms promotes certainty for RSPs. RSPs can also give effect to the protection by taking any other steps which place **nbn** in a position no worse than it would have been under the model undertaking. Each of these options was developed and proactively offered by **nbn** in response to RSP requests for certainty. The obligation for RSPs to indemnify **nbn** for any third party claims only applies if RSPs have not availed themselves of any of these options.

6.2 Principles of risk allocation

6.2.1 Risk should be allocated to the party best placed to bear it

In its Second Discussion Paper, the ACCC states that *"for services to be provided efficiently, risk should be allocated to the party who is best able to manage that risk"*. **nbn** broadly agrees with this principle of risk allocation, and considers that it is consistent with section 152BCA(1)(g) of the CCA – see **nbn**'s proposed Guiding Principle 3. To understand its implications, **nbn** considers that the principle requires close examination.

First, this principle does not require parties to bear liability for all *"losses that they cause or contribute to"*, as the ACCC suggests in respect of third party claims. In some circumstances, it will not be commercially feasible for **nbn** to avoid a given loss, even if **nbn** causes or contributes to this loss through its act or omission (e.g. because taking greater steps to avoid losses may require inefficient over-investment in infrastructure). Another party (e.g. business end-users) may actually be in a better position to manage or efficiently mitigate such losses that **nbn** causes or contributes to. Where these other parties can manage these losses at a lower overall cost than **nbn**, it is more efficient for these parties, and not **nbn**, to manage such risks.

Accordingly, the idea that **nbn** might have to bear liability for all losses that it causes or contributes to is in conflict with the principle (supported by the ACCC) that risk should be allocated to the party best placed to manage it. Requiring each party to bear the full extent of the losses that they cause or contribute to (even if they are unable to efficiently avoid such losses) would be highly inefficient and does not reflect standard commercial risk management practices. Indeed, liability caps and exclusions of liability in commercial agreements reflect the fundamental principle that it is not commercially practicable or economically efficient for a party to bear *all* losses that it causes or contributes to.

Second, **nbn** considers that, in determining whether a party is able to efficiently manage a risk, the following factors need to be considered:



- **the level of control that the party has over the relevant loss (including the extent of the loss)** – if a party is less able to reasonably estimate or measure a particular loss, including the extent of the loss, than another party, then the first party cannot be in the best position to efficiently prevent or manage such loss from occurring (even if the loss causally relates to its conduct). In these circumstances, there is a risk of the party either *underestimating* the loss (in which case the party will not make sufficient investments to avoid the loss) or *overestimating* the loss (in which case the party will invest too many resources to avoid the loss, thereby increasing costs, which are ultimately passed on to other parties and do not result in an efficient management of the loss). The better the visibility of the potential issues and understanding of how they can be mitigated, the better placed a party is to effectively control any potential losses;
- **the costs that the party would incur to manage the risk (acting efficiently) compared to other parties** – the costs of managing a risk may include greater investment in redundant network infrastructure or service provision, the cost of backup services or the cost of purchasing insurance to cover the relevant risk. A risk is allocated efficiently when it is borne by the party who is able to manage the risk using such measures (and others) at the lowest cost;
- **the effect that managing the risk would have on innovation** – in some circumstances, requiring a party to manage a risk produces certain spill over benefits, such as encouraging greater innovation (e.g. requiring a party to bear the risk of network outages may encourage it to innovate in respect of the substitutable services it procures for redundancy, which would result in overall efficiency gains). These benefits are relevant in determining whether it is efficient for a party to bear a risk; and
- **the economic benefit that the party derives from taking on the risk** – it may be efficient for a party to bear a risk where it gains a significant countervailing benefit from doing so (e.g. higher prices), and these benefits should be offset against the costs that the party would incur in managing the risk. For example, as explained in section 6.5, RSPs would only voluntarily bear the risk of any third party claims against **nbn** for business continuity loss (in their retail contracts with large enterprise end-users) if the RSP receives a countervailing benefit (e.g. in the form of higher prices or volume commitments). These benefits need to be considered when determining which party is best placed to manage this risk.

In the Second Discussion Paper, the ACCC states that "*liability and indemnity clauses can promote the economically efficient use of and investment in infrastructure by managing the allocation of risk between the parties*".

We agree and, in our view, the liability and indemnity regime will only promote the objective of economic efficiency where risk is allocated in accordance with the principles and factors above. Economically efficient use of and investment in **nbn**'s infrastructure will not be promoted if **nbn** is required to bear all losses that it causes or contributes to, even where it has no control over (and cannot reasonably estimate) the extent of the relevant loss and other parties can manage the loss at a lower cost.

6.2.2 Appropriate risk allocation is best determined through commercial negotiation rather than regulation

nbn considers that an efficient and appropriate risk allocation is best determined through commercial negotiation rather than regulation. Commercial parties are best placed to assess the scope of a given risk, including the relative costs and benefits of bearing a risk. Regulatory intervention in respect of liability and indemnity would remove the power of commercial actors to make rational risk assessment and would lead to an outcome that lacks the flexibility and efficiency of a commercially negotiated solution.

As explained in section 1.1, a commercially negotiated solution is more likely to promote the long-term interests of end-users and efficient use of (and investment in) infrastructure, when compared to regulatory intervention. In the specific area of liability and indemnity, commercial negotiation has consistently delivered improvements for RSPs. For example, WBA3 led to the introduction of the MSF Regime as an additional stream of liability for significant service failures, while also creating a greater level of flexibility and certainty in how RSPs can implement the Third Party Claims Protection.

