

Submission to the ACCC – Draft Decision on the NBN Wholesale Service Standards Inquiry

13 November 2019

Public Version





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1 Executive summary of submission

- 1.1 **nbn** welcomes the opportunity to provide comments on the ACCC's draft decision (**Draft Decision**) and draft final access determination (**Draft FAD**) on **nbn**'s service standards.
- 1.2 **nbn** considers that there is insufficient basis to justify the making of any final access determination (**FAD**). A FAD would have significant detrimental flow-on consequences, resulting in outcomes that would be contrary to the long-term interests of end users (**LTIE**).

nbn's customer-led focus

- 1.3 **nbn** was created to build a national broadband network and bridge the digital divide, so that all Australians get the benefit of high-speed broadband at affordable prices regardless of where they live. **nbn** was also established to level the playing field in Australian telecommunications, to create real and vibrant competition within the industry and provide choice for consumers and businesses. The **nbn**[™] network is Australia's largest and most complex national infrastructure project, representing a significant investment by the government and Australian taxpayers.
- 1.4 The **nbn**[™] network is a next generation telecommunications network covering a geographical area of more than seven million square kilometres, supplying more than six million services over seven unique access technologies. As noted in the **nbn** Annual Report for this year, by 30 June 2019 almost 10 million premises were declared ready for service, exceeding the Corporate Plan 2019-22 target by 254,000 and more than 5.5 million Australian premises had been activated, exceeding the 2019-22 Corporate Plan target by 32,000 premises.¹
- 1.5 Delivering such an enormous undertaking has required the skills of a workforce comprising over 6,000 employees and contractors, as well as the labour and expertise provided by our service delivery partners. Australian taxpayers have made a significant investment in funding this important piece of critical infrastructure and the government has mandated that **nbn** achieve a commercial return on that investment.
- 1.6 Acknowledging that there have been, and will be more, challenges in implementing such significant outcomes for Australia, **nbn** has retained a strong focus on customers, even where this has involved a

¹ NBN Co, *Annual Report 2019*, p 16, available at: https://www.nbnco.com.au/content/dam/nbnco2/2019/documents/corporate-reports/nbn_annual_report_2019.pdf



substantial short-term cost or revenue sacrifice. These initiatives have resulted in significant and empirically-demonstrated improvements to customer experience on the **nbn**TM network at the same time as **nbn** has confronted the challenge of connecting more users than ever to the **nbn**TM network.

- 1.7 This is because **nbn** is, at its core, a customer-led service delivery company with strong commercial incentives to overcome these challenges, and deliver the outcomes expected of us by all Australians.

Regulatory intervention is not appropriate at this time

- 1.8 The current inquiry into wholesale service standards takes place as the industry as a whole is evolving into a mature operational setting with even greater focus on improving the experience of end user customers on the **nbn**TM network. Against this backdrop, and having regard to **nbn**'s inherent incentives which are closely aligned with access seekers, **nbn** submits that negotiations for the next iteration of the Wholesale Broadband Agreement (**WBA4**) should be the primary vehicle to enable commercial solutions to be developed to address new and not-yet-solved issues with service delivery. Such an approach will best allow for the market to evolve efficiently, for service standards and product differentiation to develop, and for **nbn** and access seekers to be incentivised to deliver services to end user customers at an appropriate standard.

- 1.9 As a prerequisite to any regulatory intervention, there must be clear evidence of market failure. Further, there must also be a considered analysis of the likely overall outcomes that would result from any intervention, as compared to either non-intervention or a less intrusive form of intervention. There is a notable absence of such evidence or analysis in the Draft Decision.

- 1.10 Indeed, there is strong evidence that regulatory intervention is not necessary, as evidenced by the following:

- (a) **nbn** has engaged in proper commercial negotiations with access seekers in relation to each Wholesale Broadband Agreement;
- (b) WBA4 negotiations remain the most appropriate vehicle for **nbn** and access seekers to develop commercially appropriate initiatives to respond to the concerns that have been raised during the **nbn** Wholesale Service Standards Inquiry;



- (c) any FAD will not have any effect to the extent of any inconsistency with **nbn**'s existing access agreements, which apply until 30 November 2020;²
- (d) **nbn**, as a vertically separated wholesaler has very different incentives when compared with the vertically integrated incumbents that have historically been subject to regulation in fixed line telecommunications markets; and
- (e) these significant commercial incentives drive **nbn** to improve customer experience on the **nbn**[™] network, and **nbn** has consistently responded to those incentives to deliver such improvements, as set out in Section 2 of this submission.

1.11 Having regard to the factors above, **nbn** considers that the case for regulatory intervention has not been established, and any such intervention would be pre-emptive and hinder the development of industry-led commercial solutions at a critical juncture in the maturation of the structurally separated industry.

The Draft FAD measures would not be in the LTIE

1.12 The need for strong evidence of market failure is amplified by the risk that any FAD based on the Draft FAD could have significant detrimental impacts on the LTIE. As currently formulated, the Draft FAD would require **nbn** to materially change the nature of its products, service levels, rebates and access seeker reporting in ways that will disrupt arrangements that **nbn** and access seekers have developed to efficiently and effectively meet the demands of a diverse market of end user customers.

1.13 There is a real likelihood that, if made, the Draft FAD would result in profoundly negative impacts for end user customers for years to come by driving cost, complexity and perverse incentives into **nbn**[™] powered services. In particular:

- (a) The excessively high proposed rebates, which are often set at multiples of any relevant benchmark, would focus significant **nbn** resources on priorities which do not reflect customer preferences. Such significant additional costs (in the form of increased rebates and resources directed at mitigating them) would increase the cost of all **nbn**[™] powered services being supplied to end user customers, impacting budget-conscious end user customers in particular.

² See section 152BCC of the CCA.



- (b) Excessively high rebates would also divert resources away from other present and future customer-experience initiatives which are more responsive to the needs of the fast-moving broadband market. The Draft FAD, if made, would pick “winners” and “losers” from the many customer experience initiatives that **nbn** and access seekers might want to invest in, by requiring **nbn** to fund specific initiatives to a particular degree determined by the ACCC. The Draft Decision does not explain why these initiatives and this degree of investment are required, or the cost to (or existence of) alternative initiatives. These might include access technology upgrades, in-premises initiatives or further discounts on services.
- (c) The absence of any requirement for access seekers to pass through the benefit of rebates to end user customers (except in one case) would significantly undermine the LTIE. This approach would mean there is no guarantee these rebates will directly benefit any end user customers, particularly given that access seekers who do not voluntarily pass through the rebates would benefit from significant windfall gains from the rebates. Even more concerning, these windfall gains would likely cause a fundamental misalignment between **nbn** and access seeker incentives to resolve issues as quickly as possible, and instead incentivise a range of gaming behaviours by access seekers, leading to worse outcomes for end user customers.
- (d) The “service speed assurance” provisions would change the fundamental nature of affected **nbn**[™] Ethernet AVC traffic class 4 (**AVC TC-4**) declared services as set out in Section 3 of this submission. These services have been designed as *peak information rate* services to best respond to the demands of end user customers, based on considerable market research, detailed product and pricing development, and taking into account the technical characteristics of the **nbn**[™] network. The Draft FAD would effectively change affected AVC bandwidths so they no longer operate as peak information rate services. Any such provisions, if included in a FAD, would be outside the scope of the power vested in the ACCC to make final access determinations as set out in section 152BC of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
- (e) The limited list of apparently exhaustive service level exclusions in clause 8 of the Draft FAD would have a significantly distorting impact by placing obligations on the wrong party in the supply chain to complete activities best completed by another party, causing delays to the connection and fault rectification of end user customer services.



- (f) The Consumer Safeguards provision in clause 12 of the Draft FAD would impose unknowable obligations on access seekers and **nbn**, and would undermine the certainty that access agreements are intended to provide. The provision would also be inconsistent with the intended operation of the hierarchy of instruments established under Part XIC of the CCA.
- (g) The Draft FAD would constrain **nbn** and access seekers' ability to negotiate a WBA4 that contains commitments by both **nbn** and access seekers to help deliver substantial improvements to the experience of end user customers on the **nbn**TM network. The Draft FAD, if made, would create a "regulatory overhang" to these commercial negotiations, effectively setting a baseline of commitments by one party (**nbn**) that are offered without any corresponding commitments from the other party (access seekers).
- (h) The Draft FAD would also add to the already significant challenges in recovering the substantial upfront investment by Australian taxpayers in rolling out the **nbn**TM network. In this context, the reference in the Draft Decision to the long-term revenue constraint methodology (**LTRCM**) in **nbn**'s special access undertaking (**SAU**) satisfying **nbn**'s legitimate business interests is incorrect, and represents a misunderstanding of the how the SAU operates. The LTRCM does not operate to guarantee **nbn**'s recovery of its reasonably incurred costs. The LTRCM only gives **nbn** the opportunity to recover its reasonably incurred costs. Accordingly, the extent to which any FAD affects **nbn**'s commercial ability to recover its costs must be considered in making any FAD. The LTRCM does not "solve for" **nbn**'s legitimate business interests in the manner suggested in the Draft Decision.
- (i) The Draft FAD would negatively affect future investors' willingness to invest in telecommunications network infrastructure in Australia.

nbn's submissions

- 1.14 **nbn** submits that the LTIE would be best served by the ACCC not making any FAD. The LTIE would be best served by **nbn** and access seekers agreeing, through commercial negotiations on WBA4, a set of commitments to be made by each of **nbn** and access seekers to undertake initiatives that will improve the experience of end user customers on the **nbn**TM network
- 1.15 **nbn**'s detailed submissions are structured as follows:
 - (a) Section 2 sets out **nbn**'s customer-led focus;



- (b) Section 3 sets out why the ACCC should not make a FAD;
- (c) Section 4 sets out comments on each of the specific remedies proposed in the Draft FAD;
- (d) Section 5 sets out comments on the reasonableness criteria in Part XIC as they apply to the Draft FAD;
- (e) Section 6 sets out comments on the timing and duration of any FAD;
- (f) Section 7 sets out **nbn**'s concluding comments;
- (g) Appendix A sets out drafting improvements that **nbn** submits should be made to any FAD to the extent that, despite our submissions, such a FAD includes elements of the Draft FAD;
and
- (h) Appendix B sets out improvements to the ACCC's "Broadband Speed Claims – Industry Guidance (May 2019)" that **nbn** recommends should also be made by the ACCC to help address the issues that the ACCC has raised regarding FTTN/B/C service speed assurance.



2 nbn's customer-led focus

- 2.1 **nbn's** mission is to lift the digital capability of Australia, allowing Australians to have access to a fast, reliable broadband network, at least possible cost to the taxpayer. The scale of this mission has created a number of challenges. While there is more work for **nbn** to do to overcome these challenges, **nbn** has a customer-led focus to optimise the experience of end user customers on the **nbn**TM network.
- 2.2 **nbn** is required by its Shareholder Ministers to offer the highest standards of service at affordable prices as quickly as possible (as set out in the Statement of Expectations³). Meeting the expectations of end user customers is critical to driving the revenue growth necessary for **nbn** to earn a return on its investment by attracting customers to the **nbn**TM network and meeting the competition posed by ever-more capable competing mobile and fixed networks. In this way, **nbn's** objectives and incentives are absolutely aligned with the promotion of the LTIE.

nbn is proving its customer-led focus

- 2.3 **nbn's** customer-led focus and the substantial commercial and reputational incentives that drive that focus, have been practically demonstrated by the broad range of initiatives that **nbn** has undertaken to improve the experience of end user customers on the **nbn**TM network, even where this has involved a significant short-term cost or revenue sacrifice.
- 2.4 These customer service initiatives that **nbn** has proactively implemented have resulted in significant and empirically-demonstrated improvements to customer experience on the **nbn**TM network at the same time as **nbn** has confronted the challenge of connecting more users than ever to the **nbn**TM network (approximately 35 thousand **per week** additional active services during the 5 week period from 3 October to 7 November this year). In particular:
- (a) [Commercial-in-Confidence];

³ <https://www.communications.gov.au/publications/nbnstatementofexpectations>



- (b) based on the latest report prepared by the Australian Communications and Media Authority:
 - (i) there has been a 16% year-on-year reduction in the number of reported complaints made about services delivered over the **nbn**TM network; and
 - (ii) the number of complaints about broadband services delivered over the **nbn**TM network (as a proportion of activated services) during the 2018-19 financial year was almost half the number of complaints that were made about broadband services delivered over legacy networks during that same period; and
- (c) based on **nbn**'s own customer surveys, over the past two years, residential dissatisfaction (**DSAT**) has fallen by 44% in the period since 2014 as a result of initiatives invested in by **nbn** and in collaboration with access seekers, as described in section 2.5 below.

2.5 Key initiatives that **nbn** has implemented to achieve these outcomes include:

- (a) **(Right first time connection improvements)** “Right first time” connections have been lifted to around 92–93%⁴ through initiatives such as HFC equipment and configuration refinements, network simulation labs for technician training and the availability of premium appointments for businesses and other customers with especially time-sensitive considerations.
- (b) **(Improved fault rectification performance)** As of October 2019, 92% of accepted **nbn** faults were resolved within **nbn**'s target time frames, compared to 72% in September 2018. The number of ‘aged’ trouble tickets which have been open for more than 7 days has also significantly reduced. These ‘aged’ trouble tickets now comprise around [Commercial-in-Confidence] and generally relate to cases that require civil works and other complex resolutions. **nbn** is continuing to invest in resolving both ‘aged’ and other faults even faster by:

⁴ In any largescale telecommunications rollout, there will always be 5–6% of premises that are not standard installations – for a variety of reasons such as site access, or the complexity of lead-in work required. Therefore, the addressable market for “right first time” connections is likely to be around 94–95% of premises. **nbn** is continuing to invest in raising its right first time connection performance even higher, to try to complete connections right first time for every premises in that addressable market.



- (i) offering more appointments on Mondays for faults raised over the weekend after 9 pm Friday – an initiative driving improvements in customer experience. This initiative was launched in September 2019, and initial results indicate that mean time to resolve has improved by [Commercial-in-Confidence]. **nbn** has also made Premium Appointments available (from February 2018) to end users who wish to book a specific arrival time for **nbn** technicians. This is particularly targeted at business customers who prefer **nbn** connections to be performed outside busy trading periods;
 - (ii) assigning case managers to handle repeat fault tickets for customers and reduce the prevalence of faults repeating;
 - (iii) investing in new network simulation labs to provide training and assessments for more than 2,000 in-field technicians to improve their capacity to identify and resolve complex issues; and
 - (iv) introducing new processes (which are currently being developed in consultation with access seekers) to investigate, diagnose and resolve complex issues which are not service faults but nevertheless adversely affect customer experience (e.g. re-syncs and modem flaps). These new processes are designed to minimise inconvenience to end user customers, including by reducing repeat appointments and incidences of “no fault found”.
- (c) (**Reduced congestion**) A co-ordinated set of pricing initiatives by **nbn** has helped to reduce the average number of minutes of bandwidth congestion experienced by customers due to CVC under-provisioning by access seekers. Congestion has fallen from almost 5 hours per service per week at the start of 2017 (on average across the network) to 40 minutes per week on average for the first 6 months of 2019 – and this has further fallen to 30 minutes or less per week between July and September 2019.⁵

⁵ <https://www1.nbnco.com.au/content/dam/nbnco2/2019/documents/how-we-are-tracking/nbn-september-2019-monthly-progress-report-2.pdf>



- (d) **(FTTX improvements)** Investments in **nbn**'s systems, processes and technology developed in conjunction with access seekers have improved the experience of end user customers on **nbn**[™] FTTX networks. Many of these investments commenced prior to the announcement of the **nbn** Wholesale Service Standards Inquiry. [Commercial-in-Confidence]
- (e) **(Establishment of Business Operations Centre (BOC))** The BOC was established in March 2019 to support a premium service experience for customers using business solutions (namely **nbn**[™] Ethernet AVC traffic class 2 services and **nbn**[™] Ethernet AVC traffic class 1 services with speeds greater than 150 kbps, Enhanced Service Levels and **nbn**[™] Enterprise Ethernet). This service support team engages with business end users and access seekers to:
- (i) improve the *Before the day planning* in establishing a right first-time connection, understanding the complexities of the commercial premises being connected, preparing for site inductions and ensure the right site access and contact will be present onsite;
 - (ii) support *On the Day*, while **nbn** technicians are in field with back-to-base support for additional information or access;
 - (iii) *After the Day* support, offered to access seeker field technicians when they go out following an **nbn** connection to switch over access seeker customer premises equipment. This After the Day service support ensures service continuity and has significantly reduced the incidents of service continuity [Commercial-in-Confidence] in the first 6 months of operations; and
 - (iv) in addition, our BOC houses our Enhanced Service Levels assurance team offering 24/7 support for access seekers providing business services and their end users.
- (f) **(HFC Pause)** Following the launch of **nbn**[™] Ethernet (HFC), based on feedback from access seekers and end user customers, **nbn** recognised that there were challenges with the HFC Network that were preventing the delivery of a wholesale product of an appropriate standard. In November 2017, **nbn** paused further orders on the HFC Network, forgoing



approximately \$700 million in revenue⁶ to rectify those issues and deliver a wholesale product that meets end user customers' expectations of quality.

