

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
ACCC Consultation Paper

**Inquiries into NBN access
pricing and wholesale
service standards**

Public Version

September 2020

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Section 1. EXECUTIVE SUMMARY

- 1.1 Optus welcomes the opportunity to provide comments on the ACCC's inquiries into NBN access pricing and wholesale service standards.
- 1.2 These inquiries have been ongoing for almost three years, over which time we have seen substantial changes to the take-up and use of NBN broadband services. Optus is disappointed with the approach the ACCC proposes to take since it will only result in incremental reform and not address issues that are fundamental to the sustainability of the fixed broadband market. The current intent to not adopt CVC reforms represents a lost opportunity to encourage greater use of the NBN, address inefficiencies and promote consumer interests.
- 1.3 Over many years, the industry has consistently raised concerns with the NBN wholesale service performance and the CVC pricing construct. These are not insignificant issues; they go to the sustainability of the current fixed broadband market. The current CVC price construct has resulted in a situation where NBN resellers across the market make little or no margins and carry all the downside risk of changes in demand. The COVID pandemic has brought the problem into stark reality since the CVC construct has effectively had to be suspended to meet the changes in demand. Similarly, the current wholesale service standards do not meet customer or even regulator expectations. Resellers too often bear the consequences of this with additional calls into customer service, which places further pressure on their margins.
- 1.4 Optus submits that any assessment of the long term interest of end-users (LTIE) should take into account these issues. To that end:
 - (a) Optus strongly opposes the proposal to abstain from the consideration of CVC price reform and to adopt price regulation only for a product few consumers are using.
 - (b) Optus submits the ACCC should address the CVC construct issue reflecting the new-normal of greater reliance on fixed broadband throughput and the need to put the fixed broadband market onto a more sustainable basis. Failure to do so risks undermining the social and economic benefits accruing from the NBN.
 - (c) Regulatory pass-through obligations in the Wholesale Broadband Agreement (WBA) should be strengthened to rebalance the regulatory risk which still predominantly sits with RSPs for actions that lie within NBN Co's sphere of control.
 - (d) Effective monitoring and reporting processes are required over NBN Co's performance against key service level metrics across industry. An effective reporting and monitoring scheme – similar to that in place for Telstra's SSU compliance – will be important to ensure regulators (ACCC and the ACMA) have sufficient evidence to review the effectiveness of regulatory decisions.

ACCC must address the CVC issue

- 1.5 The importance of efficient and competitive wholesale broadband pricing has not been higher as the economic and social impacts of the COVID pandemic hits home for Australian consumers. More than ever, Australians are relying on affordable broadband services to stay connected to friends and family, and where possible, to continue working and learning from home.

- 1.6 Optus does not agree with the stated intent of the ACCC “not to adopt” reforms to the CVC component of NBN pricing.¹ Further, such a position is counter to the objectives of the Competition and Consumer Act. Optus does not support the proposal to regulate only a 12 Mbps entry-level product. Such a limited intervention will have little, if any, impact on the market and does not promote the LTIE.
- 1.7 Rather, the ACCC should focus on interventions that benefit all Australians and fully assess the merits of the CVC construct, which has no engineering, economic or social justification, against alternative models. The COVID pandemic has emphasised the social and economic benefits that arise from un-congested broadband networks. NBN Co has shown us what can be achieved if the CVC structure is removed.
- 1.8 The continual reliance on CVC to grow NBN Co’s revenue undermines these benefits. The two-part pricing structure of the NBN is a unique and flawed approach. It is not reflective of wholesale arrangement in other jurisdictions nor does it reflect retail pricing or consumer expectations.
- 1.9 Optus has long called for fundamental price reform. To be clear though, a change in approach should not be achieved at the expense of a material revenue decline for NBN Co; it is not the price level rather the price construct that is limiting the benefits of the NBN. Optus again calls on the ACCC to offer meaningful and long-term changes to the structure of wholesale NBN pricing; focusing on removing the CVC charge component.