It is also important to note that the WBA3 liability regime is an integrated, commercially negotiated solution to managing liability and risk. Changing one aspect of the liability framework in isolation (and particularly through



regulatory intervention) is likely to produce unexpected outcomes and would not result in an allocation of risk that is efficient and in the long-term interests of end-users. For example, when considering the appropriate quantum of a liability cap, commercial actors will also take into account the areas of liability excluded from that cap. A cap of \$X excluding certain losses might be more appropriate than a higher cap of \$Y which applies to a broader range of losses. In this example, the balance between the quantum of the liability cap and the scope of included/excluded liability is a careful one that negotiators consider. This is just one example of how one aspect of liability (e.g. liability cap) cannot be considered in isolation from other aspects of liability (e.g. included/excluded liability).

6.3 Liability caps

6.3.1 The WBA annual liability cap only applies to unforeseen losses that do not directly relate to service performance

In its Second Discussion Paper, the ACCC refers to an RSP's submission that the "annual liability cap is an insufficient incentive on NBN Co to manage its risks appropriately".²⁹

nbn strongly disagrees with this statement. This argument fails to recognise that the annual liability cap is only one component of **nbn**'s broader liability framework and applies only to unforeseen losses that are not directly related to service performance and for which RSPs and **nbn** have not negotiated a specific liability regime. For identifiable categories of claims, **nbn** and RSPs have agreed specific liability regimes to allocate risk efficiently and proportionately (including uncapped liability for service performance failures and for losses related to property damage, death and personal injury).

More specifically, and as the ACCC alludes to in its Second Discussion Paper, the liability cap does not apply to the following areas, which are directly related to service delivery and network construction:

- liability for commercial rebates, CSG Compensation and section 118A damages;³⁰
- liability for breach of confidentiality and intellectual property rights (for which **nbn** is liable on an indemnity basis);³¹
- liability for acts that contribute to death, personal injury or damage to tangible property (for which **nbn** is also liable on an indemnity basis);³² and
- liability for breaches of confidence and intellectual property breaches.³³

nbn accepts **uncapped liability** in these areas, as **nbn** is best placed to avoid risks from arising in these areas.

²⁹ ACCC, Second Discussion Paper, section 6.1, page 22.

³⁰ WBA, Head Terms, clause E1.4(i).

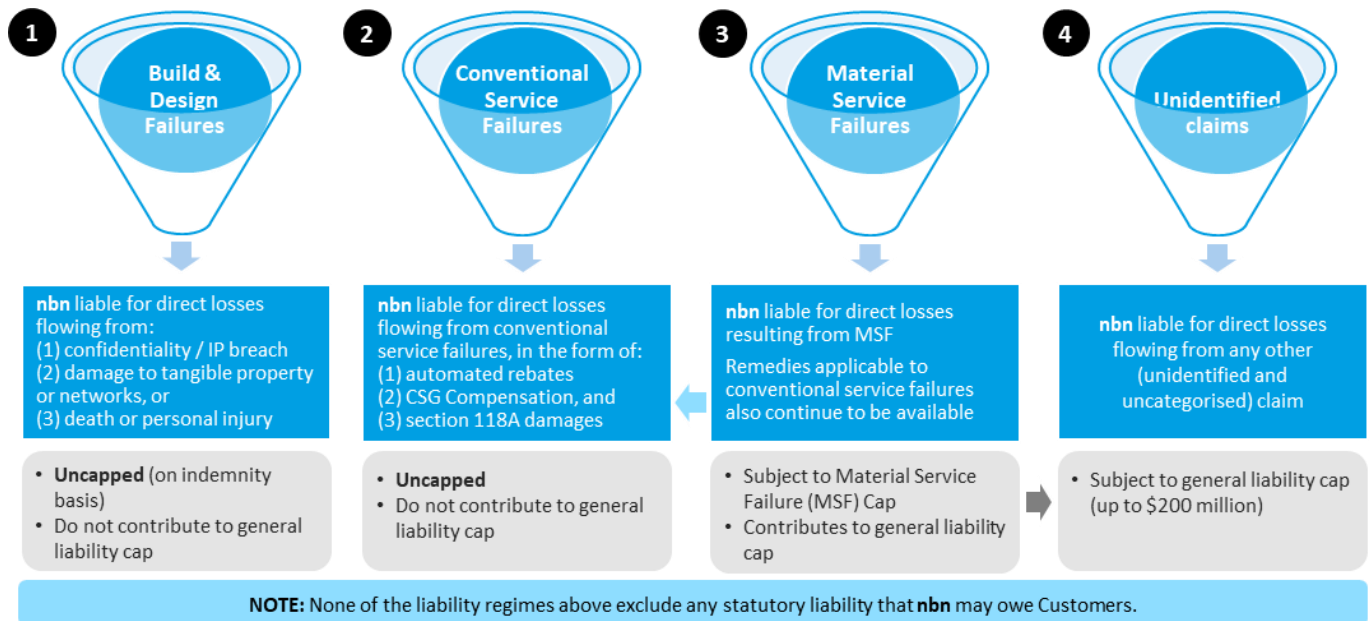
³¹ WBA, Head Terms, clause E2.

³² WBA, Head Terms, clause E2.

³³ WBA, Head Terms, clause E2.