- (g) **(Fixed Wireless expansion)** As **nbn™** Ethernet (Wireless) has become even more popular than forecast, demand for data has significantly increased. The Wireless Network is, and is expected to remain, a loss-making investment. However, in the interests of seeking the best possible customer experience for all end user customers, **nbn** has spent, or committed to spend, over \$800 million on Wireless Network improvements.
- (h) **(FTTC introduction)** **nbn** invested approximately [Commercial-in-Confidence] developing **nbn™** Ethernet (FTTC) (in addition to the costs of rolling out the FTTC Network) to optimise the multi-technology mix for emerging end user customer demand for high bandwidth services. This was the first large-scale rollout of FTTC technology in the world.
- (i) **(nbn™ Sky Muster™ 2017 improvement program)** In mid-2016, customer experience on **nbn™** Ethernet (Satellite) was not meeting customer expectations. **nbn** established an improvement program for **nbn™** Ethernet (Satellite) which included significant financial and personnel investments through a targeted program led by senior management. The program included experts in network operations, engineering, products and community and access seeker communication teams, to improve the experience for customers on the Satellite Network. As a result of this targeted improvement program, satellite network incidents have been reduced by [Commercial-in-Confidence]
- (j) **(nbn™ Sky Muster™ Plus introduction)** In August 2019, **nbn** launched the **nbn™** Sky Muster™ Plus wholesale product, which is designed to allow homes and small businesses in the **nbn™** satellite footprint to access unmetered data for essential online activities, including static image and text web browsing, select email, and select PC and smartphone operating system updates. Feedback from the trial of this product in mid-2019 revealed four out of five existing **nbn™** Sky Muster™ customers reported an improvement in their online experience, with many reporting the unmetered data was particularly helpful when it came to managing their overall data usage. This product, developed in response to feedback from

⁶ See NBN Co Corporate Plan 2019–22, page 65



users and market research and in consultation with access seekers, is part of **nbn**'s ongoing commitment to help meet the broadband needs of regional and remote Australians.

(k) **(FW Plus introduction)** The demand for data has increased dramatically, resulting in a reassessment of the **nbn**[™] Ethernet (Wireless) product and the entire configuration of the Wireless Network. Significant resources have been invested in implementing a change to the TDD frame configuration on the Wireless Network. As a result, **nbn** has introduced its new FW Plus product, which better aligns product offerings with the greater demand for download bandwidth, as compared to upload bandwidth, on the Wireless Network.

(l) **(In-Premises wiring and gateway initiatives)** Over the last three years, **nbn** and access seekers have been working together closely to address factors within premises that may impact stability, speed and customer experience. This includes poor internal copper wiring that can cause interference on FTTN/B services. This program has included **nbn** performing wiring-related services free of charge and providing financial contributions to enable these works to be performed by private cablers within industry. Separately, to address poorly performing VDSL2 modems and gateways, **nbn** has provided assistance to access seekers and equipment vendors to:

- (i) identify underperforming firmware or devices;
- (ii) develop, test and upgrade new firmware versions that improve the speed and stability of impacted services; and
- (iii) understand the impact of device features on performance.

These initiatives have improved the speed and stability of services using affected gateway devices and contributed to reduced levels of customer dissatisfaction (DSAT).

(m) **(Service Health Card)** **nbn** will shortly introduce the "Customer Service Health Card", which is a new tool that will be available to all access seekers. This tool will allow access seekers to deep dive into metrics for each service including the status of a connection, how the service is performing and additional historical data that the access seeker can use to resolve customer issues. The Customer Service Health Card tool will take existing service and network information and present it to access seekers in a more accessible manner,



combining it with enhanced service assurance features which provide access seekers with assistance in determining their next course of action to resolve end user issues. This tool has been developed in consultation with access seekers and will continue to be developed in response to feedback from them. The Customer Service Health Card delivers the following enhancements to allow access seekers to more effectively manage end user issues:

- (i) rationalises test and diagnostic actions to remove unnecessary activities that do not add value to the objective of determining the presence or location of an **nbn** service fault;
- (ii) reduces the number/volume of test and diagnostic transactions required to determine and raise an **nbn** Trouble Ticket;
- (iii) provides (as far as possible) an access technology-agnostic view of the health of an **nbn** service;
- (iv) simplifies the service restoration lifecycle and maximises the value and effectiveness of interactions between access seekers and **nbn**; and
- (v) improves the service assurance experience for end users.

Alignment of incentives is critical

2.6 As discussed with the ACCC over several months, a package of customer experience commitments had already been prepared by **nbn** to offer to access seekers in WBA4. This package contains many similar provisions to those subsequently incorporated by the ACCC in the Draft FAD. This package would facilitate a genuine commercial negotiation with industry and, **nbn** submits, would be more likely than a FAD to deliver a holistic outcome that best promotes the LTIE. [Commercial-in-Confidence]

2.7 An example of the potential created by aligned incentives and co-operation between **nbn** and access seekers is demonstrated by a press release that Telstra published at the time of the HFC Pause, in which it stated:

“We believe nbn co’s decision to stop connecting customers in HFC areas has been driven by issues around customer experience. We understand nbn co’s core priority is to protect the customer experience and we are committed to working with them on this.”



2.8 **nbn** is fully aware of the challenges it faces and will continue to face given the size and complexity of the changes brought about for all Australians by the **nbn**[™] network. The above initiatives show in a very practical way that **nbn** and access seeker incentives are aligned, and that **nbn** has proven itself as a customer-led organisation. **nbn** believes these same aligned incentives and customer-led focus provide the best foundation for **nbn** to meet the challenges of the future to optimise the experience of end user customers on the **nbn**[™] network.



3 Reasons why a FAD should not be made

3.1 Any FAD made in accordance with the Draft FAD would be contrary to the LTIE and should not be made for the following reasons:

- (a) the LTIE is best promoted by allowing the market to evolve efficiently, with downstream differentiation being allowed to develop and the alignment of incentives of **nbn** and access seekers being allowed to deliver good service effectively and efficiently. In the absence of any demonstrated market failure or other proper justification for regulatory intervention, any FAD is likely to be inherently less effective at promoting the LTIE;
- (b) there is no basis to conclude, and it has not been demonstrated that, any proposed interventions will achieve better outcomes than the industry will achieve through negotiation without regulatory intervention;
- (c) the Draft FAD will not encourage the economically efficient use of, and investment in, infrastructure;
- (d) the Draft FAD will create a real risk of incentivising access seekers to game the rebate system to increase their rebate revenue, rather than incentivising industry cooperation to efficiently address customer experience issues;
- (e) the Draft FAD will be damaging to competition in downstream retail markets;
- (f) the Draft FAD does not properly account for **nbn**'s legitimate business interests; and
- (g) there is insufficient evidence to justify regulatory intervention of the kind described in the Draft FAD.

3.2 For the above reasons, the Draft FAD, if made, would be contrary to the LTIE. If a FAD is made, it would likely lead to worse overall customer experience outcomes on the **nbn**TM network than will be the case if **nbn** and access seekers are given the opportunity to negotiate the terms of WBA4 and better align the parties' incentives and processes to optimise customer experience through commercial negotiations.



There is no market failure justifying intervention

- 3.3 There does not appear to be any evidence presented of a market failure which, as set out in **nbn's** previous submissions, is needed to justify regulatory intervention. In the absence of such demonstrated market failure, commercial negotiations provide the best mechanism for achieving economically efficient outcomes.
- 3.4 The absence of any evidence of a relevant market failure or any other proper basis to justify making a FAD is demonstrated by the following matters in particular:
- (a) there does not appear to be evidence, or any allegation, that **nbn** has adopted an inappropriate or excessively resistant posture in respect of any customer experience focused proposals put forward by access seekers during the course of WBA negotiations. Indeed, some of the proposals included in the Draft FAD (especially matters pertaining to the quantum of the proposed rebates) have not been put forward by any access seeker to **nbn**, or rejected by **nbn**, in the course of any WBA negotiations;
 - (b) there does not appear to be any reasoned basis for the assertion that WBA negotiations “have not always resulted in provisions that appropriately balance access seekers interests with NBN Co’s” other than that **nbn's** current rebates do not reflect the rebate amounts set out in the Draft FAD (which **nbn** submits are inappropriate and have a number of potentially negative customer impacts, including incentivising access seeker gaming); and
 - (c) in some cases, such as the Draft FAD provisions relating to “Consumer Safeguards Events”, the proposed regulated terms do not have any clear operation or impact, and no issues have been identified in the experience of end user customers on the **nbn™** network.

Better outcomes will be achieved without regulatory intervention

- 3.5 Contrary to there being any market conditions or demonstrated market failure that would provide a proper basis for regulatory intervention, the evidence instead demonstrates that there are appropriate market dynamics in the wholesale telecommunications market and that these dynamics are ensuring that market participants are focused on, and invested in, delivering improved end user customer outcomes.



3.6 In particular:

- (a) **nbn** is already subject to competitive pressures, which incentivise **nbn** to optimise customer experience on the **nbn**TM network to improve **nbn**'s ability to recover the very significant upfront investments made in rolling out the **nbn**TM network. These include:
 - (i) the risk of end user customers delaying their migration from legacy copper and HFC networks to the **nbn**TM network (which has significant revenue consequences for **nbn**);
 - (ii) the risk of mobile and fixed wireless access substitution; and
 - (iii) the risk that end user customers will acquire lower-value services if the network does not perform well;
- (b) **nbn** negotiates the terms of the WBA with counterparties who include large, sophisticated entities, able to wield significant bargaining power in those negotiations with **nbn**;
- (c) over the course of each Wholesale Broadband Agreement negotiation, **nbn** has made significant commitments on items of importance to access seekers to obtain the agreement by all parties to the Wholesale Broadband Agreement terms;
- (d) **nbn** has undertaken a number of significant initiatives to improve customer experience on the **nbn**TM network, some of which are set out in Section 2; and
- (e) as rollout of the **nbn**TM network is completed (due to be in 2020), **nbn** will have even greater capacity to progress its customer experience initiatives.

3.7 The Draft FAD, if made, would have a particularly damaging effect on the ability of **nbn** and access seekers to develop commercial positions which efficiently and effectively improve customer experience on the **nbn**TM network.

3.8 In the absence of a FAD, WBA4 will focus on commitments by both **nbn** and access seekers to deliver substantial improvements to the experience for end user customers receiving telephone and internet services via the **nbn**TM network. This focus reflects the need, as recognised by the ACCC, for action from both **nbn** and access seekers to achieve the best possible end user customer outcomes. **nbn** has outlined this strategy in initial WBA4 consultation papers released to access seekers, not only to



respond to concerns of access seekers and end user customers, but also to help migrate more end user customers onto the **nbn**[™] network.

- 3.9 To deliver on this intention, **nbn** needs to be given the opportunity:
- (a) to offer specific commitments to access seekers in exchange for specific commitments from those access seekers to progress their own customer experience initiatives, so that both parties align their efforts and improve service delivery in a way that has an appreciable impact for end user customers; and
 - (b) to deliver customer experience initiatives that are informed by extensive market research and experience of operating a broadband access network, including to develop product and process improvements and that are calibrated to appropriately address the full range of customer experience improvement opportunities and demands, as set out below.

3.10 The Draft FAD, if made, will inevitably shift the focus of WBA4 negotiations to the terms of the FAD, which will form the baseline commitments that **nbn** must make without any corresponding commitments from access seekers. Further, any regulatory intervention will ensure that the parties will be ever-conscious during WBA4 negotiations of the prospect of further regulatory intervention, which could result in access seekers endeavouring to rely on the ACCC as an ongoing informal ‘arbitrator’ of matters in commercial dispute, rather than fully engaging in ordinary commercial negotiations. Either outcome, even on its own, would have a chilling effect on the ability of the parties to discover, through negotiations, the ideal set of aligned commitments that will deliver benefits to end user customers.

A FAD will not encourage the economically efficient use of and investment in infrastructure

- 3.11 **nbn** submits that, in the absence of market failure, market participants are best placed to determine the economically efficient use of, and investment in, infrastructure. The Draft FAD is not a suitable vehicle to encourage the economically efficient use of and investment in infrastructure.
- 3.12 There is no evidence or analysis showing that the proposed rebates in the Draft FAD are structured in a way, or set at an amount, that maximises the economically efficient use of, and investment in, infrastructure. In particular, there is no analysis in the Draft Decision which shows:
- (a) the costs to access seekers of a failure by **nbn** to meet its service standards;



- (b) the comparative value to end user customers of the expected and quantified impacts of the rebates as compared to the value of other initiatives that **nbn** will be unable to deliver because of the need to offset the cost impact of the proposed rebates (e.g. further discounts on service charges, or improvements to other end user customer-impacting issues which are not the subject of the FAD);
- (c) the minimum amount at which these rebates could be set to provide effective incentives for **nbn** to provide an appropriate standard of service; or
- (d) the extent to which commercial challenges for fixed line telecommunications networks in Australia, compounded by the rebates, could discourage future investment in telecommunications infrastructure, including by **nbn**.