¹ ACCC, 2020, Consultation Paper, p.9

Section 2. CVC PRICING MUST BE ADDRESSED

- 2.1 The ACCC found that certain price related terms of access to the NBN are impeding competition and efficiency objectives and placing consumers at greater risk of being unable to migrate to the NBN without price shock.²
- 2.2 Optus agrees with both of the observations. But we do not agree with the focus on addressing the price shock of migration and the lack of focus on the structure of NBN pricing that impacts competition and is manifestly inefficient.
- 2.3 Optus does not support the proposal to regulate only a 12 Mbps entry-level product. Such a limited intervention will have little, if any, impact on the market and does not promote the LTIE. Rather, the ACCC should focus on interventions that benefit all Australians and address concerns with the CVC construct which has no engineering, economic or social justification.

Regulating a 12 Mbps product does not promote the LTIE

- 2.4 It is not clear to Optus how the proposal to regulate only a 12 Mbps product – below the mandated minimum speed of the NBN – promotes the LTIE when the ‘regulated’ product is unlikely to apply to a large proportion of end-users.
- 2.5 The ACCC places weight on the ‘benefit’ of price stability as end-users migrate from ADSL to the NBN. Optus accepts that the benefit of price stability during migration may have been an important factor back in 2015 – but it is unclear whether such benefit exists now at the end of the migration period as we approach 2021; when over 8 million premises are forecasted to be active and migrated to NBN.³
- 2.6 Rather than focusing on 12 Mbps pricing, Optus submits this pricing review should focus on ensuring NBN pricing promotes the LTIE into the future, reflecting the growing data consumption of end-users. Given the majority of customers are also on 50 Mbps and above, this inquiry should focus on ensuring the full range of consumer NBN bundle products promote positive consumer outcomes.

The CVC construct must be removed to benefit all Australians

- 2.7 The importance of efficient and competitive wholesale broadband pricing has not been higher as the economic and social impacts of the COVID pandemic hits home for Australian consumers. More than ever, Australians are relying on affordable broadband services to stay connected to friends and family, and where possible, to continue working and learning from home.
- 2.8 In response to this unprecedented growth in network usage, NBN Co has provided RSPs an additional 40% CVC bonus. Such a move is greatly welcomed, and it has also shown what can be achieved if the CVC structure is removed. However, this benefit is at the grace of NBN Co and whilst we welcome the fact that it has been extended twice it is planned to be removed in November. This will almost certainly be to the detriment of Australian consumers.

² ACCC, 2020, Consultation Paper, p.9

³ NBN Co, FY20 Results Presentation, p.3

- 2.9 Optus again emphasises that the CVC structure has no engineering, economic or social justification. The LTIE is not promoted by the CVC. Optus submits the ACCC needs to intervene to address the CVC and promote the LTIE.
- 2.10 The NBN was conceived by Government to achieve several objectives for the community; universally available broadband services were and are considered the foundation for a future connected, competitive economy and social progress. These benefits, however, flow from the use of broadband services which the NBN will make available. Access to the network alone is not enough.
- 2.11 To deliver on these objectives, pricing should support the future demand of consumers for high speed broadband. This, in turn, means that usage of the network should be affordable and designed to promote such usage.
- 2.12 In order for the benefits of the NBN to be realised, any price regulation should be designed to capture and enhance the advantages of the NBN. The NBN's greatest advantage over legacy technologies is its ability to handle very large amounts of data throughput at low additional cost.
- 2.13 The continual reliance on CVC to grow revenue undermines this advantage. The two-part pricing structure of the NBN is a unique and flawed experiment. It is not reflective of wholesale arrangement in other jurisdictions nor does it reflect retail pricing or consumer expectations.
- 2.14 The continual use of CVC overage charges sets the wrong incentives and is likely to again result in RSPs trying to limit how much additional shared bandwidth that they purchase to help manage their costs and therefore consumers' retail prices.
- 2.15 This is clearly a sub-optimal outcome. The incremental costs to the NBN from providing additional shared bandwidth to RSPs are very low, since the majority of the network required to deliver additional shared bandwidth is already in place. The current pricing structure unnecessarily restricts the use of the NBN, or, put another way, by using a different pricing structure, it would be possible to significantly improve consumer outcomes with only minimal increases in network costs. The COVID CVC capacity increases have clearly demonstrated the material benefits that could accrue from the permanent removal of the CVC.
- 2.16 Optus has long called for fundamental price reform. This does not necessarily mean a material revenue per user decline for NBN Co; it is not the price level rather the price construct that is limiting the benefits of the NBN.
- 2.17 Optus again calls on the ACCC to offer meaningful and long-term changes to the structure of NBN pricing taking into account that:
- (a) The CVC charge should be removed; and
 - (b) Any growth in ARPU should come from value-added components offered by NBN Co not the provision of basic bandwidth. Best efforts TC-4 CVC is not a value-add since it is the basic product and should not be directly charged.