The interplay between the various liability arrangements is illustrated below:



Relationship of annual liability cap to other liability arrangements in WBA3

6.3.2 nbn's existing areas of uncapped liability strongly incentivise nbn to maintain and improve service delivery and network construction performance

The areas in which **nbn** accepts uncapped liability are those directly related to service delivery and network construction. These are also the areas where **nbn** is best placed to avoid risks from arising, and uncapped liability in this area provides a strong incentive for **nbn** to improve its performance.³⁴ For example, **nbn** is incentivised to:

- maintain a high level of service and network performance to avoid uncapped liability for rebates, CSG Compensation and section 118A damages;
- take due care in network construction activities to avoid uncapped liability for death, personal injury and damage to property; and
- maintain confidentiality of access seeker information to avoid uncapped liability for confidentiality breaches.

Uncapped liability in the areas mentioned above, as well as the remedies associated with service level breaches (e.g. rebates, CSG Compensation, section 118A damages and Corrective Action obligations) create strong incentives on **nbn** to improve its service performance and network operation. To the extent that any improvements in these incentives are needed, the appropriate solution should be improvements in the service level regime. **nbn** considers that commercial negotiation is the best approach to delivering these improvements in a proportionate manner. The constant improvements in service levels and rebates throughout each version of the WBA is testament to this.

Significantly, the liability cap only applies to losses outside the areas listed above. Unlike losses relating to service delivery and network construction, **nbn** cannot quantify or take specific actions to prevent the losses subject to the liability cap. This is because such losses are largely unforeseeable. It is standard commercial practice and reasonable for **nbn** to impose a cap on its liability for unforeseen losses.

³⁴ With the exception of consequential losses such as those discussed in section 6.5 below.



6.3.3 Increasing the WBA liability cap would not incentivise nbn to maintain and improve service delivery or network construction performance

Significantly, because the losses covered by the liability cap are largely unforeseeable and therefore not readily able to be quantified or mitigated, the amount of the liability cap does not have a strong influence on **nbn**'s incentives. In other words, increasing **nbn**'s liability for these losses (e.g. by increasing the amount of the liability cap) is unlikely to incentivise improvements in **nbn**'s behaviour in any particular area. This would not be consistent with section 152BCA(1)(g) of the CCA – **nbn**'s proposed Guiding Principle 2.

More importantly, changes to the liability cap are particularly not relevant to incentivising **nbn** to maintain and improve its service delivery or network construction performance, as the key losses in these areas are already subject to uncapped liability. Accordingly, it is incorrect to say that the quantum of the liability cap constitutes an "insufficient incentive on NBN Co to manage its risks appropriately", particularly in the context of the ACCC's present inquiry, the subject of which is **nbn**'s service delivery performance.

6.3.4 The WBA annual liability cap is in line with standard contracting behaviour and is more generous than international benchmarks

In its Second Discussion Paper, the ACCC also refers to an RSP's submission that the annual liability cap "is inconsistent with liability caps often used in commercial contracts". **nbn** strongly disputes this assertion. Liability caps are very commonly used in commercial agreements as a way of controlling unforeseeable losses. In line with the principles identified in section 6.1, liability caps recognise that such losses are not fully within the control of one party and cannot readily be quantified or mitigated. In these circumstances, it is not efficient to allocate the entire liability (on an uncapped basis) to that party.

In setting the quantum of the liability cap, **nbn** submits that the risk allocated to **nbn** should not be out of proportion with comparable wholesale service providers. As outlined in Table 2, the annual liability cap in WBA3 is already significantly more generous than liability caps in equivalent contracts overseas.

Table 2: Comparison of nbn's liability cap with international benchmark operators

nbn WBA3	Chorus (New Zealand) <i>UFB Services Agreement (2012)</i>	Openreach (UK) <i>GEA Conditions (2016)</i>	Nucleus Connect (Singapore) <i>Master Interconnection Offer (2018)</i>
In each contract year, nbn 's liability for relevant losses subject to the cap is limited to: <ul style="list-style-type: none"> if Customer's Nominated Billings Amount is above \$200 million – \$200 million; If Customer's Nominated Billings Amount is higher than \$5 million but below \$200 million – the Nominated Billings Amount; or if Customer's Nominated Billings Amount is less than or equal to \$5 million – \$5 million. 	Liability is capped at the lesser of NZ\$500,000 (~A\$475,000) and the aggregate value of the charges paid and payable by the RSP during the relevant 12-month period.	With the exception of the first contract year, liability is capped at the lesser of £25 million (~A\$46 million) and the total charges levied by Openreach from the relevant RSP for services in the given contract year (with a minimum cap of £250,000).	Liability is limited to the total charges paid or payable by the RSP for the affected service in the 12 month period prior to the event giving rise to the liability.

As can be seen above, **nbn** has a significantly higher annual liability cap than any of the benchmarked operators (\$200 million compared to approximately \$0.475 million for Chorus and \$46 million for Openreach).



Unlike the other operators, Nucleus Connect does not impose a fixed liability cap, but instead limits liability to the total annual charges paid or payable by the RSP *for the affected service*. In practice, this results in Nucleus Connect, like Chorus and Openreach, having a much lower liability than **nbn**, for two reasons. Nucleus Connect's total revenue is significantly lower than **nbn**'s, meaning a single RSP's total annual charge contribution to that revenue and corresponding liability cap will always be significantly lower than the equivalent figure for **nbn**. Further, Nucleus Connect's liability is limited to the charges incurred for an "affected service", whereas **nbn**'s concept of "Nominated Billings Amount" relates to charges paid or payable across all services. In this way, **nbn** has the highest exposure to liability across all of the benchmarked operators in Table 2.