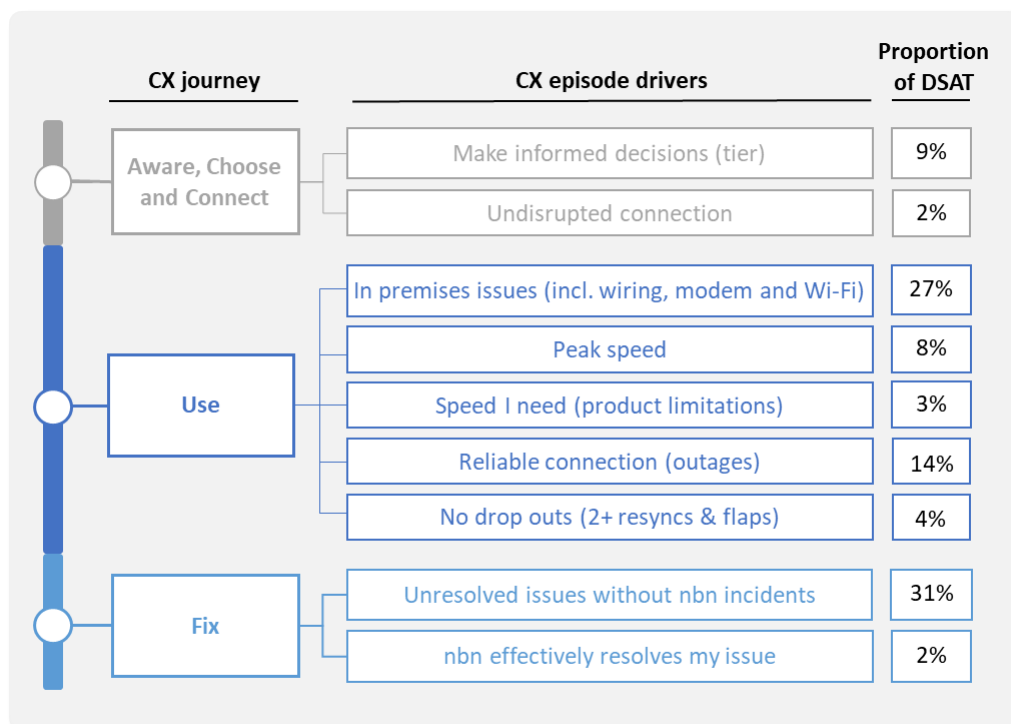
3.13 By contrast, the quantum of the rebates appear to have been set by reference to largely arbitrary matters, such as the service fees over a 6 month or 12 month period for particular **nbn** products at a particular point in time. There is no clear basis for asserting that the proposed rebates would encourage the economically efficient use of, and investment in, the **nbn**TM network that is necessary to promote the LTIE. Rather, there is a real likelihood that the proposed rebates would instead detract from investments in other, more economically efficient and more impactful, customer experience initiatives. This is because, like any other company, **nbn** has a finite capacity to invest in initiatives such as customer experience initiatives, [Commercial-in-Confidence].

3.14 Other highly impactful initiatives currently being considered, subject to funding availability, that could potentially be cancelled, delayed or reduced in scale to accommodate the investments **nbn** will need to make to comply with the Draft FAD, and to pay relevant rebates, include:

- (a) upgrading FTTN services to FTTC;
- (b) initiatives to improve in-home wiring;
- (c) programs to address in-home Wi-Fi issues;
- (d) remediation and rehabilitation of the copper network; and
- (e) targeted incentive programs designed to encourage higher take-up among under-served market segments.



3.15 By diverting resources away from these other customer experience-enhancing initiatives, the Draft FAD will have a negative overall impact on the LTIE. This is particularly the case because the measures in the Draft FAD do not address the issues that end users have identified as having the greatest impact on customer experience, which are summarised in the diagram below.



x% Proportion of contribution to DSAT

A FAD will create gaming incentives

3.16 The excessive quantum of the proposed rebates without express pass-through obligations on access seekers will create a perverse incentive for access seekers to act in a manner that fails to improve, and even detracts from, the experience of end user customers on the **nbn**TM network. This is because an access seeker will benefit from a windfall gain each time that access seeker receives a rebate and does not pass through the full value of the rebate.

3.17 **nbn** recognises that access seekers currently have their own incentives to improve customer experience on the **nbn**TM network to maximise their own revenue. However, rebates of this quantum (which far exceed the revenue access seekers receive from their end user customers) necessarily create a tension between the existing customer-favourable incentives and the perverse incentive those access seekers would have under the Draft FAD to maximise their rebate revenue.



- 3.18 The impact of this perverse incentive to maximise rebate revenue will potentially be even greater given the extent to which end user customers frequently associate problems with their service with “problems on the **nbn**”, which creates an opportunity for access seekers to maximise their rebate revenue whilst **nbn** bears the reputational burden of associated impacts on customer experience.
- 3.19 Such perverse incentives can result in a significant deterioration of customer experience on the **nbn**TM network and, more broadly, would lead to misaligned incentives between **nbn** and access seekers. This may give rise to a continuing disputes-driven, divisive relationship between **nbn** and access seekers.
- 3.20 **nbn** has also considered the argument that access seekers should not have to pass on rebates because the access seeker could apply rebate revenue in some other customer-favourable way (e.g. to subsidise the cost of its services). However, if an access seeker chose to reduce prices by the expected value of the rebates, that access seeker would be dependent on the continuation of those rebates to sustain that price reduction. This would effectively force the access seeker to continue seeking that rebate revenue stream as part of its business model, irrespective of the impact on customer experience. This is demonstrated by the illustrative example below.



Illustrative Example – access seeker reliance on rebate revenue:

1. Access Seeker A supplies a “Fast50” retail product for \$65 per month, which is aimed at budget-conscious end user customers.
2. Access Seeker A’s aggregate cost at present of supplying its retail product “Fast50” is \$60 per month, representing a \$5 per month profit per each service.
3. Once the FAD is made, rather than passing through connection rebates and service fault rebates on a per-event basis, Access Seeker A instead decides to ‘pass-through’ the rebate revenue in the form of a discount on the price of the product.
4. Access Seeker A forecasts that, based on the rebates in the Draft FAD and its expectations about **nbn**’s future service level performance, it is likely to receive rebates from **nbn** that are equal to \$8 per month per service. Accordingly, Access Seeker A supplies Fast50 for \$57 per month, based on a 24-month minimum contract term.
5. After Access Seeker A has sold a number of Fast50 services, **nbn** identifies a way to improve its service level performance beyond Access Seeker A’s expectations with the cooperation of access seekers, significantly reducing Access Seeker A’s rebate revenue.
6. In these circumstances, Access Seeker A would have to choose between:
 - (i) supplying Fast50 at a significantly reduced profit (and potentially even at a loss); or
 - (ii) refusing to agree to **nbn**’s service level improvement initiatives (and thus maintain Access Seeker A’s rebate revenue) to meet its original business projections.

3.21 This is a real, and not just a theoretical, risk. There is evidence which clearly demonstrates that, at a practical and operational level, access seekers have genuine opportunities to impact **nbn**’s service level performance in a way that could drive up rebate revenue for the benefit of an access seeker at the expense of end user customers.

3.22 For example, prior to July 2019, access seekers had the option when submitting a trouble ticket in respect of the FTTB/N networks, to identify the location of the fault as “inconclusive”. On average, access seekers selected this option approximately 30% of the time. In July 2019, **nbn** made process amendments that removed this option, meaning access seekers instead ran the relevant tests and diagnostics to accurately determine the location of the fault prior to submitting trouble tickets. **nbn**



also introduced process changes around this time requiring access seekers to reserve an Appointment at the time of raising a Trouble Ticket. These changes to access seeker behaviour resulted in an average reduction of 18 operational hours (i.e. 2 Business Days) in average trouble ticket resolution performance. This demonstrates how important it is for access seekers and **nbn** incentives to remain aligned at the operational level, and how damaging it will be if a rebate scheme is introduced that creates incentives for access seekers to do the opposite.

3.23 In addition, access seekers could potentially seek to game the FTTN/B/C service speed assurance rebate by choosing not to raise a trouble ticket with **nbn** or to reserve an appointment for **nbn** to attend the end user customer's premises. The access seeker could instead seek to continue obtaining rebate payments for the underperforming service (particularly if the end user customer has not submitted a complaint to the access seeker). In these circumstances, **nbn** would not be in a position to address the issue, and the access seeker's incentives to do so would be significantly diminished.

3.24 If an access seeker failed to raise a trouble ticket or reserve an appointment, **nbn** could potentially end up being required, as a practical matter, to pay rebates in circumstances where the issue is beyond **nbn**'s network boundaries and therefore beyond the scope of **nbn**'s declared service. This is because, where the cause of the issue is outside of **nbn**'s network boundaries, **nbn** may not be able to diagnose the exact location of the fault or properly assess the maximum attainable line rate of the **nbn**TM network connection without visiting the premises and testing the line rate at **nbn**'s network boundary. Potential examples of where the end user customer experience is affected by issues beyond **nbn**'s network boundary and outside of **nbn**'s control include:

- (a) where there are problems with the in-premises wiring; and
- (b) where the end user customer's modem has been configured to limit the modem's traffic throughput or the VDSL synchronisation rate negotiated between the DSLAM and modem.

In each case, because the cause of the fault and/or issue is outside of **nbn**'s network boundary, **nbn** would be unable to address the underlying cause of the end user customer's problem and the rebate that **nbn** could end up having to pay, as a practical matter, could reduce the access seeker's incentives to resolve the issue itself.

3.25 Separately, access seekers could also be incentivised to game the service speed assurance rebates by selling a retail service at one speed to the customer, and ordering a higher speed from **nbn**, to extract a



rebate even where there is no corresponding access seeker or end user customer loss or disadvantage. For example, an access seeker could sell a retail service with a peak speed of 50 Mbps, but order an AVC from **nbn** with a PIR of up to 100 Mbps. In these circumstances, under the proposed rebate, if the relevant AVC achieves a PIR of 48 Mbps, the access seeker would receive a rebate, despite neither the access seeker or the relevant end user customer incurring any loss. This is a very real risk, because some access seekers already order a higher speed tier than their end user customer has ordered and shape the traffic, to obtain higher CVC inclusions and other benefits.

- 3.26 By comparison, in the United Kingdom, Openreach provides service level rebates to access seekers, subject to access seekers' participation in the Automatic Compensation Scheme established by Ofcom.⁷ This means that, for each rebate paid by Openreach to the access seeker, the access seeker is required to provide an even greater rebate to the end user customer. This ensures that the interests of each of Openreach and its access seekers are aligned in a manner that promotes customer experience – i.e. both Openreach and access seekers have 'skin in the game' in delivering improved performance outcomes. Implementing a wholesale rebate scheme without aligning retail incentives will not promote the LTIE and, as we have described above, creates a real risk of significantly damaging the LTIE.

A FAD will damage competition in downstream retail markets

- 3.27 Rather than promote competition in downstream retail markets for broadband and voice services over the **nbn**TM network, **nbn** submits that the Draft FAD would reduce competition. In particular:
- (a) **nbn** disagrees that there is any uncertainty regarding its current service standards. **nbn**'s service standards, and the consequences of not meeting them, are clearly set out in the WBA. Access seekers are also provided detailed reporting on **nbn**'s actual performance against those service standards;
 - (b) in any event, there is no evidence that any uncertainty over these **nbn**'s service standards has hindered competition, either by way of preventing new entrants into the market (noting that there are more than 235 retail providers currently selling services that use the **nbn**TM network) or by limiting the ability or willingness of access seekers to offer services based on differentiated product offerings. Indeed, while **nbn** is focused on continuing to improve its connection and fault rectification performance in keeping with its commercial incentives,

⁷ See clause 9.1 of Schedule 4 of the GEA contract; clause 11 of Part VI of the LLU contract and clause 8.1 of Schedule 4 of the WLR3 contract, as published by Openreach at <https://www.openreach.co.uk/org/home/products/contracts/contracts.do>.



the offer of failover modems by some access seekers is an example of service standard-based product differentiation; and

- (c) customer-satisfaction scores suggest that there is a significant degree of service-standard based differentiation between different access seekers, as demonstrated by the large degree of variance between access seekers in residential customer experience outcomes. For example, in **nbn**'s research, the best-performing access seeker achieved a DSAT score on one access technology of just 5% and the worst-performing access seeker had a DSAT score on the same access technology of 40%. Such dramatic variances between access seekers indicate the extent to which access seekers influence customer satisfaction and provide very different standards of service with respect to retail products supplied using the **nbn**TM network.

3.28 Rather than improving upon the existing service quality-based competition, the excessive quantum of the rebates in the Draft FAD creates a risk that any FAD could negatively impact service-standard differentiation, and thus competition. This is because the quantum of these rebates will cannibalise the market for the existing, commercially negotiated, enhanced fault rectification service. This enhanced service level option supports access seekers to design differentiated product offerings to appeal to different segments of the markets, with:

- (a) enhanced service level offerings being used to support higher-cost retail products marketed at business users and other end user customers who value premium service levels; and
- (b) lower-cost services with standard service standards being marketed to more budget-conscious users.

3.29 By cannibalising the market for **nbn**'s existing enhanced service levels, the excessive rebates that have been proposed in the Draft FAD will ultimately undermine the ability of access seekers to differentiate their products in the downstream retail market. This lack of differentiation between retail products will likely reduce, not promote, competition.

3.30 In addition to damaging competition in downstream retail markets, the Draft FAD would also damage competition at the wholesale level. In the absence of equivalent regulatory conditions imposed on all competing operators, the proposed rebates place **nbn** at a significant competitive disadvantage. These competitors include other operators of superfast fixed line networks, such as TPG's fibre to the



building network, as well as mobile network operators, [Commercial-in-Confidence]. To the extent the ACCC proposes to make a FAD that would require **nbn** to pay substantial rebates, **nbn** submits that equivalent conditions should be imposed on all competitors supplying comparable services, including by way of amendments to the Superfast Broadband Access Service and Local Bitstream Access Service FADs.

nbn's legitimate business interests

- 3.31 Based on the quantum of the rebates in particular, the Draft FAD has been formulated in a way that **nbn** submits does not have due regard to **nbn's** legitimate business interests, particularly its interests in recovering the significant investments it has made in constructing the **nbn**TM network.
- 3.32 The Statement of Expectations provided to **nbn** by its Shareholder Ministers requires **nbn** to pursue the government's objective of ensuring that all Australians have access to very fast broadband as soon as possible, at affordable prices, and at least cost to taxpayers. **nbn** currently faces a significant, but achievable, challenge as a business to recover a return on the initial investment in building the **nbn**TM network. Any incremental increases to **nbn's** cost base, particularly those of the magnitude proposed under the Draft FAD, or any hindrance on **nbn's** ability to effectively compete with other telecommunications network operators, will logically and unavoidably impact on **nbn's** ability to recover a return on this investment.
- 3.33 The suggestion by the ACCC that the Draft FAD would not have any such impact solely because "NBN Co would have the opportunity to recover these costs under the long term revenue constraint methodology set out in its SAU" is misguided for the reasons set out in Section 5 of this submission.
- 3.34 More broadly, this factor is included under section 152BCA of the CCA not just as a matter of fairness for service providers such as **nbn** but because it is crucial to ensuring that regulatory intervention does not have the unintended effect of discouraging future investment in telecommunications infrastructure. Given the challenging economics that face all fixed line telecommunications networks in Australia, regulatory intervention in the manner proposed in the Draft FAD is likely to discourage such future investment, which would be very damaging to the LTIE.

Speed assurance on AVC TC-4 cannot be imposed through a FAD

- 3.35 The 'service speed assurance' terms (clauses 4 and 5) of the Draft FAD are beyond the scope of the ACCC's power to make a FAD under section 152BC of the CCA, because those terms change the nature



of the service being offered outside the scope of the declared service as set out in the current iteration of the Wholesale Broadband Agreement (**WBA3**).