Section 3. WHOLESALE SERVICE STANDARDS

- 3.1 Optus notes there are challenges in commenting on the NBN Co's proposed arrangements, given there is still some uncertainty over the final form of drafting and Optus is still engaging with NBN Co in regard to how some proposed processes and rebates will operate in practice.
- 3.2 The ACCC considers that NBN Co's proposed arrangements:
- (a) Significantly improve the clarity of service levels;
 - (b) Improves on the allocation of risk and responsibility between NBN Co and RSPs;
 - (c) Provide greater incentives on NBN Co to improve its service outcomes by increasing its rebate liability; and
 - (d) Improve end-user outcomes.
- 3.3 While NBN Co has taken on board some of the ACCC's feedback around simplifying arrangements as earlier WBA4 proposals were unnecessarily complex, Optus sees room for further improvement.
- 3.4 This section discusses:
- (a) Regulatory pass-through obligations need strengthening;
 - (b) Additional monitoring and reporting processes are required;
 - (c) Failed connections rebates;
 - (d) Delayed connections and unresolved faults rebates;
 - (e) Missed appointment rebates;
 - (f) Underperforming service speed rebates;
 - (g) Consumer safeguards;
 - (h) Fixed wireless service rebates; and
 - (i) Service information and operational matters.

Regulatory pass-through needs strengthening

- 3.5 Optus does not agree that NBN Co's proposed arrangements suitably improve the allocation of risk and responsibility between RSPs and NBN Co. Even after the proposed changes, too much responsibility is placed upon RSPs to address issues caused by the underlying NBN network or processes. Moreover, the regulatory risk still predominantly sits with RPS for actions that lie within NBN Co's sphere of control.
- 3.6 Notwithstanding the improvements that can be made in relation to the wholesale service standards, there is a strong need to ensure that regulatory obligations placed on RSPs can flow through to the wholesale NBN service.
- 3.7 This is particularly important in the current environment where the ACMA imposes strict black letter obligations on RSPs and intends to impose new and yet to be specified regulatory obligations on the retail sector.

- 3.8 The proposed regulatory pass-through is limited to RSPs requesting a change within 6 months of a new regulation and whether the RSP will be unable to comply with the new regulations (proposed clause F3.2(c)). Optus does not consider that this reflects the principle that risk and responsibility be allocated across industry.
- 3.9 It may be possible for an RSP to comply with a retail obligation based on WBA arrangements, but, the RSP may only be able to do so by bearing all (or the majority) of the risk and responsibility itself – for example, the retail obligations is not reflected in wholesale SLAs. Further, where there are complex regulations introduced or amended, it may not be possible to know within 6 months if there are compliance issues or if the regulator has a different interpretation of obligations than industry.
- 3.10 Optus observes there are instances where the WBA does not adequately support RSPs in relation to the ACMA's NBN rules. While RSPs may be able to 'comply' with the rules, RSPs are held to stricter timeframes than those in the WBA and must provide options to end-users where end-users experience a service continuity event and those timeframes are not met, even where the RSP is not the party responsible for or able to control meeting the timeframes and may not be at fault. Due to a lack of corresponding SLAs in the WBA, NBN Co faces no or little risk or responsibility.
- 3.11 For example, the ACMA's interpretation of the service continuity rules requires that customers have a working NBN service within 3 business days and effectively imposes a connection performance standard on RSPs. Yet RSPs do not control the connection process and there are no corresponding strict timeframes on NBN Co.
- 3.12 Optus acknowledges there are reasons for longer connection service levels and timeframes in some instances – namely, more difficult connections simply take longer to complete. However, there is no recognition in retail requirements that this is not the fault of the RSP. Therefore, RSPs bear the responsibility of providing options to the end-user, even where it may not be the RSP's fault that the customer experiences a service continuity issue.
- 3.13 NBN Co may deliver a connection within the service level timeframes of the WBA, yet the RSP could still be liable for providing the end-user with options because the timeframes are different. Therefore, while the RSP has technically complied with the regulations, it bears the cost of doing so when it may not be at fault and may not be eligible for any rebate.
- 3.14 Ideally, retail regulations would accurately capture the wholesale SLAs. However, this is not always the case. Where regulators decide to impose regulatory obligations on NBN services that differ from contractual commitments in the WBA, a process should exist to update the WBA obligations.