6.4 Material Service Failure regime

6.4.1 The MSF regime creates an additional stream of liability over and above nbn's general liability for service failures

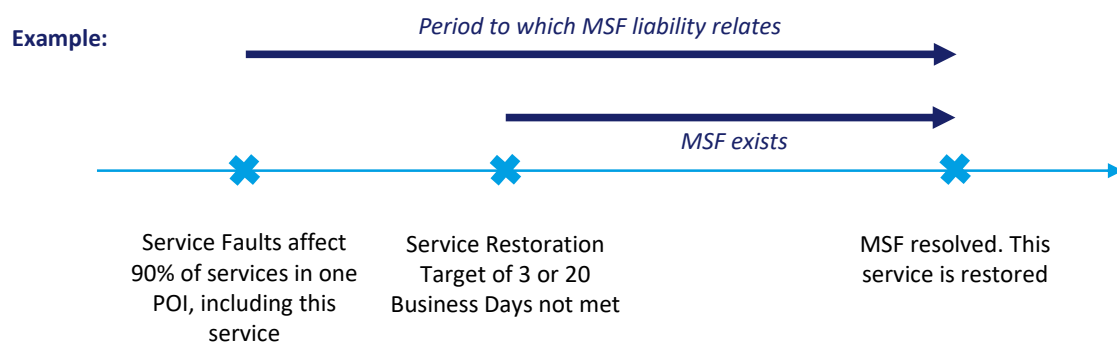
The Material Service Failure (**MSF**) regime was introduced in November 2017, in WBA3, and works alongside and in addition to other liability streams available to RSPs to incentivise **nbn** to minimise significant service failures that affect a large number of premises.

The MSF regime does this by creating an additional stream of liability for material service failures, over and above **nbn**'s general liability for service failures (through the payment of commercial rebates, CSG Compensation, section 118A damages and Corrective Action obligations).

nbn is liable to RSPs for MSF damages if:

- one of a range of events take place (e.g. 90% or more of **nbn**TM Ethernet Ordered Products supplied from a single POI, or over a specific network technology, are subject to a service fault for at least 24 hours); and
- the event is not resolved within the prescribed "Service Restoration Target", which ranges from 3 to 20 business days.³⁵

Importantly, even though an MSF is only deemed to occur when a particular event is not resolved within the Service Restoration Target, **nbn**'s *liability* for the MSF is calculated by reference to the losses suffered by an RSP from the time that the service was first affected.³⁶ For example, if 90% of **nbn**TM Ethernet Ordered Products from a given POI are subject to service faults due to a general failure and **nbn** only restores service in 22 business days (in this example, 2 business days after the Service Restoration Target), **nbn** would be liable to pay damages to RSPs for losses suffered since the beginning of the period that the services were faulty. Liability would not be restricted to losses suffered during the 2 business days that exceed the Service Restoration Target. This provides a very strong incentive for **nbn** to meet the Service Restoration Targets, particularly when seen in the context of additional remedies that may be open to RSPs in such circumstances.



³⁵ WBA, **nbn**TM Ethernet Product Terms, clause 22.

³⁶ WBA, Head Terms, clause E1.3(a).



6.4.2 The MSF Service Restoration Targets are designed by reference to detailed engineering assessments and incentivise nbn to efficiently resolve faults within such timeframes

We do not agree with RSP submissions summarised in the ACCC's Second Discussion Paper that the "*criteria for satisfying a material service failure is unreasonably high*". The MSF Regime is a specific regime that applies to a foreseeable range of events likely to cause significant service disruptions that affect a large numbers of premises. The events that trigger liability under the MSF Regime were identified and settled with RSPs during commercial negotiations leading up to WBA3.

The Service Restoration Targets that form part of the MSF regime are designed by reference to the likely timeframe that it would take **nbn** to recover from each identified failure *if nbn operates efficiently*. These timeframes were developed by reference to detailed engineering assessments and were extensively discussed with RSPs during WBA3 negotiations. The Service Restoration Targets are not designed to reflect exceptional circumstances or to ensure that **nbn** only exceeds such timeframes in exceptional circumstances.

In addition, the Service Restoration Target of 20 business days only applies when an event is caused by a "General Failure" (e.g. a combination of software and hardware failures, a hardware failure in respect of more than one item of equipment, the destruction or significant impairment of any building or a component failure in respect of which **nbn** is unable to gain safe and timely access to equipment, infrastructure or hardware to rectify the fault).³⁷ Due to its nature and scope, a General Failure requires **nbn** to replace several different types of equipment or carry out extensive works, thereby justifying a 20 business day Service Restoration Target.

As stated above, this timeframe has been set on the basis that **nbn** will immediately bear the losses for the full period of the MSF caused by its inefficiency if it does not resolving the fault efficiently in line with good engineering practice. If the event is caused by a "Component Failure" (e.g. a software failure or a failure in a single item of equipment), a much shorter Service Restoration Target of 3 business days applies, again requiring **nbn** to act efficiently to perform the more contained restoration works required or bear financial consequences for its failure do so.³⁸

6.4.3 The MSF regime works within a broader context of remedies and incentives

If a significant service fault event affects multiple users and is resolved within the relevant Service Restoration Target (i.e., if an MSF liability does not arise), there remain a range of incentives for **nbn** and remedies for RSPs. These include commercial rebates (e.g. the End User Fault Rebate payable on a per-service basis), CSG Compensation (if the RSP is liable to the end-user for CSG damages) and section 118A damages. In addition, regardless of whether the MSF regime applies or not, **nbn** has Corrective Action obligations if a Performance Objective in relation to End User Faults or Network Faults is not met.

Accordingly, it is inappropriate to seek to shift the threshold for MSF liability by reference to general notions of significance or materiality. Rather, the specific role of the MSF regime should be recognised – to ensure that **nbn** responds to specific significant circumstances in line with good engineering practice and meet pre-determined Service Restoration Targets. The broader assurance that **nbn** continues to be incentivised to avoid service faults of any significance is delivered through the full combination of service fault-related remedies in the WBA.