- 3.36 The Draft FAD would require the payment of specified rebates to access seekers when service speeds fall below certain benchmarks selected by the ACCC.
- 3.37 For AVC TC-4s provided over the FTTN, FTTB and FTTC networks:
- (a) **nbn** would be required to pay a rebate of \$20 for each month that the downstream PIR is less than the PIR Objective (downlink) (clause 4.2 of the Draft FAD); and
 - (b) **nbn** would be required to pay a rebate (of an amount to be determined) for each month where the downstream PIR drops below a certain proportion (approximately 50%) of the downstream PIR that the service is capable of achieving (clause 4.3 of the Draft FAD);
- 3.38 For AVC TC-4s provided over the Wireless Network, **nbn** would be required to pay a rebate of \$20 per month where:
- (a) the average speed of a wireless network cell falls below 6 Mbps (clause 5.2(a) of the Draft FAD); and/or
 - (b) there is congestion on the backhaul link of 0.25% or more over 28 days (clause 5.2(b) of the Draft FAD).
- 3.39 These service speed assurance provisions for both the FTTX networks and the Wireless Network would have the effect of changing the **nbn**TM Ethernet declared service and, accordingly, are beyond the scope of the ACCC's power to make a FAD under section 152BC of the CCA. This is because:
- (a) under section 152BC of the CCA, the ACCC may only make an access determination "relating to access to a declared service";
 - (b) the phrase "relating to access" confines the matters upon which the ACCC may make an access determination to a customer's opportunity to become connected to a service which has been declared;



- (c) there is a distinction to be made between what is a declared service, and access to that service. The **nbn**TM Ethernet service that has already been declared is the service set out in the WBA3 standard form of access agreement;
- (d) the declared service includes a PIR. The concept of the PIR in WBA3 is essentially the highest speed that the network is capable of achieving at the **nbn**TM network boundary in any 24 hour period. In the case of speed tiers expressed as a range (e.g. 25-100 Mbps), under the WBA, those services may achieve a PIR anywhere in that range during any 24 hour period, but there is no guarantee that any particular service will necessarily ever achieve a PIR at the upper end of that range;⁸
- (e) these declared services have been developed having regard to the nature of the different access technology. For the FTTX networks, this includes the limitations of the legacy copper network that **nbn** acquired from Telstra. For the Wireless Network, the fact that **nbn** does not offer an average speed commitment (in addition to the PIR commitment **nbn** does make) reflects the inherent limitations of wireless networks and is consistent with other wireless terrestrial networks (e.g. mobile networks) in Australia;
- (f) the Draft FAD would require the relevant **nbn** services to achieve average speeds and minimum download speeds that are not features of those services as declared by the WBA;
- (g) to require **nbn** services to meet the standards chosen by the ACCC would be to alter the nature of the service being provided. Although the service speed assurance terms are described in the Draft FAD as rebates, the effect is to require significant capex investment to re-design networks and change the **nbn**TM Ethernet product description and technical specifications; and
- (h) as an example, clause 4.3(a) of the Draft FAD would have the effect of turning **nbn**'s 25-100 Mbps speed tier for the FTTN, FTTB, and FTTC networks into a 50-100 Mbps speed tier, notwithstanding that **nbn** has not declared a service with an AVC TC-4 for FTTN, FTTB, FTTC with a speed tier of 50 – 100 Mbps.

⁸ See section 14.1(a) of the **nbn**TM Ethernet Product Description.



4 Comments on particular provisions of the Draft FAD

- 4.1 In previous sections, **nbn** commented on the Draft FAD in general. In this Section 5, **nbn** sets out in more detail the issues that would be created by each of the individual provisions in the Draft FAD, should they be included in any FAD.
- 4.2 **nbn** maintains the comments it has made in previous submissions in relation to each of the items included in the Draft FAD, but for brevity has not repeated those comments here. This Section 5 responds only to new issues raised by the details of the Draft FAD.
- 4.3 Separately, **nbn** has set out at Appendix A suggested drafting improvements to the provisions in the Draft FAD. To be clear, **nbn**'s position is that the Draft FAD should not be made and that the LTIE would be better promoted by **nbn** and access seekers agreeing, through commercial negotiations on WBA4, a set of commitments to be made by each of **nbn** and access seekers to undertake initiatives that will improve the experience of end user customers on the **nbn**TM network. However, in the event the ACCC proceeds to make such a FAD in spite of **nbn**'s views, **nbn** submits that the suggested changes set out in Appendix A should be made to ensure that the operation of any FAD is clear and is consistent with the ACCC's intention.

Missed appointment rebate (clause 1 of Schedule 2 of Draft FAD)

- 4.4 **nbn** has already agreed to provide \$25 rebates for missed appointments, and has been doing so since December 2018. The higher rebates for missed appointments in the Draft FAD are excessive and will drive increased costs that will detract from investments in other initiatives that would have a greater impact in improving the experience of end user customers on the **nbn**TM network.
- 4.5 The excessiveness of the proposed rebate is illustrated by the fact that the existing missed appointment rebate of \$25 is already greater than the equivalent CSG compensation amounts, which **nbn** submits themselves are excessive as a benchmark for the reasons set out in paragraphs 4.17 to 4.22 of this submission. Specifically, the \$25 rebate is slightly higher than the CSG compensation payable for a missed appointment where the relevant end user customer is a business (in which case the damages payable under the CSG Standard are \$24.20) and almost twice the amount of the damages payable under the CSG Standard for a missed appointment where the relevant end user



customer is a residential or charity end user (in which case the damages payable under the CSG Standard are \$14.52).

4.6 Increasing the rebate to \$75 per missed appointment would result in **nbn** being required to pay a rebate that is:

- (a) 3 times the current rebate; and
- (b) more than 5 times the amount of the damages payable under the CSG Standard for a residential or charity end user customer.

4.7 **nbn** submits that it would be contrary to the LTIE to increase the rebates in this way, and thus drive further costs into the supply chain for all **nbn**[™] powered services, without evidence that the existing missed appointment rebates are ineffective at achieving their original, intended outcomes. **nbn** submits that the 12-month period that has elapsed since **nbn** first offered these rebates is not enough time to properly assess their impact. While the rebates provided an immediate incentive to **nbn** to improve its appointment performance, a longer period of time is required to implement the necessary changes to the relevant processes adopted by **nbn** and its delivery partners to achieve sustainable improvements to **nbn**'s appointment performance.

Failed connections (clause 2.2 of Schedule 2 of Draft FAD)

4.8 The Draft FAD provisions relating to failed connection (or "New Service Never Worked") scenarios are unnecessary because **nbn** and access seekers are already working to develop an appropriate response, however there are significant operational challenges to develop a solution across each of **nbn**'s access technologies that will be effective, will coordinate with access seeker processes, and will not cause unnecessary delays to the activation of end user customer services.

4.9 As part of the "Service Continuity" project, **nbn** has invested significant resources to address this problem and is already consulting with access seekers to implement a solution to address these issues, but access seekers have requested additional time to understand the proposed solution and ensure they are able to align their systems and processes. Rather than constituting a market failure, this issue highlights the interdependence of access seekers and **nbn**, and the complexities of the arrangements that support the supply of **nbn**[™] powered services to end user customers, which are best addressed by access seekers and **nbn** working together with aligned incentives to develop effective responses.



- 4.10 As the ACCC has recognised, **nbn** and access seekers have agreed processes for the FTTC Network to avoid these scenarios and are working on solutions to address this issue to the extent it arises with **nbn**'s other access technologies. However, differences between networks create a greater operational challenge for **nbn** and access seekers to achieve this same outcome for the FTTN/B Networks. In particular, the modem at the end user customer premises is not part of the **nbn**TM network and yet its presence is necessary to assess the performance of the relevant connection. Accordingly, FTTN/B testing requires cooperation by both end user customers and access seekers.
- 4.11 Given these operational complexities and existing projects by **nbn** and access seekers to seek ways to avoid failed connections across all networks, **nbn** submits that regulatory intervention on this issue is not required and that the LTIE would be better promoted by **nbn** and access seekers being afforded sufficient opportunity to together develop a solution which is practical, efficient and appropriately allocates relevant responsibilities between **nbn** and access seekers. A solution that is implemented without adequate engagement by all parties could have unintended consequences (and costs) for all parties. It would be in the LTIE for access seekers and **nbn** to work together to develop, trial and implement solutions that address the root causes of the underlying issues and delivers enhanced end user outcomes.

Connection Rebate (clauses 2.3 and 2.4 of Schedule 2 of Draft FAD)

- 4.12 The proposed connection rebate is excessive and would impose a cost burden that would significantly hinder other, more impactful, customer experience initiatives.
- 4.13 The quantum of the connection rebate does not appear to reflect any evidence-based methodology. Instead, the quantum of the rebate appears to have been set on the basis that a 4-week delay in connecting a premises (during which time no fees are payable to **nbn**) is approximately equivalent to 6 months' worth of service fees. However:
- (a) there is no evidence that the rebate amount reflects the cost to an access seeker of specific mitigations such as supplying a mobile service to that premises (e.g. by way of a failover modem) or continuing to supply a legacy copper service to a premises during the period of any delay, noting that any windfall to access seekers in these circumstances has the real risk of creating perverse incentives for access seekers;



- (b) there is no evidence that the proposed rebate amount reflects the losses incurred by any end user customers as a result of a delay in connection of their broadband service, with this lack of evidence being particularly acute in relation to those end users who continue to receive mobile or legacy copper or HFC services during the period of the delay; and
- (c) to the extent that **nbn** causes or contributes to any access seekers paying damages under the CSG Standard to end user customers, access seekers already have both a statutory entitlement (under section 118A of the *Telecommunications (Consumer Protections and Service Standards) Act 1999* (Cth)) and a contractual entitlement (under the WBA) to recover an appropriate portion of those damages from **nbn**.

4.14 In assessing whether the connection rebates are set at an appropriate level, a relevant benchmark is the Model Non-Price Terms and Conditions Determination made by the ACCC in 2008 (**Model Terms**). The Model Terms provide that, in the event of a delay to the original supply of any declared service, the sole remedy available to the access seeker is:

- (a) provision of a temporary alternative, comparable service at no additional cost to the access seeker; or
- (b) otherwise, a waiver of a portion of the fees payable for a period of time equal to the length of the original delay (referred to as the “Fee Waiver Period”), with such portion varying from 50% (for the first 2 months of the Fee Waiver Period) to 100% (for the fifth month and each subsequent month of the Fee Waiver Period).

4.15 The approach in the Model Terms is reflective of the ACCC’s approach with respect to compensation available under the consumer law warranties, where liability is generally capped at repair or re-supply of the relevant service.

4.16 By contrast, based on **nbn**’s average revenue per user (**ARPU**) of \$46 per month taken from **nbn**’s Annual Report 2019, the connection rebate rate of \$13.50 per business day is more than 5 times the ARPU per business day, which is out of all proportion to the equivalent remedy required to be provided by service providers under the Model Terms.

4.17 The CSG compensation regime is an excessively high benchmark to base the connection rebate on.



- 4.18 CSG is a retail-level remedy, recognising that the access seeker is the party with primary responsibility for the experience of the end user customer, and the party best placed to manage the overall experience.
- 4.19 Further, despite the benefits of the CSG Standard to consumers in the event of delays to connections, faults, or missed appointments, and the existence of genuine competition between providers in the retail telecommunications market in Australia, many retail end user customers elect to waive their rights under the CSG Standard. The ACMA submission to the DoCA Consumer Safeguards Review (January 2019) reported that between 2013-2014 and 2017-2018, there were 5.89 million CSG waivers, and the number of waivers given per year had more than doubled from 783,615 in 2014 to 1,768,419 in 2018. In other words, it has been empirically demonstrated in a properly functioning competitive market that rebates of this magnitude (and the impact that offering those rebates has on the cost of services) do not reflect the demands of a significant number of end user customers.
- 4.20 Accordingly, there does not seem to be any reasonable basis to assert that:
- (a) CSG compensation rates are an appropriate proxy for the rebates that would be offered in a competitive market for equivalent services; or
 - (b) rebates of this magnitude are in the long-term interests of end user customers.
- 4.21 Instead, the unsuitability of the CSG Standard to many end user customers demonstrates more broadly why regulatory intervention should be reserved as a last resort in the event of a market failure, rather than being assumed to be appropriate in markets that have historically been highly regulated due to structural issues that no longer exist.
- 4.22 In addition, as a separate issue arising from the proposed connection rebate provision in the Draft FAD, there is no justification for the proposal to require **nbn** to pay rebates for connections at premises that are Service Class 3, 6, 9, 13, 24 and 34, particularly given that, as the Draft Decision acknowledged, “NBN Co has demonstrated strong performance against its service levels for standard connections”. Regulatory intervention in this context is an illustration of how the Draft FAD appears to have reversed the appropriate preference for commercially negotiated outcomes over regulated outcomes.



Fault rectification rebate (clause 3 of Schedule 2 of Draft FAD)

- 4.23 The proposed fault rectification rebate is similarly excessive. The fault rectification rebate, if included in a FAD, would impose an even greater cost burden than the proposed connection rebate and would significantly hinder **nbn**'s ability to invest in other, more impactful customer experience initiatives.
- 4.24 Without repeating our comments in relation to the proposed connection rebate, **nbn** submits that:
- (a) as an appropriate benchmark, the Model Terms provide that the sole remedy available to an access seeker for a service interruption is a pro-rata reduction in any recurring charges for the service attributable to the period of such interruption in excess of the service level period. An equivalent approach in these circumstances would result in a service fault rebate on average of approximately \$2.50 per Business Day, which is between 8 and 12 times less than the \$20 and \$30 daily rebate rates proposed in the Draft FAD; and
 - (b) the proposed daily service fault rebate for the first 5 Business Days' delay is higher than the equivalent CSG compensation daily rate for residential and charity premises (\$20 per day for the proposed rebate, as compared to \$14.52 for the relevant CSG Compensation during the equivalent period of the delay). Wholesale rebates which are higher than the CSG compensation levels highlights the disproportionate level of the rebates in the Draft FAD.

Service speed assurance (clauses 4 and 5 of Schedule 2 of Draft FAD)

- 4.25 As per our comments in Section 3 of this submission, it is beyond the scope of the power under section 152BC of the CCA to include provisions of this nature in any FAD because they do not relate to access to a declared service for the purposes of that provision. Rather, these provisions purport to fundamentally change the nature of the declared service, which is not permitted under section 152BC of the CCA.
- 4.26 In this section, we also explain why the proposed provisions are inappropriate in any event.

FTTN/B/C service speed assurance (clause 4 of Schedule 2 of Draft FAD)

- 4.27 **nbn** supports the objective of ensuring that customers are receiving value for money for services purchased over the **nbn**[™] network. This objective is important to the future of the industry and ensuring the existence of a sustainable value proposition for customers.



- 4.28 The proposed FTTN/B/C “PIR Objective” service speed assurance rebate will potentially reduce choice for access seekers by creating financial incentives for **nbn** to restrict the availability of service options to access seekers, and will penalise **nbn** in circumstances where it does not currently have the contractual right to downgrade the ordered services.

PIR Objective rebate (clause 4.2 of Schedule 2 of Draft FAD)

- 4.29 Currently, if an access seeker acquires a 25/5 Mbps speed tier from **nbn** and the service at a Premises performs at a speed between 12/1 Mbps and 25/5 Mbps, the access seeker may elect to either continue acquiring the 25/5 Mbps speed tier or modify the service to acquire a 12/1 Mbps speed tier. In particular, the access seeker might continue acquiring the 25/5 Mbps speed tier if the service, despite failing to perform at 25/5 Mbps, delivers a benefit over a 12/1 Mbps service that is sufficiently valued by the end user customer — for example, the service may be performing at 24/4 Mbps which the end user customer wishes to continue enjoying until **nbn** is able to remediate the line over which the service is delivered.
- 4.30 Under the Bundle 25 discount changes that **nbn** has recently announced, **nbn** will supply the 25/5 Mbps service for \$37. However, if the ACCC includes the PIR Objective rebate in a FAD, **nbn** will only receive \$17 in revenue for this service (\$37 - \$20 rebate). Accordingly, **nbn** will be strongly financially incentivised to only offer a 12/1 Mbps service for which **nbn** can earn \$22.50 until it is confident it will achieve 25/5 Mbps service performance. In this way, the ACCC’s proposed PIR Objective rebate removes choice from end user customers and access seekers and creates a perverse incentive for **nbn** to supply a lower grade of service for a higher revenue while it works to remediate any line issues on the FTTN/B/C networks. Neither the removal of choice nor the incentive for an operator to supply lower grade services for higher revenue is in the LTIE.
- 4.31 Section 4.1.5.3 of the Draft Decision states that “... NBN Co should continue to remediate lines even if a customer downgrades, as this is necessary to provide the end user with a choice of higher speeds once remediation is complete”. **nbn** is concerned that this could require the payment of a rebate in circumstances where the root cause is located at the end user customer’s premises, and **nbn** has no ability to address the issue because it is up to the access seeker to raise a Trouble Ticket and book an appointment with their end user customer for **nbn** to perform a site visit. If the access seeker decides not to raise a Trouble Ticket, or fails to book an appointment with their end user, the access seeker will receive a rebate from **nbn**. Such a scenario could create a perverse incentive for access seekers to not cooperate with **nbn** to fix issues.