Monitoring and reporting processes are required

- 3.15 Currently, there is no general visibility over NBN Co's performance against key service level metrics across industry. This lack of visibility could hamper effective monitoring of the effectiveness of NBN Co's commitments in the WBA.
- 3.16 Optus submits that an effective reporting and monitoring scheme – similar to that in place for Telstra's SSU compliance – will be important to ensure regulators (ACCC and the ACMA) have sufficient evidence to review the effectiveness of regulatory decisions.
- 3.17 Optus considers that reporting requirements should be put in place on NBN Co to enable monitoring of:
- (a) Quality of service metrics; and

- (b) Proposed rebates in WBA4.
- 3.18 It would be particularly beneficial for there to be reporting on measures that are likely to be increasingly important through further WBA periods, such as fault rectification or the PIR Objective Rebates designed to address underperforming services, including matters related to these measures (e.g. such as the number of trouble tickets rejected for remediation).
- 3.19 Such matters could be explored further in consultation on making a record keeping rule, but, industry level reporting of key performance metrics and key information related to the proposed rebate framework would allow the ACCC, industry and other stakeholders to monitor their effectiveness.

Failed Connection Rebate

- 3.20 NBN Co's proposed access arrangements includes a new Failed Connection Rebate designed to refund the recurring wholesale charges for New Service Never Worked (NSNW) connection faults on a pro-rated basis for the period until the fault is rectified. The ACCC considers this should ensure that NBN Co is not charging for new services that are not functioning.
- 3.21 NBN Co has committed to consulting with RSPs during FY21 on the potential introduction of automated testing to significantly reduce and/or eliminate NSNW issues.
- 3.22 The failed connection (NSNW) rebate is subject to the following conditions:
 - (a) A service fault ticket is raised within 20 business days of completing the end-user connection for the ordered product.
 - (b) The service was continuously incapable of being used to receive or transmit data from the time the end-user connection was completed until the service fault trouble ticket was accepted.
 - (c) The amount of the failed connection rebate will be equal to the recurring charges payable on a daily pro-rated basis for the service.
 - (d) The rebate is not payable in connection with end-user faults which are closed on the basis they are external faults or end-user faults to which service levels do not apply.
 - (e) It can be considered a part of damages for a material service failure.⁴
- 3.23 Optus does not consider the requirement to raise a service fault ticket within 20 business days is a reasonable limitation on potential availability of the rebate. In cases where a end-user still has access to a working legacy service and the RSP is not allowed to bill the customer (as required by the ACMA's Service Continuity Standard and Service Migration Determination) it can take longer for the end-user to plug in their modem and finish activating their NBN service. In these cases, a NSNW fault is not known until the end-user attempts to plug in their modem and use the service.
- 3.24 Optus considers that NBN should not be charging for a service where retail regulations limit the ability of RSPs to move customers onto the NBN particularly where NBN does

⁴ NBN Co, WBA4 Rider Booklet (Pricing and Service Standards Proposals) 21 August 2020, p. 32. Proposed clause 1.5.

not yet have in place testing to determine if it has correctly completed an install. Optus considers that 90 Business Days in which to raise a fault is more appropriate.

- 3.25 Further, Optus considers that any rebate should be calculated to when the original fault ticket was raised where NBN Co closes the fault ticket, yet the fault reoccurs and the end-user still can't use their service and another fault ticket must be lodged. It is not clear from current drafting if this is what is proposed. Optus considers any definition of 'Failed Connection Period' and arrangements regarding a connection fault rebate, should be drafted to ensure the rebate is calculated from when the first fault ticket is lodged. Even if the end-user has multiple connection faults, the relevant criterion should be that the end-user has not been able to use their service.