6.4.4 The MSF regime compares favourably to international benchmarks

Finally, it is important to note that the MSF regime is unparalleled when WBA3 is compared to similar contracts of international benchmark operators. Unlike **nbn**, none of Chorus (New Zealand), Openreach (UK) nor Nucleus Connect (Singapore) provide an additional liability stream for material or significant service failures. Instead, Openreach and Nucleus Connect limit their liability for breaches of fault rectification service levels to ordinary

³⁷ WBA, Dictionary, definition of "General Failure".

³⁸ WBA, **nbn**TM Ethernet Product Terms, clause 22; Dictionary, definition of "Component Failure".



service level rebates.³⁹ This means that, unlike under **nbn**'s MSF regime, RSPs are not able to claim any additional damages beyond their service level rebates in the event of a significant or mass service failure.

Chorus limits its liability for losses incurred by RSPs to its general liability cap (which is set at a low amount of up to NZ\$500,000 annually).⁴⁰ While this would allow RSPs to obtain damages beyond ordinary service rebates, the low level of the liability cap means that, in practice, the remedy is very limited. By way of comparison, **nbn**'s liability for MSF events is limited to the pro-rated eligible charges paid by the access seeker for the period in which the relevant services were affected by the service fault giving rise to the MSF. This liability is subject only to **nbn**'s general liability cap of up to \$200 million.⁴¹

In this context, regulatory intervention to impose greater liability on **nbn** in respect of Material Service Failures would be unwarranted and highly unusual compared with international benchmarks.

6.5 Third party claims

6.5.1 The Third Party Claims Protection predominantly allocates business continuity risk to business end-users, a risk that service providers widely exclude in commercial agreements

Clauses E2.5(a)–(e) of WBA3 require RSPs to protect **nbn** against liability to end-users and downstream service providers in respect of pure economic loss which such persons may suffer from failures of **nbn**'s network, to the extent that RSPs can lawfully exclude or limit such liability (**Third Party Claims Protection**).⁴²

nbn remains fully liable, including to third parties, for property damage, death or personal injury, on an uncapped basis.⁴³ As the Third Party Claims Protection only applies in respect of claims for pure economic loss, this mechanism predominantly affects business end-users (who may suffer pure economic loss due to service disruption caused by a failure of **nbn**'s network). The Third Party Claims Protection is unlikely to have any material impact on residential end-users, who face a minimal risk of suffering material *economic* losses from service failures to an extent that would result in them bringing a claim against **nbn**.

The pure economic loss faced by end-users as a result of business interruption is a type of consequential loss that service providers widely exclude in commercial agreements. Additionally, such losses will also generally be excluded under retail terms and conditions for telecommunications services in Australia. The only reason why the exclusion of this loss requires a specific mechanism in WBA3 (in the form of the Third Party Claims Protection) is that **nbn** does not have a direct relationship with end-users, so **nbn** has had to implement this standard risk allocation position through an obligation on RSPs, rather than through an exclusion clause directly agreed with end-users.

Significantly, the Third Party Claims Protection can be implemented either through:

- the access seeker including in its downstream contracts a commitment that end-users or downstream service providers will not sue **nbn** in respect of pure economic losses they suffer from failures of **nbn**'s network (**claim bar**); or
- *if the access seeker does not include a claim bar in its downstream contracts*, the access seeker indemnifying **nbn** in the case of any claim that could have been excluded or limited through a claim bar.

As explained further below, **nbn** has adopted this mechanism to avoid unduly interfering with the terms on which RSPs supply their services and to provide maximum flexibility and certainty for RSPs in how they give effect to the Third Party Claims Protection.

³⁹ **Openreach**: Contract for GEA Service – Conditions (2016), clause 14.6; **Nucleus Connect**: Master Interconnection Agreement, clauses 13.1 and 13.2.

⁴⁰ **Chorus**: UFB Services Agreement, Bitstream Services Service Level Terms (June 2018), clause 18.1.

⁴¹ WBA, Head Terms, clause E1.3(a).

⁴² **nbn**, *Submission to the ACCC – Discussion Paper on NBN Wholesale Service Standards*, section 6.3.1, page 80.

⁴³ WBA, Head Terms, clause E2.5(b)(X.2).



6.5.2 The Third Party Claims Protection allocates business continuity risk to the party best placed to manage that risk

nbn strongly agrees with the ACCC's statement in the Second Discussion Paper that "*for services to be provided efficiently, risk should be allocated to the party who is best able to manage that risk*". However, we disagree with the ACCC's view that the Third Party Claims Protection "*could transfer the risk of certain matters within NBN Co's areas of responsibility to either customers or RSPs*", and that "*this may result in downstream customers or end users bearing liability for risks over which they have no control, or which NBN Co is in a better position to manage*".

nbn strongly disputes the view that end-users have no control over the risks covered by the Third Party Claims Protection, and that **nbn** is in a better position to manage these risks. To the contrary, the Third Party Claims Protection reflects the principle that liability for a residual risk that cannot be commercially avoided should be allocated to the party best able to manage and mitigate the effects of the risk should it occur.

The only risk allocation work done by the Third Party Claims Protection is to ensure that businesses retain the responsibility that is naturally theirs, to manage business continuity (i.e. the risk of economic loss flowing from a business interruption, in this case caused by an interruption to their connectivity service on **nbn's** network).