4.32 If a rebate is imposed for an under-performing service under clause 4 of the Draft FAD, **nbn** submits the Draft FAD should make it clear that **nbn** will not be required to pay a rebate if the failure of the relevant service to achieve the PIR Objective is caused by an issue that is outside of **nbn**'s control. Without such a condition, **nbn** will be required to pay a rebate for an issue it does not have the ability to attempt to address.

4.33 Finally, these rebates will not provide any material benefits to access seekers because there are already processes in place to address under-performing services. For example, under WBA3, access seekers are entitled to raise a Trouble Ticket if a service does not achieve its PIR Objective, following which **nbn** will either rectify the fault in accordance with its standard fault rectification processes or remediate the line. In either case, the access seeker has the option of either downgrading the bandwidth profile of the relevant service, cancelling the service, or waiting for **nbn** to address the issue, depending on which option best suits its end user customers on a case by case basis. There is no need for a rebate where there is an existing process in place to deal with the particular concern.

Speed tier rebate (clause 4.3 of Schedule 2 of Draft FAD)

4.34 **nbn** is supportive of the *outcome* the ACCC is attempting to achieve through this provision of the Draft FAD, by ensuring that end user customers only pay for the service they receive. However, **nbn** submits that regulatory intervention on this issue is likely to result in outcomes that are worse than the outcomes that could be achieved in the absence of regulatory intervention, including possibly creating a risk of access seeker gaming.

4.35 **nbn** is currently developing a proposal to put forward to access seekers as part of WBA4 negotiations
[Commercial-in-Confidence]

4.36 [Commercial-in-Confidence]



- 4.37 Until **nbn** has had an opportunity to consider any feedback from access seekers in relation to this proposal, **nbn** is not in a position to anticipate how they may respond. In particular, in the context of commercial negotiations, it is possible that access seekers may not accept **nbn**'s proposal, and **nbn** may be unable, commercially, to agree with access seekers to amend the WBA to give **nbn** this right.
- 4.38 [Commercial-in-Confidence]
- 4.39 [Commercial-in-Confidence]
- 4.40 In these circumstances, the ACCC should avoid proceeding with any regulatory intervention and should give **nbn** and access seekers the opportunity to develop an appropriate response to this issue through WBA4 commercial negotiations.
- 4.41 Separately, **nbn** recommends updating the ACCC's "Broadband Speed Claims – Industry Guidance" (May 2019) (**Broadband Speed Guidance**) in accordance with Appendix B to ensure that access seekers are required to take appropriate steps to address the ACCC's concerns and to support the initiatives currently being developed by **nbn**.

Wireless Network service speed assurance (clause 5 of Schedule 2 of Draft FAD)

- 4.42 The strength of **nbn**'s existing incentives to improve the experience of end user customers on the **nbn**TM network is such that any Wireless Network service speed assurance rebate is not capable of providing any meaningful additional incentive to improve the performance of the Wireless Network. In those circumstances, any such rebate would simply penalise **nbn** and divert resources away from other, more impactful customer experience initiatives.
- 4.43 **nbn** has spent, or committed to spend, over \$800 million on upgrading the Wireless network since 2015, in the absence of any rebate requirement or other regulatory intervention. The quantum of **nbn**'s current commitment to this program, without any corresponding rebate, reflects the very



significant incentives that are already driving **nbn** to seek to improve customer experience on the Wireless Network.

- 4.44 Further, there are real constraints on further expanding the existing program of works because of limitations on the availability of appropriately skilled people, the speed at which **nbn** can reasonably obtain site acquisition and environmental design approvals.
- 4.45 Finally, the way in which the rebate is drafted is problematic. Requiring the rebate eligibility of each Wireless Network cell to be calculated on a monthly basis would require significant investments to alter **nbn**'s existing fixed wireless measurement and reporting tools and processes without any resulting benefit. This is because, as reflected in the terms of **nbn**'s Service Level Improvement offer, fixed wireless reporting is currently undertaken on a weekly basis (leading to a 28-day cycle that does not align with calendar months or access seeker billing cycles). Similarly, Radio Access Network performance is measured on a 30-day average basis which again, does not align with calendar months or access seeker billing cycles. Such operational complexities further illustrate the importance of regulatory intervention being treated as a last resort.

Payment of rebates (clause 6 of Schedule 2 of Draft FAD)

- 4.46 To the extent the ACCC proposes to make a FAD, **nbn** agrees with the inclusion of clause 6.2 of the Draft FAD, which provides that **nbn** may offset any liability to pay rebates against any payments it makes as CSG Compensation or under section 118A of the *Telecommunications (Consumer Protections and Service Standards) Act 1999* (Cth)). Such a provision is necessary to avoid 'double dipping'.
- 4.47 However, there is no basis for regulatory intervention proposed under clause 6.1 of the Draft FAD, which requires **nbn** to automatically pay rebates without requiring an access seeker claim. **nbn** has already agreed to similar provisions in relation to its existing rebates under the Service Level Improvement offer and there is no evidence that the same outcome wouldn't have been reached by agreement between access seekers and **nbn** in WBA4. Regulation for its own sake is contrary to principles of proportionality.

Availability of service information (clause 7 of Schedule 2 of Draft FAD)

- 4.48 Regulatory intervention on service information reporting similarly would not promote the LTIE. The ACCC has recognised that **nbn** acknowledges the importance of providing accurate and timely service information to access seekers and has made significant progress in relation to the quality and



timeliness of information that it provides to access seekers. Intervention of the type proposed will not provide any substantive benefits to access seekers or end user customers.

- 4.49 The level of detail provided by the ACCC in the Draft FAD makes it very difficult to assess the cost and resource impacts of the proposed measure. For example, it is not clear what is meant by the reference to “all regular and ongoing service specific information” beyond the specific items set out in subclauses 7.1(a) to (d). The ACCC should make this list exhaustive in any FAD to ensure certainty about the scope of the obligation and to allow an assessment of the potential impacts of the obligation before any FAD is made. Specific examples of issues raised by access seekers should also be made available, to allow all parties to consider and respond to such concerns.

Service level exclusions (clause 8 of Schedule 2 of Draft FAD)

- 4.50 Clause 8 of the Draft FAD sets out circumstances in which time may be excluded from the measurement of **nbn**’s service level performance. This clause of the Draft FAD is excessively narrow in its scope and, if made, would significantly distort the measurement of service level performance in a way that would greatly increase the risk of rebate gaming resulting in worse experiences for end user customers on the **nbn**TM network. The subject matter of this provision is heavily influenced by operational processes adopted by both **nbn** and access seekers. Accordingly, any substantive changes to these provisions need to be addressed through detailed operational discussions and commercial agreement.
- 4.51 Appendix A sets out circumstances which are not listed in clause 8.1 of the Draft FAD in which an extension should be allowed for measuring end user connection and end user fault rectification service levels. For example, under clause 8.1 of the Draft FAD, if an access seeker selects an installation appointment outside of the Service Level timeframe, even where there is an earlier appointment available, **nbn** would be required to pay a connection rebate. Such an outcome is not only unreasonable, it would also create substantial incentives for access seekers to delay end user connections to increase rebate payments.
- 4.52 To the extent the ACCC proposes to regulate the exclusions that apply to service level measurement, the LTIE would be better served by ensuring that any regulatory intervention is limited to circumstances where (1) there is evidence that service level exclusions are being applied in a way that is inappropriate, having regard to the complexities of the interactions between **nbn** and access seekers; and (2) the issue is not reasonably capable of being effectively resolved by commercial



agreement between **nbn** and access seekers. Any other approach creates a very real risk that, given the criticality of these service level exclusions, regulatory intervention will:

- (a) have material, broad-ranging and unintended consequences; and
- (b) arbitrarily influence and inhibit the future development of **nbn**'s processes in a way that is contrary to the LTIE.

Service level reporting (clause 9 of Schedule 2 of Draft FAD)

4.53 **nbn** has no issue with the type of reporting described in clause 9.1(a) of the Draft FAD. However, rather than justifying regulatory intervention, the proposal in the Draft FAD is evidence that regulatory intervention is unwarranted. **nbn** has been providing access seekers with service level reporting of the nature described in clause 9.1(a) of the Draft FAD, on a voluntary basis, since December 2018, by 10 Business Days after the end of each month. **nbn** also provides supplementary reporting to all access seekers, broken down by location, service class and network. Line Level Detail, which underpins service level reporting, is also made available to access seekers. Thus, there is no evidence to suggest that appropriate service level reporting cannot be agreed commercially between **nbn** and access seekers.

4.54 However, requiring **nbn** to provide aggregated service level reporting to all access seekers as described in clause 9.1(b) will potentially provide a competitive advantage to **nbn**'s largest access seeker. As the largest access seeker acquires approximately 50% of services supplied by **nbn**, that access seeker would be in a comparably improved position, as compared to the rest of the downstream market, to understand their own performance relative to their competitors (by subtracting their own performance outcomes from the overall industry performance). By contrast, smaller access seekers will be able to extract fewer insights about the performance of each of their competitors because each other access seekers only acquires less than 25% of services supplied by **nbn**, and the performance reporting on the other, more than 75% of, services supplied by **nbn** will have a large (and unknown) component dominated by a single access seeker.

Wireless Network performance reporting (clause 10 of Schedule 2 of Draft FAD)

4.55 The proposed Wireless Network performance reporting requirements in clause 10 of the Draft FAD are unnecessary and are likely to result in outcomes that are contrary to the LTIE.

4.56 **nbn** already provides access seekers with wireless network performance reports similar to those described in clause 10.1 of the Draft FAD. In particular, **nbn** reports on Priority Upgrade Cells under the



Service Level Improvement offer and separately publicly provides data regarding packet loss on the backhaul links connecting Fixed Wireless towers. At present, that information is the best available Wireless Network performance information that can be reasonably and usefully reported. Similarly, **nbn** already provides the information to access seekers that it would be required to provide under clause 10.2 of the Draft FAD. Accordingly, it is unnecessary to impose regulated terms that would simply replicate reporting that is already provided by **nbn**.

4.57 Moreover, **nbn** is concerned that the proposed regulation will interfere with plans to improve reporting. Currently, **nbn** is internally progressing initiatives to develop a reporting tool to provide more meaningful reporting that is more reflective of the end user customer experience on the Wireless Network. If a FAD is made and includes clause 10 of the Draft FAD, it will create an obligation to continue outdated reporting beyond any introduction by **nbn** of any enhanced reporting tool. The dual reporting of enhanced and legacy reporting would drive unproductive and otherwise avoidable costs and likely create confusion for access seekers and end user customers. This outcome would be contrary to the LTIE.

Wireless Network maximum attainable speed information (clause 11 of Schedule 2 of Draft FAD)

4.58 Clause 11 of the Draft FAD requires **nbn** to provide an access seeker with a 'birth certificate' specifying the maximum attainable speed at a premises at the time that a service is installed. The benefits to access seekers and end user customers of this data are likely to be outweighed by the issues arising from the inherent limitations of such a data point.

4.59 The signal strength measurements taken at installation, which the draft FAD proposes are to be used to infer estimated maximum attainable throughput information for each premises, are point-in-time measurements. These measurements, the accuracy of the corresponding calculations of the maximum attainable throughput, and their relevance to end user customer experience can be affected by a large number of factors, including:

- (a) interference from other sources of radio signals such as other carriers' networks and other nearby wireless devices;
- (b) weather, and other atmospheric conditions including smoke, cloud cover or rain;
- (c) vegetation that may grow and subsequently interfere with the line of sight from the premises to the Wireless network cell;



- (d) new buildings which may interfere with the line of sight from the premises to the Wireless Network cell over time;
- (e) atmospheric phenomena, including seasonal effects such as “thermal ducting”, which can introduce significant interference from other Wireless Network towers many kilometres away; and
- (f) the equipment and configuration or the relevant part of the Wireless Network, including the frequency bandwidth of the cell, the modulation capabilities of the W-NTD, and the radio block algorithm in use.

4.60 Even to the extent the maximum attainable speed is technically accurate, providing such information to end user customers is still problematic. The inherent characteristics of wireless networks mean that the impact of usage by other end user customers is significantly greater than for **nbn**’s fixed line networks. As a result, as compared to **nbn**’s fixed line networks, the speeds that end user customers experience on the Wireless Network at different times of day can fluctuate to a much greater extent. Accordingly, the maximum attainable speed will not only be of little to no utility to end user customers; there is a real risk that this information could actually mislead end user customers about the performance they can expect from their services.

4.61 In these circumstances, the potential benefits from providing this information are likely be outweighed by the potential negative consequences. A formal, detailed technical analysis of the accuracy of this information has not been performed. Similarly, there has been no consultation with access seekers about use of this information and its impacts. As such, at this stage, the utility and accuracy of this information is undetermined.

Consumer Safeguards (clause 12 of Schedule 2 of Draft FAD)

4.62 The provisions of the Draft FAD dealing with potential future changes to telecommunications consumer safeguards regulation are inappropriate to be included in an access determination. In particular:

- (a) there has been no market failure in relation to these potential future changes, given that these changes haven’t been developed or implemented;



- (b) the operation and impacts of this provision are necessarily unknowable, meaning there can be no assessment that the benefits of the provision outweigh its detriments and costs; and
- (c) by requiring the parties to effectively amend any access agreements in place to accommodate any such changes (which includes regulatory intervention), this provision impermissibly reverses the legislative hierarchy by making the terms of a regulatory instrument take precedence over the terms of an access agreement.

4.63 Had the parliament intended that regulatory instruments should directly and necessarily override or modify access agreements agreed between commercial parties, it would have reflected this position in the CCA. Instead, on the contrary, the legislature made clear, by way of section 152BCC of the CCA, that access agreements should take precedence over the terms of any access determination to the extent of any inconsistency.

4.64 Therefore, clause 12 of the Draft FAD is inconsistent with the purpose of the underlying legislation and, if included in any FAD, would represent a concerning example of regulatory intervention beyond what parliament had intended in granting the ACCC powers under section 152BC of the CCA.

4.65 Finally, it is unclear to what practical effect clause 12 of the Draft FAD is intended to have given that:

- (a) clause 12 only applies in circumstances where **nbn** has already agreed an access agreement with the relevant access seeker, in which case clause 12 of the Draft FAD would likely have no effect at all by virtue of section 152BCC of the CCA; and
- (b) on its face, clause 12 would only require **nbn** to negotiate in good faith. It would not guarantee that any agreement could be reached between **nbn** and access seekers.

Liability and indemnity

4.66 **nbn** agrees with the ACCC's decision not to include any liability or indemnity terms within the Draft FAD.