Business end-users are the best placed to manage such specific risks to their operations – and it is a task that **nbn** cannot undertake in any practical commercial manner. This is because business end-users have the greatest level of information about the particular impacts that network failures will have on their business, and are best placed to determine how to respond in a proportionate and efficient manner to these impacts. This is particularly important given that the impact of network failures on a business differs radically across different businesses. For example:

- for a large enterprise, service interruptions are likely to have a very significant impact on their business, interrupting core activities carried out over a WAN or cloud computing infrastructure – such an enterprise might manage the risk of service interruptions is through fibre backup services, business interruption insurance and, potentially, sharing liability for interruptions with their RSP (in exchange for providing the RSP with a "whole-of-business" commitment or other significant spend commitments for a portfolio of value-added services); and
- by contrast, for a small bricks and mortar retailer, service interruptions might be far less disruptive (although this depends heavily on the specifics of the business) – such a retailer might rely on a mobile hotspot to manage the risk of a service interruption.

Determining the most appropriate and efficient response to managing service failures is highly context-specific and involves an examination not only of the size of the end-user, but also on the value of telecommunication services to its business, the way in which it uses such services and the industry it operates in. **nbn** is not in any position to effectively ascertain what the specific impacts of network failures will be on each end-user. **nbn** has no direct contractual relationship with end-users, and limited opportunity to influence the portfolio of telecommunications services that the end-user acquires. Further, **nbn** has no ability to tailor the services it provides to an end-user or the charges can **nbn** vary its charges to account for any risk sharing that a business might desire.

6.5.3 Transferring business continuity risk from end-users to nbn would result in inefficient management of risk and would lead to higher prices for nbn services and diminish nbn's ability to invest in its network

Transferring business continuity risk from end-users to **nbn** (by removing the Third Party Claims Protection) would cause two deeply problematic consequences.

First, such a transfer would require **nbn** to mitigate business continuity risks for businesses around Australia through significant additional insurance. It is not clear that such insurance would be available, at all or at a commercially feasible charge. However, even if it were, it would potentially lead to higher prices for **nbn** services or diminish **nbn's** ability to invest in future network upgrades to improve services for all end-users (by diverting resources away from network construction and service delivery). This would impact all end-users and it would also effectively require end-users who face no or very low business continuity risk (including all



residential end-users) to cross-subsidise the business continuity risks of large enterprises and government end-users. Accordingly, transferring business continuity risk to **nbn** would not be in the long-term interest of end-users.

Second, because **nbn** cannot effectively quantify the extent of its exposure to liability regarding business continuity loss, there is a high risk of **nbn** either underestimating or overestimating such risks. Overestimating such a risk is particularly problematic, as it would effectively involve business continuity risk being managed at a higher overall cost than the efficient level, with the broader end-user base bearing a higher cost for **nbn** to manage business continuity risk than businesses would bear if they efficiently and proportionately managed the risk themselves, as they do a range of other business interruption risks. Allocating business continuity risk to **nbn** would not promote the economically efficient use of, and investment in, **nbn's** infrastructure, but is likely to result in inefficient over-investment ('gold plating') in the network to address our increased risk exposure.

6.5.4 Third Party Claims Protection does not transfer all risks associated with service interruptions to end-users

It is important to note that, while the Third Party Claims Protection ensures that the *business continuity risk* sits with the parties best placed to manage it (business end-users), it does not transfer *all* risks associated with service interruptions to end-users. The other elements of the WBA3 liability and service standards regime ensure that **nbn** retains liability for those risks that it is in a better position than end-users to manage. For example, service levels and rebates, the MSF regime and Corrective Action obligations all incentivise **nbn** to design and operate its network in a manner that minimises faults and disruptions as much as commercially practicable. Managing these risks appropriately rests with **nbn**, as it is **nbn** who is best placed to ensure that it designs, builds and operates its network in a manner that minimises faults. However, the *impact* that such faults may have on end-users who use downstream telecommunication services in significantly varying ways, and with whom **nbn** has no contractual relationship, is not a risk that **nbn** is best placed to manage. Accordingly, it is reasonable and efficient for business-end users to bear liability for such risks and it is in the long-term interests of all end-users that this be the case.

6.5.5 The Third Party Claims Protection does not require RSPs to bear any liability beyond that which they might, acting rationally, agree with end-users to bear

In the Second Discussion Paper, the ACCC also refers to RSP submissions that "*there are legitimate reasons why RSPs may not be able to flow down the model terms in WBA3 and in those instances the RSP effectively gives NBN Co an uncapped indemnity for all losses suffered by NBN Co for a claim brought against NBN Co by an end customer*".

nbn does not understand this claim to relate to any legal or regulatory impediment faced by RSPs. Rather, the only reason why RSPs may be unable to include a claim bar in their retail contracts is due to a rational commercial decision open to the RSP. For example, in negotiations with large enterprise end-users, RSPs may agree to take on a degree of liability for service interruptions (including where such interruptions are caused by **nbn's** network), in exchange for value that the RSP obtains from end-users (e.g. by the RSP selling a service at a premium or binding the end-user to a whole-or-business, service term, or other volume commitment). Whether RSPs adopt this liability is ultimately a voluntary commercial decision for them.

nbn considers that an RSP (like any other commercial actor) would never voluntarily accept liability unless there is a rational commercial reason to do so, based on a commercial calculation of the value of a contract and the risk premium built into that contract. This same rationale applies regardless of whether the RSP is accepting liability for its own conduct or for **nbn's** conduct – in either case, an RSP would only accept to take on a risk if it is commercially rational for it to do so.