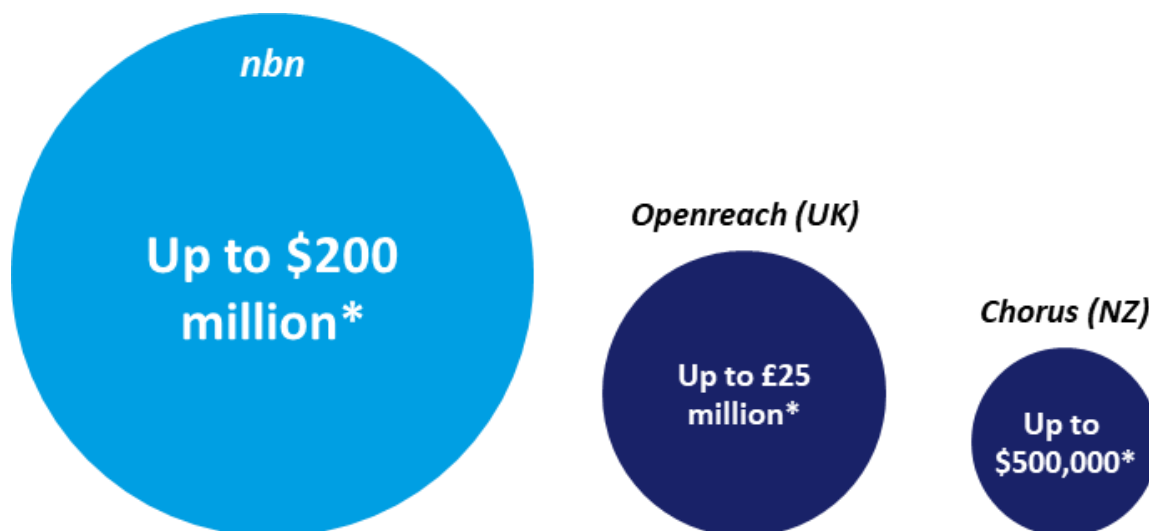
4.67 The liability and indemnity framework set out in the WBA comprises a set of intertwined mechanisms which work together as part of an integrated, commercially negotiated solution. Changing any element of this framework would likely produce unexpected outcomes and would not result in an allocation of risk that is in the LTIE.



4.68 The ACCC's Second Discussion Paper focused on three elements of the WBA 3 liability framework: liability caps, the material service failure regime, and exclusion of third party claims. The appropriateness of these liability and indemnity regimes, and **nbn's** support of the ACCC's decision not to include within the Draft FAD any liability or indemnity terms, is discussed below.

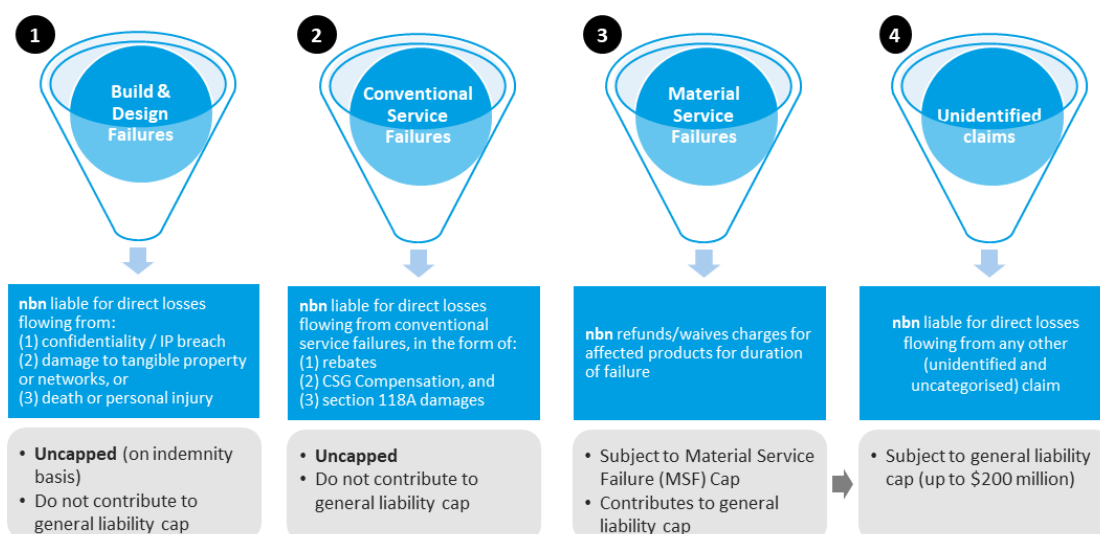
Liability caps

4.69 As outlined in **nbn's** response to the ACCC's Second Discussion Paper, **nbn's** liability cap is significantly more generous than comparable overseas wholesale operators. Across its customer base, the aggregate risk **nbn** bears greatly exceeds that of comparable overseas wholesale operators:



** If an RSP's total annual charges paid to the wholesale operator are lower than the amount shown, **liability is limited to the total annual charges**. **nbn** has a minimum liability cap of \$5 million, Openreach has a minimum cap of £250,000 and Chorus has no minimum.*

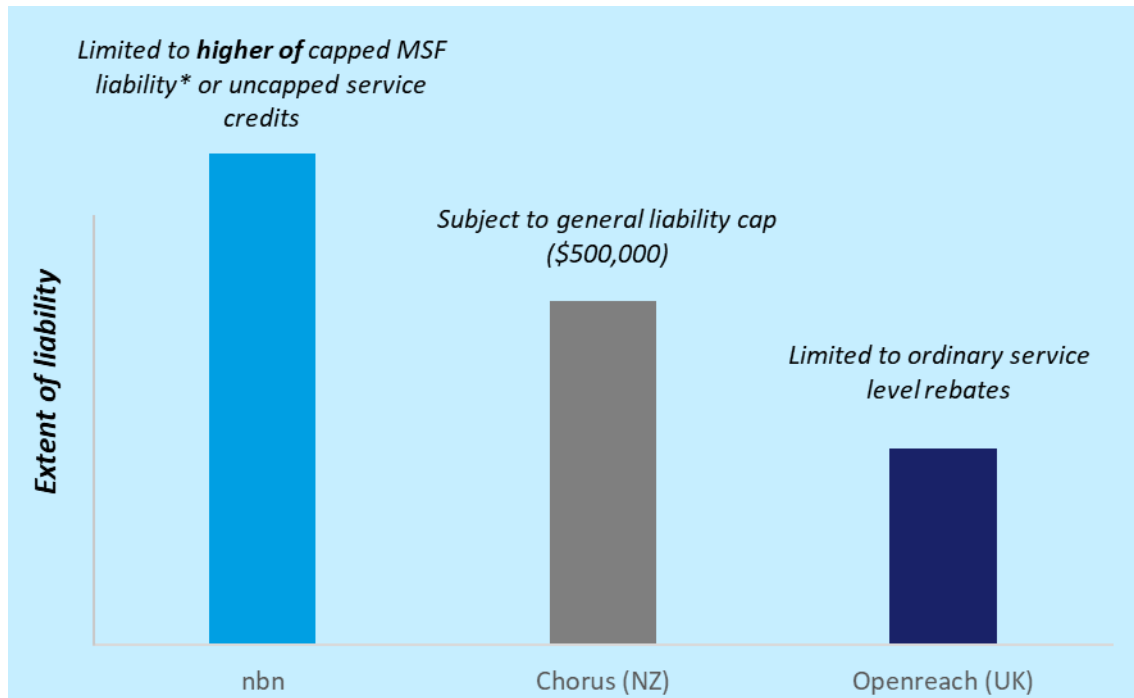
4.70 Furthermore, **nbn's** annual liability cap of up to \$200 million needs to be considered in the overall context of its liability and indemnity framework, which, broadly speaking, comprises the following categories.



4.71 Any increase to the amount of the general liability cap in the Draft FAD would not incentivise **nbn** to improve its performance or better manage its risks because it would not have any impact on **nbn**'s liability for 'build and design failures' or 'conventional service failures', which are excluded from the general liability cap, and it would have a limited impact on **nbn**'s liability for 'material service failures', which is subject to a separate liability cap. Instead, it would simply force **nbn** to bear a greater risk of unidentified claims which, as the wholesaler, it is in a worse position to identify than the retailer, which is the party in the supply chain with the closest relationship to the end user customer.

Material Service Failure regime

4.72 **nbn**'s benchmarking indicates that its liability for Material Service Failures is unparalleled compared to international benchmarks, as shown by the following diagram.



4.73 **nbn** notes that the Material Service Failure regime applies in addition to **nbn**'s other commitments and liabilities in respect of service faults, including Rebates, CSG Compensation and Corrective Action obligations, and accordingly to the extent a service failure does not meet the criteria for a Material Service Failure, access seekers will still have remedies available to them pursuant to the other **nbn** commitments and liabilities in the WBA liability framework.

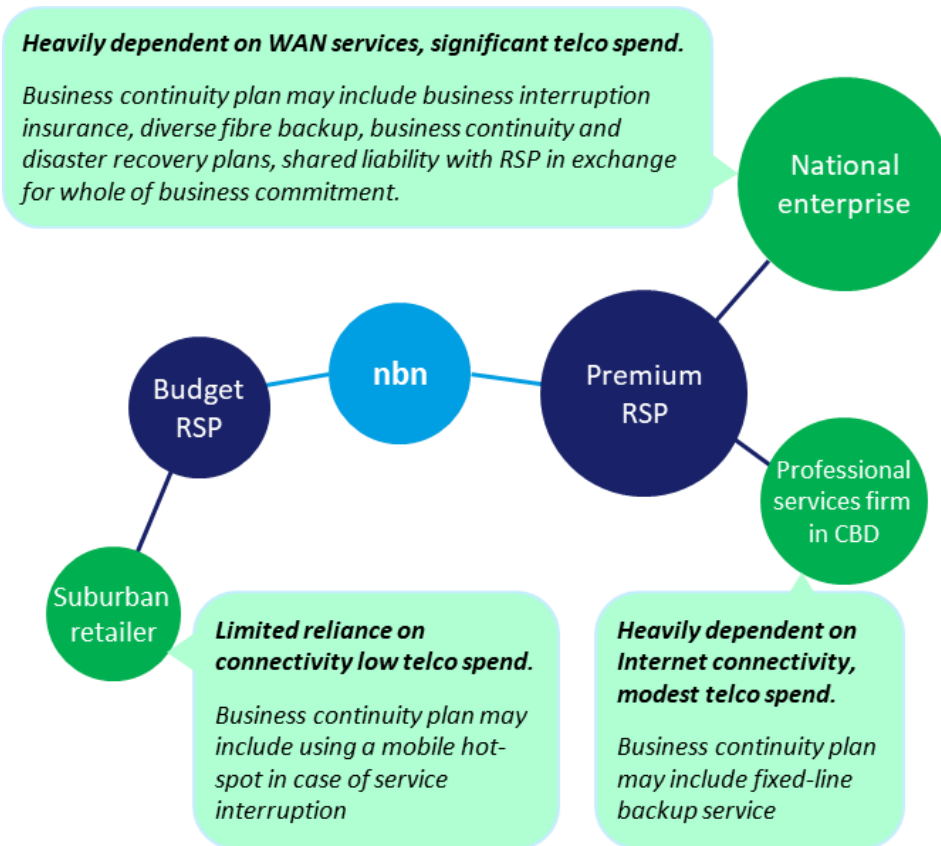
Exclusion of third party claims

4.74 **nbn**'s third party claims protection is intended to protect **nbn** from bearing the pure economic loss to businesses flowing from a wholesale service failure. Significantly, **nbn** remains fully liable (with no limitations or exclusions) for property damage, death and personal injury claims, and the third party claims protection has no significant impact on residential end user customers, who are unlikely to suffer material economic losses from service failures. The protection also provides a substantial degree of flexibility to access seekers, who can elect from a range of options how they decide to give effect to the regime.

4.75 The third party claims protection ensures that **nbn** is not inadvertently held responsible for the disparate range of possible risks that end user customers across Australia could potentially face in the event of an interruption to services on the **nbn**TM network. The third party claims protection instead



incentivises end user customers to put in place protections that are appropriate and proportionate to their risk exposure, some options for which are demonstrated by the following.



4.76 This approach is consistent with the approach that has been adopted in comparable overseas agreements in the telecommunications sector, as follows:



<p>nbn</p>	<p><i>Excludes most liability to end-users</i></p>	<p>Chorus (NZ)</p>	<p><i>Excludes most liability to end-users</i></p>
<p>RSPs must either:</p> <ul style="list-style-type: none"> include terms in their downstream contracts to protect nbn from downstream claims (i.e. claims by end users or downstream service providers relating to pure economic loss); or indemnify nbn in respect of any losses suffered or incurred by nbn in respect of such downstream claims. 		<ul style="list-style-type: none"> For most end-users – RSPs must procure that the end-user excludes Chorus’s liability for any losses incurred by the end-user, except for property damage. For large business end-users or resellers – where the RSP’s agreement with an end-user limits or excludes the RSP’s liability, the RSP must ensure that Chorus receives the benefit of a substantially similar limit or exclusion of liability in connection with Chorus’s end-user equipment. 	
<p>Nucleus Connect (SG)</p>	<p><i>Excludes most liability to end-users</i></p>	<p>Openreach (UK)</p>	<p><i>Excludes most liability to end-users</i></p>
<p>RSPs must indemnify Nucleus Connect against any losses incurred by it in connection with a claim by a third party relating to Nucleus Connect’s supply of a mandated service to the RSP, except if the claim is the result of Nucleus Connect’s negligent, wilful or reckless breach of the wholesale supply agreement.</p>		<p>At the time that Openreach’s latest wholesale agreement entered into force (2016), BT excluded most liability to end-users through its standard retail contracts. This protection covered Openreach, which was part of the same legal entity as BT. Since the majority of Openreach wholesale services are provided to BT, liability to a majority of end-users was excluded.</p>	

4.77 Importantly, in considering the appropriate scope of **nbn**’s liability by reference to other industry benchmarks, a clear distinction needs to be made between liability that is contractually accepted in standard form agreements by wholesale-only telecommunications network operators and ex-gratia payments made by vertically-integrated telecommunications network operators who have a direct retail relationship with most, if not all, of the recipients of any such payments.



5 Comments on the application of the reasonableness criteria

- 5.1 In making a FAD, the ACCC is frequently required to balance competing factors set out in section 152BCA of the CCA, some of which will weigh in favour of making a FAD, and some against. However, in assessing whether to make a FAD based on the Draft FAD, no such ‘balancing’ is required. **nbn** submits that each of the matters to which the ACCC must have regard under section 152BCA of the CCA and each of the additional questions in section 3 of the Draft Decision, when properly considered in respect of the Draft FAD, do not support the making of a FAD.

The Draft FAD will not promote the LTIE

- 5.2 For the reasons set out in Section 3 of this submission, the Draft FAD would not promote the LTIE. On the contrary, the Draft FAD will negatively impact on the LTIE, including by:
- (a) creating incentives for access seekers to game the proposed rebates;
 - (b) diverting significant resources away from other more impactful customer experience initiatives; and
 - (c) constraining and distorting, without adequate reasoning or evidence, commercial negotiations between **nbn** and access seekers through which the parties can determine the investments and incentives most likely to improve customer experience. Commercial negotiations will also result in commitments which will align the efforts and incentives of the parties in the interest of delivering improved outcomes for end user customers.

The Draft FAD would be contrary to the legitimate business interests of nbn

- 5.3 As set out in paragraphs 3.31 to 3.33 of this submission, the Draft FAD would be contrary to **nbn**’s legitimate business interests, particularly its interests in recovering the significant investments that have been made, and are continuing to be made, in constructing, maintaining and operating the **nbn**TM network.
- 5.4 As set out in Section 3 of this submission, the LTRCM only gives **nbn** the opportunity to recover, but not the guarantee that it will recover, its investment. **nbn** will only be able to recover this investment if commercial circumstances in the future permit **nbn** to earn additional revenues on top of existing



projections. There is no certainty that this will be the case. Any incremental increases to **nbn**'s cost base only increases the size of the challenge facing **nbn** and increases the risk that Australian taxpayers will be unable to fully recover their investment in **nbn**. If the ACCC's interventions preclude **nbn** from recovering its investments, the LTRCM will not provide any means by which **nbn** can recover those investments.