Even in this context, an RSP would only have to give **nbn** an "*uncapped indemnity*" in the context of end-user claims against **nbn** if the RSP did not limit an end-user's ability to bring a claim against **nbn at all**. Even in agreements with the largest enterprise and government end-users, **nbn** considers it improbable that an RSP would ever commercially agree to total uncapped liability for a business end-user's pure economic losses flowing from a service interruption. Likewise, the RSP does not need to agree a position in which the business end-user has an unfettered right to claim all such losses from **nbn**. As part of commercial negotiations, the RSP has the ability to limit the quantum of an end-user's claim against the RSP and **nbn** to a particular amount. In



this context, the RSP would only have to indemnify **nbn** for the amount that the end-user claims against **nbn**, up to the liability cap set out in the retail contract. Just as the RSP prices its potential liability into its retail contract, it could also price in the liability it is taking on in respect of potential claims against its upstream providers, in this case **nbn**.

Since the amount of liability that RSPs choose to bear in respect of third party claims is a commercial decision that is within the full control of RSPs, **nbn** does not consider that the Third Party Claims Protection illegitimately or involuntarily transfers any risk to RSPs in a manner that would require any regulatory intervention. When considered in light of the Part XIC factors, the Third Party Claims Protection cannot reasonably be said to affect the interests of RSPs, who always have the option (and are given a clear mechanism) to pass liability through to end-users (i.e. the parties best placed to manage the relevant risk).

6.5.6 The exclusion of liability to end-users is a standard practice in wholesale agreements similar to WBA3

As outlined above, the Third Party Claims Protection reflects ordinary principles of good contractual risk allocation, including the principle that risks should be borne by parties best placed to bear them.

In this regard, an analogy can be made between the Third Party Claims Protection and the direct contractual exclusion of consequential loss (including pure economic loss), which is a standard and accepted feature of most commercial contracts. The rationale for excluding consequential loss in supply agreements is that the suppliers are unable to accurately quantify or control the scope of consequential losses, thereby leaving them exposed to potentially unlimited liability.

The exclusion of this kind of loss is implemented in WBA3 via the Third Party Claims Protection obligation on RSPs because **nbn** is not able to directly agree such standard exclusions with end-users. RSPs have a direct contractual relationship with end-users, but **nbn** does not.

Reflecting the principles above, the exclusion or limitation of a wholesale operator's liability to end-user claims is widespread in comparable overseas agreements in the telecommunications sector:

- Nucleus Connect (Singapore) imposes obligations on RSPs to indemnify the wholesale operator against most losses incurred by it in connection with a third party claims;⁴⁴
- Chorus (New Zealand) requires RSPs to procure the exclusion of the wholesale operator's liability for most losses incurred by the end-user;⁴⁵ and
- Openreach (United Kingdom), due to its integration until very recently with its retail arm (BT), which is also its biggest wholesale customer by a significant margin, effectively excludes most liability to end-users because of pure economic loss exclusions in BT's retail contracts.

Further, in other industries, wholesalers exclude liability to end-users for economic loss through statutory or quasi-statutory protections. As outlined in greater detail in **nbn**'s submission to the ACCC's First Discussion Paper:⁴⁶

- Australia Post benefits from a statutory immunity in respect of loss or damage arising from the carriage of a letter by means of the basic letter service, under section 34 of the *Australian Postal Corporation Act 1989* (Cth);
- electricity network service providers benefit from a limitation of their liability for negligent acts or omissions, under the National Electricity Law; and

⁴⁴ Nucleus Connect Master Interconnection Agreement, clause 13.6.

⁴⁵ Chorus UFB Services Agreement, General Terms (December 2012), clause 10.2(c) and 10.2(j); Chorus UFB Services End User Terms, clause 6.

⁴⁶ **nbn**, *Submission to the ACCC – Discussion Paper on NBN Wholesale Service Standards*, section 6.3.8, page 85.



- the Australian Stock Exchange benefits from a limitation of its liability to market participants and clients of market participants under the ASX Operating Rules, which are given statutory backing under the *Corporations Act 2001* (Cth).

The above-mentioned statutory protections have a similar effect, and are based on the same standard commercial approach to risk management, as **nbn**'s Third Party Claims Protection.

6.5.7 The Third Party Claims Protection provides a range of implementation options to RSPs, reflecting RSP needs for commercial flexibility

In the Second Discussion Paper, the ACCC refers to an RSP's submission that the Third Party Claims Protection is "complex and imposes some potentially onerous obligations on customers". Above, we have set out why the Third Party Claims Protection does not require RSPs to bear any liability beyond that which they might, acting rationally, agree with end-users to bear, and therefore does not impose any onerous or unreasonable obligations on RSPs.

Moreover, **nbn** does not consider that the regime introduces an undue level of complexity. Any complexity in the design and operation of the Third Party Claims Protection arises from the flexibility offered to RSPs, preserving their ability to adopt many different options to give effect to the Third Party Claims Protection, while also setting out a clear mechanism that RSPs can opt to implement to give them certainty that they will not bear any liability for third party claims. In earlier versions of the WBA, **nbn** did not set out standard terms (e.g. a model undertaking) that RSPs could use to implement the Third Party Claims Protection with full certainty. In response to requests from RSPs in the course of WBA3 negotiations, **nbn** now provides a broader range of options for RSPs to implement the Third Party Claims Protection. If any of these options is implemented, the RSP does not have any further responsibility for limiting **nbn**'s liability.

More specifically, RSPs can either:

- include a model undertaking in their downstream contracts (in the form set out in clause E2.5(b) of the WBA Head Terms) that prevents the end-user or downstream service provider from bringing a claim against **nbn** (subject to certain exclusions, such as claims for property damage, personal injury and death, and without restricting any rights under the consumer service guarantees in the Australian Consumer Law);⁴⁷
- include alternative terms in their downstream contracts that have the same effect as the model undertaking, provided that **nbn** (acting reasonably) agrees in writing that such terms are no less effective in protecting **nbn**'s interests;⁴⁸ or
- take any other steps which have the effect of placing **nbn** in a position that is no worse than it would have been under the model undertaking;⁴⁹ or
- if they do not take any of the steps above, indemnify **nbn** for the losses it suffers in connection with a downstream claim (provided that such losses could have lawfully been excluded or limited by the RSP in its downstream contracts).⁵⁰

It is up to RSPs to choose which of these options is most appropriate in their specific commercial context, and the availability of these options has come about specifically due to RSP requests that the Third Party Claims Protection provide a greater level of flexibility and adaptability to their distinct commercial needs, while offering certainty in standard-form contexts.

Both the model undertaking and the "alternative terms" options promote certainty by ensuring that, once an RSP incorporates the model undertaking in their downstream contracts (or **nbn** agrees in writing that the alternative terms are adequate), the RSP will not be liable to indemnify **nbn** for third party claims. The third option of taking "any other steps" to protect **nbn** from third party claims provides a substantive backstop for

⁴⁷ WBA Head Terms, clause E2.5(b).

⁴⁸ WBA Head Terms, clause E2.5(b).

⁴⁹ WBA Head Terms, clause E2.5(c)(i)(B).

⁵⁰ WBA Head Terms, clause E2.5(c).



RSPs who may have taken steps to protect **nbn** from liability without a model undertaking or **nbn**-approved alternative terms.

Accordingly, rather than being too "complex", the Third Party Claims Protection seeks to strike a balance between maintaining flexibility for RSPs in implementing the relevant protection while also delivering certainty through options such as the model undertaking and **nbn**-approved alternative terms.

6.6 Answers to specific questions

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

The WBA3 liability framework is either broadly in line with or more favourable than the wholesale telecommunication customer agreements of operators who have similar features to **nbn**. In each of the sections above, we have specifically compared how **nbn**'s liability cap, MSF regime and Third Party Claims Protection is broadly in line with or more generous to RSPs than comparable provisions in the contracts of Chorus (New Zealand), Openreach (UK) and Nucleus Connect (Singapore).

In summary:

- **nbn**'s liability cap is significantly higher than the liability caps offered by Chorus, Openreach and Nucleus Connect in New Zealand, the United Kingdom and Singapore (jurisdictions with a similar telecommunications industry structure to Australia);
- none of Chorus, Openreach nor Nucleus Connect offer a specific, additional liability regime for material or significant service failures – instead, Openreach and Nucleus Connect limit their liability to ordinary service level rebates, while Chorus limits its liability to a low general liability cap of up to NZ\$500,000; and
- protections against claims by end-users or other third parties are:
 - widespread in comparable overseas agreements in the telecommunications sector;
 - based on the same commercial risk management principles as standard exclusions against consequential loss (widespread in all commercial agreements); and
 - given effect through statutory protections in other industries, such as electricity supply, postage and stock exchange services.

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

The WBA3 rebates regime specifically incentivises **nbn** to improve service performance and other aspects relating to end-user experience. By contrast, while the liability framework has some influence on service performance (e.g. through the MSF regime and uncapped liability for service rebates), the liability regime plays a much broader role, for example by allocating and managing unforeseen risks that are largely unrelated to end-user experience.

nbn considers that amendments to the liability regime carry a significant risk of unforeseen effects that extend beyond **nbn**'s service performance and end-user experience. For example, lowering the threshold for an event to constitute an MSF would increase the likelihood that **nbn** would be liable for MSF damages, which in turn would leave less of the general liability cap available for other losses. Furthermore, because the MSF regime is a unique innovation in the telecommunications context and introduced only in 2017, varying it without any history of liability or experience of its practical operation carries a heightened likelihood of risk misallocation.

As outlined in section 2, **nbn** considers that its rebates regime (alongside other remedies, such as CSG Compensation and Corrective Action) is the appropriate mechanism for incentivising the maintenance and improvement of service performance and end-user experience in a commercially practicable and proportionate manner. Rebates directly relate to service performance and do not have the same degree of contingent or unforeseen impacts on broader risk allocation as the liability framework.



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

nbn's full response to the reasonableness on the Third Party Claims Protection is set out in section 6.5 above. In summary, **nbn** considers that the Third Party Claims Protection is reasonable because:

- it only seeks to ensure that *business interruption risk* (i.e. the risk of pure economic loss arising from a business interruption flowing from an interruption on **nbn**'s network) is retained by businesses, while **nbn** continues to take responsibility for the risks it controls, including the risk of loss arising from property damage, death or personal injury and ensuring that it designs, builds and operates its network in a manner that minimises faults;
- business end-users are best placed to manage business interruption risk because they have the greatest amount of information about the specific impacts that network interruptions will have on their business and are in the best position to efficiently and proportionately control this risk;
- transferring business interruption risk to **nbn** would result in such risk being managed at a higher overall cost than if such risk continues to be managed by businesses – such costs would ultimately be passed down to all end-users, creating a particularly disproportionate effect on residential end-users who face no or very low economic loss risks from interruptions to **nbn**'s network; and
- the Third Party Claims Protection does not require RSPs to bear any liability for end-user claims, except to the extent that RSPs, acting in a commercially rational manner, agree with end-users to bear some of this liability (which is ultimately a standard commercial decision for RSPs and does not provide a basis for regulatory intervention).