- 5.5 In considering the effect of this matter under section 152BCA of the CCA, it is appropriate to also consider the effect that the impact of any regulatory intervention on **nbn**'s legitimate business interests may have on future investment in the telecommunications industry, and the consequential impacts on the LTIE.

The Draft FAD would be contrary to the interests of all persons who have rights to use the declared service

- 5.6 The Draft FAD would be contrary to the interests of all persons who have rights to use the declared service, which comprise access seekers, downstream service providers and end user customers.
- 5.7 In relation to access seekers and downstream service providers:
- (a) to the extent these service providers will profit from the rebates paid by **nbn** under the Draft FAD, this would only be in the short-term interests of those service providers (at the cost of significant broader and longer-term problems this will create as discussed in Section 3 of this submission);
 - (b) as the Draft FAD is currently constructed, it appears that direct access seekers would receive the windfall gains of the new rebate regime proposed by the ACCC, but would have no requirement to ensure these payments were passed on to downstream service providers. If this is the case, downstream service providers would be placed at a considerable competitive disadvantage to access seekers who are both suppliers and competitors of downstream service providers; and
 - (c) the clauses of the Draft FAD that relate to the provision of information to access seekers, including service level reporting, may appear to be in the interests of access seekers but could instead be contrary to their interests for the reasons set out in Section 3 of this submission, including that such regulatory intervention could disincentivise **nbn** from further developing relevant reporting tools and result in unproductive and otherwise avoidable investments in ongoing "legacy" reporting.



The direct costs of providing access to the declared service will be excessive

- 5.8 The Draft FAD, if made, would significantly increase **nbn**'s costs of providing services. [Commercial-in-Confidence]
- 5.9 **nbn** submits that this significant cost imposition cannot be justified in circumstances where:
- (a) the evidence demonstrates that increased service level rebates are not required to incentivise **nbn** to continue to improve its service level performance, as set out in Section 2 of this submission;
 - (b) the rebates are likely to be detrimental to **nbn**'s operational performance because of the perverse incentives they will create for access seekers to refuse to cooperate with **nbn** in this regard, as set out in Section 3 of this submission;
 - (c) the evidence suggests that the quantum of the rebates far exceed the downstream impacts that are likely to result from **nbn** service level commitments not being met, as set out in Section 3 and Section 4 of this submission; and
 - (d) there is no evidence that **nbn** will be able to recover its costs in the long term, noting that the LTRCM does not provide any guarantee to **nbn** that it will be able to recover its costs, as set out in paragraphs 5.3 to 5.4 of this submission above.

The value to persons of extensions, or enhancement of capability, whose cost is borne by others

- 5.10 **nbn** submits that the value to access seekers and end user customers of the FTTX and Wireless network enhancements that would be required to comply with the Draft FAD are significantly outweighed by the substantial costs that will be borne by **nbn** in delivering these enhancements.
- 5.11 Separately, **nbn** does not have any concerns in relation to the investments required to enhance the capability of its systems for delivering service specific information to access seekers. Indeed, **nbn** is already making significant investments to improve its service-specific reporting to access seekers.

The operational and technical requirements necessary for the safe and reliable operation of the nbn™ network

- 5.12 This factor is not relevant to the Draft FAD.



The economically efficient operation of the nbn™ network

- 5.13 The Draft FAD will not promote the economically efficient operation of the **nbn**™ network for the reasons set out in paragraphs 3.11 to 3.15 of this submission including, in particular:
- (a) in the absence of market failure, any regulatory-driven initiatives are inherently less likely to be as efficient or effective as initiatives developed through commercial negotiations between **nbn** and access seekers;
 - (b) the excessive quantum of the rebates will detract from **nbn**'s ability to invest in other, more impactful and more efficient, initiatives that would be implemented in the absence of regulatory intervention; and
 - (c) the rebates are set at amounts which are far in excess of the minimum amount necessary to provide effective incentives for **nbn** to provide an appropriate standard of service, which itself is economically inefficient.

Additional questions for assessing appropriateness of nbn service standards

- 5.14 In its Draft Decision, the ACCC indicated that, in assessing the appropriateness of **nbn** service standards, the ACCC considered the following questions in addition to the matters set out in section 152BCA of the CCA:
- (a) Do the service standards provide clear commitments on a per-service basis?
 - (b) Do they appropriately allocate risk and responsibility between **nbn** and access seekers?
 - (c) Do they provide effective incentives for **nbn** to perform to meet its service commitments and improve performance?
 - (d) Would regulated service levels result in improved outcomes for end user customers?
- 5.15 **nbn** agrees that the questions in paragraphs 5.14(a) to 5.14(c) are relevant when considering the appropriateness of **nbn**'s service standards. However, **nbn** submits that the ACCC should consider the following questions in place of the question referred to in paragraph 5.14(d):



- (a) Are the current service standards set out in the WBA inconsistent with what could reasonably be expected to be agreed in a properly functioning market? What evidence is there for and against such a conclusion?
- (b) Will regulated service levels result in improved customer outcomes for end user customers as compared to the outcomes that could reasonably be obtained through the ongoing process of negotiations between **nbn** and access seekers?

5.16 These questions are considered below.

*Do **nbn**'s service standards provide clear commitments on a per-service basis?*

5.17 As set out in paragraph 3.27(a) of this submission, **nbn**'s existing service levels are clearly set out and reported on in accordance with the WBA.

5.18 Further, under the Service Level Improvement offer, **nbn** already pays each of the rebates on a per-service basis.

*Do **nbn**'s service standards appropriately allocate risk and responsibility between **nbn** and access seekers?*

5.19 **nbn** is not aware of any evidence that demonstrates that existing service standards do not appropriately allocate risk and responsibility between **nbn** and access seekers.

5.20 Further, for the reasons set out in this submission, the excessive rebates proposed in the Draft FAD would not improve the allocation of risk and responsibility between **nbn** and access seekers. Instead, by inappropriately allocating risk and responsibility, the Draft FAD would create significant distortions and thus misaligned incentives.

*Do **nbn**'s service standards provide effective incentives for **nbn** to perform to meet its service commitments and improve performance?*

5.21 As described in **nbn**'s submissions to the **nbn** Wholesale Service Standards Inquiry in both March 2018 and March 2019, **nbn** has strong existing incentives to deliver services at a price and quality that meets access seeker and end user customer expectations. These strong incentives apply independently of the service standard commitments.

5.22 The impact of these existing incentives has been demonstrated by the significant improvements achieved in respect of customer experience on the **nbn**TM network, including those listed in the Section 2 of this submission.



Are the current service standards set out in the WBA inconsistent with what could reasonably be expected to be agreed in a properly functioning market? What evidence is there for and against such a conclusion?

5.23 As set out in this submission, there has been no evidence of any market failure.

5.24 As a pre-requisite before any FAD is made, it is necessary that:

- (a) there is clear evidence that this market is not properly functioning and that the service standards set out in the WBA are inconsistent with what could reasonably be expected to be agreed in a properly functioning market; and
- (b) market participants including **nbn** have a reasonable opportunity to respond to any such evidence.

*Will regulated service levels result in improved outcomes for end user customers as compared to the outcomes that could reasonably be obtained through the ongoing process of negotiations between **nbn** and access seekers?*

5.25 Regulation of **nbn**'s service standards will result in worse overall outcomes for end user customers as compared to the outcomes that could reasonably be obtained through the ongoing process of negotiations between **nbn** and access seekers for WBA4 for the reasons set out throughout this submission, including:

- (a) the perverse incentives that the proposed regulations will create for access seekers to avoid improving customer experience on the **nbn**TM network; and
- (b) the impact that the Draft FAD would have on **nbn**'s ability to invest in other initiatives that would deliver improved end user customer outcomes.



6 Comments on timing and duration of FAD

6.1 In this section 6, **nbn** comments on the preliminary provisions in the FAD in relation to the timing and duration of the FAD.

Making of any FAD

6.2 To minimise the adverse impact of any FAD on **nbn**'s ability to reach commercial agreement with access seekers on WBA4 in a way that will best promote the LTIE, the ACCC should not make any FAD until there is clear evidence that WBA4 negotiations will not efficiently and effectively promote the LTIE and achieve other mandatory criteria.

6.3 Based on the current timeframe for WBA4 negotiations, **nbn** plans to have substantively agreed the terms of WBA4 with all access seekers by April 2020. [Commercial-in-Confidence]

Commencement of any FAD

6.4 **nbn** submits that any FAD should commence no earlier than December 2020 to give **nbn** an opportunity to implement the necessary changes to comply with any FAD in an efficient and methodical manner.

Duration of any FAD

6.5 In the event a FAD is made, **nbn** agrees with the proposed duration of the FAD, particularly the proposal to set the FAD to expire on the commencement of WBA5. As set out above, **nbn** considers that commercially agreed outcomes between access seekers and **nbn**, independent of regulatory intervention, are the most efficient and effective mechanism to optimise customer experience on the **nbn**[™] network. Setting the FAD to expire on the commencement of WBA5 will maximise the flexibility of **nbn** and access seekers to agree appropriate, and efficient, mechanisms to continue to improve customer experience for WBA5.



7 Conclusion

- 7.1 The proposed Draft FAD, if made in the absence of clear evidence of a relevant market failure, will result in outcomes that are contrary to the LTIE, and will not be consistent with the matters listed in section 152BCA of the CCA.
- 7.2 In particular, there is a significant risk that any such FAD could detrimentally shape the future of the telecommunications industry in Australia by setting a framework that encourages a return to the broken industry dynamic that existed prior to the formation of **nbn**, of a disputes-driven, divisive relationship between service providers and access seekers. Such an outcome would have regrettable impacts for **nbn**, access seekers, future investors in telecommunications infrastructure in Australia and, most of all, the end user customers who rely on the **nbn**[™] network to support their businesses, education, social interaction and all the other benefits that internet connectivity can provide.
- 7.3 In these circumstances, on the basis of the evidence set out by the ACCC to date, the ACCC should not proceed to make any FAD in relation to **nbn**'s service standards.



Appendix A: Drafting Improvements

1. **nbn** has identified a number of areas in the Draft FAD where, from a legal perspective, the drafting is either ambiguous or otherwise could be interpreted in a manner that **nbn** considers is unlikely to reflect the ACCC's intention. In this Appendix, **nbn** has identified those ambiguities and expressions that are particularly problematic and have set out **nbn**'s suggested drafting improvements to address the relevant issues.
2. However, **nbn**'s position is that the Draft FAD should not be made at all. The drafting improvements set out in this Appendix would not remedy the fundamental issues with the Draft FAD that **nbn** has detailed in the body of the submissions.

No.	FAD clause	Drafting problem	Suggested Clarification
1.	Schedule 1 of Draft FAD ("End User" definition)	The definition of "End User" is drafted in a manner that potentially limits this concept to end users who purchase nbn [™] powered services from Downstream Service Providers, and thus would not include end user customers who purchase nbn [™] powered services from an access seeker who purchases products directly from nbn .	Replace this definition with the following: <i>"End User means a person who is the ultimate recipient or user of a retail product that relies on nbn[™] Ethernet as an input."</i>
2.	Clause 1.1 of Schedule 2 (Appointments)	Clause 1.1 of the Draft FAD currently provides that the service level for appointments is for nbn to attend Premises at the appointment time, during the appointment window, or within 15 minutes after the appointment time or appointment window, as confirmed by nbn . Currently, under the WBA, the service level for "attend[ing] a Premises in a Minor Rural Area, Remote Area, Isolated Area or Limited Access Area" is to attend the Premises within the appointment window (of between 4 and 5 hours) or within 45	The best option would be to delete this clause, but if retained, to replace it with the following: <i>"The service levels for appointments are to be calculated in accordance with the WBA."</i>



No.	FAD clause	Drafting problem	Suggested Clarification
		<p>minutes thereafter. This service level is derived from section 17(4)(b) of the CSG Standard.</p> <p>The proposal in the Draft FAD is either inadvertent or unsupported by any reasoning or apparent policy rationale. If adopted, this position would potentially require nbn to change its processes in respect of appointments in these areas to avoid incurring rebates, which would divert valuable nbn resources away from alternative investments that would better serve the LTIE.</p>	
3.	Clause 1.2 of Schedule 2 (Appointments)	<p>This provision, as currently drafted, would have unintended impacts for appointments on nbn's Satellite Network.</p> <p>Given the nature of nbn's Satellite Network covering extremely remote parts of Australia, nbn's operational processes for appointments are necessarily and significantly different for premises in the Satellite Network as compared to nbn's other access technologies.</p> <p>One example of this is that, for premises in the Satellite Network, after an access seeker 'reserves' an appointment, nbn is responsible for contacting the end user customer and booking an 'actual appointment' at a time that is suitable for both nbn and the end user customer. Ordinarily, this 'actual appointment' is at a different time to the original appointment 'reserved' by the access seeker (which may have no relation to an end user's availability or desired appointment time).</p> <p>The unique processes that apply to nbn's Satellite Network are recognised in section 2.3 and 10.3 of the nbnTM Ethernet Service Levels Schedule permit nbn to change appointments</p>	<p>Delete this clause (best option), or at least amend clause 1.2 to include subclause (c) as follows (with Actual Trouble Ticket Appointment having the meaning given to that term in the WBA):</p> <p><i>"in connection with scheduling an Actual Trouble Ticket Appointment".</i></p>



No.	FAD clause	Drafting problem	Suggested Clarification
		<p>for connections and fault rectification on the Satellite Network “where permitted by the WBA Operations Manual”.</p> <p>Under the Draft FAD, nbn would not be permitted to change the original ‘reserved’ appointment as part of this process and would arguably therefore be required to pay a missed appointment rebate to the access seeker on each such occasion merely because this provision does not take into account the different processes adopted by nbn in respect of the Satellite Network.</p>	
4.	Clause 2.1 of Schedule 2 of Draft FAD (End User Connections)	The reference in the Draft FAD to the service levels for End User Connections being “as set out in the WBA” is ambiguous given the complexities regarding how nbn ’s Service Levels are calculated.	<p>Replace this clause with the following:</p> <p><i>“The service levels for End User Connections begin from the time of Order Acknowledgement and will otherwise be calculated in accordance with the WBA, except to the extent of any inconsistency with clause 8.1 of this [Draft FAD].”</i></p>
5.	Clause 3.1 of Schedule 2 of Draft FAD (End User Faults)	The issue identified in item 4 above also arises in this clause.	<p>Replace the introductory paragraph in that clause with the following:</p> <p><i>“The service levels for rectification of End User Faults that begin from the time of Trouble Ticket Acknowledgement are as set out in the table below and will otherwise be calculated in accordance with the WBA, except to the extent of any inconsistency with clause 8.1 of this [Draft FAD].”</i></p>



No.	FAD clause	Drafting problem	Suggested Clarification
6.	Clause 3.1 of Schedule 2 of Draft FAD (End User Faults)	The table in clause 3.1 of the Draft FAD refers to service levels for Priority Assistance in respect of the Wireless Network. As currently drafted, there is a potential risk that this table could be misinterpreted to suggest that nbn [™] Ethernet (Wireless) services are permitted to be used to supply downstream Priority Assistance services (which is not correct).	Insert an asterisk in the last two rows of the table next to "24hrs" and "48hrs" respectively, and a note below the table as follows: <i>"* Note: Not applicable in respect of the Wireless Network."</i>
7.	Clause 4.2 of Schedule 2 of Draft FAD (FTTN/B/C service speed assurance)	<p>As currently drafted, nbn would be required to pay a rebate to an access seeker even if:</p> <ul style="list-style-type: none"> (a) the access seeker had not raised a Trouble Ticket in accordance with the processes in the WBA; and (b) the access seeker has not cooperated with nbn to help nbn resolve the relevant issue (e.g. by arranging for nbn to attend the end user premises to diagnose and rectify the issue). <p>In addition, in circumstances where the fault is caused by some other issue that does not require line remediation, under the WBA, nbn will leave the Trouble Ticket open until such time as the relevant fault is resolved. In those circumstances, under the current drafting, nbn would be required to pay a double rebate under both clause 3 of the Draft FAD and clause 4 of the Draft FAD.</p> <p>Further, nbn considers that the proposed drafting does not appropriately capture how the speed performance of an FTTN/B/C service should be calculated.</p>	<p>Replace clause 4.2 with the following:</p> <p><i>"nbn will be required to pay a rebate of \$20 per month for each service in respect of which:</i></p> <ul style="list-style-type: none"> (a) <i>the Access Line Rate that the service is capable of achieving on average during that month is less than the applicable PIR Objective (downstream);</i> (b) <i>Access Seeker has submitted a Trouble Ticket in respect of the failure by the relevant service to achieve the applicable PIR Objective (downstream) on or before the start of the relevant month;</i> (c) <i>Access Seeker has provided all assistance reasonably requested by nbn in connection with the failure by the relevant service to achieve the applicable PIR Objective (downstream); and</i> (d) <i>nbn has, acting reasonably, determined that the underperformance is not caused by issues beyond the nbn[™] Downstream Network</i>



No.	FAD clause	Drafting problem	Suggested Clarification
			<p><i>Boundary (which has the meaning given to it in the WBA); and</i></p> <p>(e) <i>a remediation case has been opened in respect of the relevant Premises and remains open at the end of the relevant month."</i></p>
8.	Clause 4.3 of Schedule 2 of Draft FAD (FTTN/B/C service speed assurance)	As currently drafted, in circumstances where a rebate is payable under clause 4.3, a separate rebate would also be payable under clause 4.2, which would result in access seekers being able to "double dip" in respect of a single service.	<p>Insert a new clause after clause 4.3 as follows:</p> <p><i>"nbn will not be liable to pay a rebate under clause 4.3 in respect of a service for a month if nbn is liable to pay a rebate under clause 4.2 in respect of that same service for that same month."</i></p>
9.	Clauses 4.3 of Schedule 2 of Draft FAD (FTTN/B/C service speed assurance)	<p>As set out in paragraph 4.35 of this submission, contrary to the assertion in Section 4.1.5.4 of the Draft Decision that "NBN Co can move an end user to a lower speed service if it cannot deliver the higher speeds", nbn does not currently have any such right.</p> <p>If nbn is to be required to pay a rebate in the circumstances set out in clause 4.3, it is imperative that nbn at least have the right to downgrade services to lower speed tiers to allow nbn to mitigate the risk of access seeker gaming.</p>	<p>Insert an additional clause after clause 4.3 as follows:</p> <p><i>"nbn may unilaterally modify any service to change the AVC TC-4 bandwidth profile to a lower AVC TC-4 bandwidth profile by giving notice to Access Seeker to avoid nbn having to pay a rebate under clause 4.3 in respect of that service."</i></p>
10.	Clause 4.3 of Schedule 2 of Draft FAD (FTTN/B/C service speed assurance)	<p>As currently drafted, nbn could potentially be required to pay a rebate to an access seeker even if:</p> <p>(a) the connection only underperformed periodically throughout the month; and</p> <p>(b) the cause of the underperformance is outside of nbn's control, specifically caused by issues beyond nbn's</p>	<p>Replace clause 4.3 with the following:</p> <p><i>"nbn will be required to pay a rebate of [\$X] per month for each service in respect of which:</i></p> <p>(a) <i>the downstream Access Line Rate that the service is capable of achieving on average during that month is less than:</i></p>



No.	FAD clause	Drafting problem	Suggested Clarification
		downstream network boundary (e.g. in-premises wiring issues).	<ul style="list-style-type: none"> (i) 50 Mbps for an AVC TC-4 that specifies a downstream PIR of up to 100 Mbps (ii) 25 Mbps for an AVC TC-4 that specifies a downstream PIR of up to 50 Mbps, or (iii) 12 Mbps for an AVC TC-4 that specifies a downstream PIR of up to 25 Mbps; (b) <i>Access Seeker has provided all assistance reasonably required by nbn in relation to the service; and</i> (c) <i>the bandwidth profile supplied to Access Seeker is not required to support an AVC TC-2 bandwidth profile supplied in respect of the same premises; and</i> (d) <i>nbn has, acting reasonably, determined that the underperformance is not caused by issues beyond the nbnTM Downstream Network Boundary (which has the meaning given to it in the WBA)."</i>
11.	Clause 5.2 of Schedule 2 of Draft FAD (Wireless Network service speed assurance)	The current drafting would require nbn to calculate the Cell Capacity Upgrade Threshold and Priority Upgrade Backhaul Links on a monthly basis. By contrast, nbn 's current fixed wireless backhaul packet loss reporting is undertaken on a weekly basis, leading to a 28-day cycle that does not align with calendar months or access seeker billing cycles. Further, Radio Access Network performance is measured on a 30-day average basis that does not align with calendar months or access seeker billing cycles.	<p>If the proposed FAD terms are implemented, further development of drafting to align with reporting cycles would be required, so that terms could actually be operationalised.</p> <p>As an initial proposal to address this issue, nbn suggests that the definitions of "Cell Capacity Upgrade Threshold and Priority Upgrade backhaul</p>



No.	FAD clause	Drafting problem	Suggested Clarification
			<p>Link could be amended as follows (by inserting the underlined text):</p> <p>"Cell Capacity Upgrade Threshold means, <u>in respect of a month</u>, where a Wireless Network cell has an Average 30 Day Downlink Throughput of less than 6 Mbps, <u>as measured at the end of the last week ending in that month.</u>"</p> <p>"Priority Upgrade Backhaul Link means, <u>in respect of a month</u>, a Wireless Network backhaul link that has an Average 28 Day Busy Hour Link Packet Loss of 0.25% of more, <u>as measured at the end of the last week ending in that month.</u>"</p>
12.	Clause 6 of Schedule 2 of Draft FAD (Payment of rebates)	It's not clear exactly what effect the words "in connection with any rebate" are intended to have in the context of clause 6.2. In particular, given that the Draft FAD requires rebates to be paid in respect of all relevant events for which damages are payable under the CSG Standard (i.e. connections, fault rectifications and both connection and trouble ticket appointments), these words appear to be redundant and, without a clear meaning, could potentially be interpreted in a way that is different to the ACCC's current intention.	Delete the words "in connection with any rebate" in both places where it is used in this clause.
13.	Clause 7.1 of Schedule 2 of Draft FAD (Availability of service information)	Clause 7.1 is drafted in a way that implies that nbn could be required to provide "regular and ongoing service specific information" beyond what is set out in clause 7.1(a) to (d). Such a provision does not give nbn or access seekers any certainty as to what nbn would be required to do to comply with this provision of the Draft FAD, and therefore would be	Amend introductory words in clause 7.1 as follows: <i>"NBN Co will make <u>the following regular and ongoing service specific information available to Access Seeker via automated IT systems, including on a regular and ongoing basis:</u>"</i>



No.	FAD clause	Drafting problem	Suggested Clarification
		likely to give rise to disputes between nbn and access seekers.	To the extent the ACCC intends to require nbn to provide any additional categories of service specific information to access seekers beyond what is set out in clause 7.1(a) to (d), clause 7 should be amended to expressly describe those additional categories of information.
14.	Clause 7 of Schedule 2 of Draft FAD (Availability of service information)	As the ACCC is aware, nbn 's systems do not currently support all of the different types of reporting required under clause 7.1. nbn understands that the intention of clause 7.2 is to make it clear that, where nbn is unable to comply with clause 7.1, it must instead comply with clause 7.2. We suggest making this operation clearer.	<p>For clause 7.1, insert the words "<i>Subject to clause 7.2</i>" at the start of the clause.</p> <p>Replace clause 7.2 with the following:</p> <p><i>"Where NBN Co does not have IT systems in place for the automated provision of ongoing service specific information to Access Seeker:</i></p> <p>(a) <i>NBN Co will not be required to comply with clause 7.1; but</i></p> <p>(b) <i>NBN Co will instead be required to maintain an indicative roadmap setting out timeframes for consulting on, developing and implementing these systems."</i></p>
15.	Clause 8 of Schedule 2 of Draft FAD (Service level exclusions)	<p>There are a number of additional circumstances in which nbn ought to be permitted to extend the period for measuring its End User Connection and End User Fault rectification service levels that are not set out in this clause.</p> <p>Preventing nbn from extending the measurement of its End User Connection and End User Fault rectification service levels in these additional circumstances would create misaligned responsibilities and an incentive for access seeker gaming</p>	This clause should be amended so that it specifically prohibits nbn from extending the period for measuring its End User Connection and End User Fault rectification service levels in circumstances that the ACCC considers nbn has unjustifiably been extending its service levels to date.



No.	FAD clause	Drafting problem	Suggested Clarification
		<p>which would lead to worse outcomes for end user customers for the reasons set out in paragraphs 4.50 and 4.51 of this submission.</p>	<p>If the (best) option above is not adopted, the following circumstances should be added to clause 8.1 of the Draft FAD:</p> <ul style="list-style-type: none"> (a) where the access seeker does not select the first available appointment; (b) any Ordering Freeze, Service Reduction or Suspension that has been validly imposed in accordance with the WBA; (c) any failure of, or inability to supply products, services, facilities or infrastructure by a third party, where the third party is unable to perform its obligations to nbn as a result of an event that would have otherwise constituted a Force Majeure Event if the obligations to be performed by the third party had arisen under this Agreement; (d) where an act or omission of the End User is not done in accordance with an applicable Authorisation to Alter; (e) where a 'Resolved' Status is applied to any Trouble Ticket; (f) where a remediation case has been opened in connection with any Trouble Ticket; and (g) for the Satellite Network: <ul style="list-style-type: none"> (i) where nbn or its Personnel cannot make contact with a Contracted End User (or their authorised representative aged 18



No.	FAD clause	Drafting problem	Suggested Clarification
			<p>or over) to schedule an Actual Appointment or Actual Trouble Ticket Appointment in accordance with the WBA;</p> <p>(ii) any deprioritisation, reduction of maximum data transfer rate, rejection of order, rejection of modification or suspension that has been validly applied in accordance with the WBA; and</p> <p>(iii) issues inherent with the Satellite Network (e.g. Satellite Limitations).</p>
16.	Clause 9 of Schedule 2 of Draft FAD (Service level reporting)	As currently drafted, this provision would require nbn to disclose nbn 's performance in relation to Priority Assistance-specific service levels to all access seekers. At present, as Telstra is the only access seeker that uses nbn TM services to supply downstream Priority Assistance services, providing 'aggregated' data to all access seekers for these service levels would disclose to the market confidential information about Telstra's services specifically. nbn does not consider that broad disclosure of this information to the market would provide any benefit to justify the disclosure of such confidential information.	<p>inserting a new clause 9.2 as follows:</p> <p><i>"Notwithstanding clause 9.1, nbn is not required to provide a report to any Access Seeker under clause 9.1(b) in respect of any service level that relates solely to Priority Assistance."</i></p>
17.	Clause 10.2 of Schedule 2 of Draft FAD (Wireless Network)	There are a number of complexities for nbn to forecast the particular Wireless Network cell to which each end user customer is likely to be connected prior to a service being installed, which arise from the topology of the Wireless Network. Frequently, a number of cells from one or more nearby Wireless towers are capable of serving a single	<p>Replace clause 10.2(a) with the following:</p> <p><i>"the identity of the Wireless Network cell that nbn forecasts the End User will be connected to;"</i></p>



No.	FAD clause	Drafting problem	Suggested Clarification
	performance reporting)	premise. These different cells have different performance characteristics, including levels of congestion. Accordingly, it is not until after an order is placed and an installer attends the premises to conduct a signal test that nbn can determine with certainty the cell to which the relevant premises will be connected.	
18.	Clause 11 of Schedule 2 of Draft FAD (Wireless Network maximum attainable speed information)	Given the inherent issues with this data, as detailed in the paragraphs 4.58 to 4.61 of this submission, there is a risk that the FAD as currently drafted would require nbn to provide this data without any clarifications or opportunity to perform detailed analysis to validate its accuracy, which would significantly increase the risk of misleading or deceiving access seekers and end users.	Insert the following at the end of clause 11.1: <i>"For the avoidance of doubt:</i> (a) nbn may provide the information subject to any disclaimers that nbn considers to be appropriate having regard to the nature of the information and any factors affecting the extent to which the information may be relied upon; and (b) <i>the maximum attainable throughput may be expressed as a range."</i>



Appendix B: Amendments to “Broadband Speed Claims – Industry Guidance” (May 2019)

1. **nbn** considers that paragraph 7 of Attachment B to the Broadband Speed Guidance should be amended as set out below (with insertions illustrated by underlined text, and deletions illustrated by strike-through text).

“7. If the actual attainable line speed is lower than the off peak speed of the plan selected and a lesser (cheaper) plan is available that is capable of delivering the actual attainable line speed (e.g. consumer purchased a plan with an off peak speed of 100 Mbps, ~~and~~ the maximum attainable line speed is 45 Mbps and there is a cheaper plan available with an off peak speed of 50 Mbps), the RSP should:

(a) inform the consumer accordingly and unless there are cogent reasons why the consumer’s selected plan can still represent additional value for the consumer, advise the consumer ~~not to~~ continue on its higher (more expensive) plan and prompt them to select a more appropriate plan that the consumer’s selected plan will automatically be changed to the lesser (cheaper) plan within 21 days and, unless the consumer decides to opt-out, change the consumer’s plan accordingly.”

(b) provide the consumer a refund to compensate the consumer for the period they were paying for a higher speed plan that they could not receive

(c) advise the consumer of the maximum attainable line speed of their line and, the automatic redress the RSP has provided and, if no unilateral action was taken by the RSP to move the consumer to a lower plan, advise the consumer that they may elect to move to a lower speed plan without charge

(d) advise the consumer of the minimum typical busy period speed of the lesser (cheaper) plan that the consumer has been moved to ~~selected~~ and any other relevant performance information, in order to avoid any confusion as to the service they are likely to receive, and

(e) advise the consumer they are free to exit the contract without penalty.”

2. **nbn** also considers that to address concerns held by the ACCC of underperforming service speeds on an ongoing basis (that is, beyond the point of sale and throughout the lifecycle of that service), additional

changes should be made to require ongoing proactive management of speeds, rather than industry relying on consumer complaints to drive issue awareness and resolution. In particular, **nbn** recommends that the clause below should be inserted before item 3.54 within Principle 6 of the Broadband Speed Guidance.

“3.xx RSPs should implement monitoring of line speed performance for services acquired over the nbn™ FTTN/B networks, to allow for identification of services where attainable line speeds degrade and no longer deliver to the speed claims made when that service was sold. Should this scenario arise, and the speed degradation has been consistent for a period of longer than 21 days, the RSP should:

(a) inform the end user customer of the degradation of speeds; and

(b) offer them potential remedies to investigate and resolve the cause of degradation, including:

(i) providing them with support to troubleshoot potential causes of the degradation;

(ii) offering or facilitating an in-home wiring visit to investigate and repair potential in-home wiring issues;

*(iii) facilitating, subject to meeting the appropriate criteria and level 1 troubleshooting requirements, investigation with **nbn** through assurance processes; or*

(iv) doing nothing; and

(c) if unable to resolve the issue through items (a) and (b) above, follow the provisions set out in paragraph 3.57.”