Delayed connections and unresolved faults

- 3.26 NBN Co's proposed access arrangements includes rebates that accrue on a daily basis (subject to rebate caps):

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

- 3.27 NBN Co has proposed to extend rebate eligibility to AVC TC-2 services designed for business applications, in addition to residential grade AVC TC-4 services. NBN Co would also apply rebates automatically, without the need for RSPs to submit claims where NBN Co misses a service level.

- 3.28 In the Draft FAD, the ACCC had proposed higher rebates for delayed connections and unresolved faults of:

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

- 3.29 In the April Position Paper, the ACCC commented in support of higher rebates that:

We have also considered NBN Co's argument that the rebates set out in the draft FAD are excessively high. On balance, we consider that the terms that were set out in the draft FAD strike an appropriate balance between the different factors that we have taken into account. In particular, the potential rebate amounts of 6 and 12 months of revenue for a typical service, for connections and faults respectively, is significant enough to offer a meaningful incentive and level of compensation in the context of the supply chain, given the associated consumer harm, while balancing the potential cost and business impact on NBN Co.

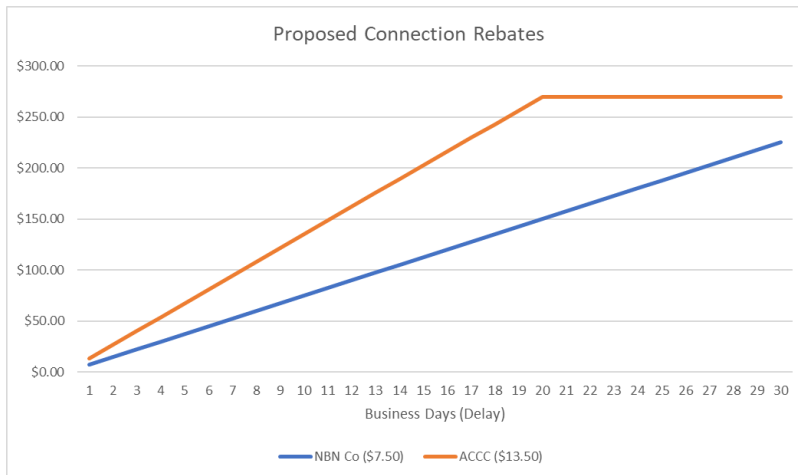
We have considered submissions which argue that increased rebates will detract from NBN Co's ability to invest in other customer experience initiatives that may have more impact on end-users. We support initiatives to improve service quality for end-users across the supply chain. However, these should not detract from incentives for the quick resolution of specific connection and fault issues impacting on individual end-users. We note that the completion of

the NBN rollout and forecast slowing rate of activations is likely to significantly reduce NBN Co's connection rebate liability.⁵

Proposed connection rebates

- 3.30 The difference between the ACCC's and NBN Co's proposed connection rebates can be seen in the following chart.

Chart 1: Proposed Connection Rebates ACCC v. NBN Co



- 3.31 Optus notes the August consultation paper does not provide clear reasons for the changed view that the lower rebates represent sufficient incentives for NBN Co to resolve consumer grade connection and fault issues promptly. While NBN Co's rebates are proposed to accrue daily over a longer time period, the reduction in amounts proposed still mean NBN Co would be facing lower potential rebates (and therefore incentives) overall.
- 3.32 Optus notes that any rebate accrues after the connection service level has been missed. Which means that any end-user whose connection still has not been completed 30 business days after the service level has been missed could have had a further 14 business days delay in their connection (at least, depending on how long NBN Co stopped the service level clock for) depending on the service class of the premises and which service level applies. This is a significant period of time for an end-user to be without a NBN service.
- 3.33 Further, a number of exclusions and conditions could still apply, which means NBN Co could 'stop the clock' on the service level. Therefore, an end-user could still have a delayed connection, but, NBN Co could be considered to have met its service level and no rebate would be payable.
- 3.34 As mentioned, in considering how the ACMA's NBN rules have worked in operation over the last two years (and in light of potential recent amendments consulted on by the ACMA), it is arguable that the service level timeframes and arrangements in the WBA are inadequate and that RSPs are bearing risk and responsibility even where the RSP is not at fault or where matters are outside the RSP's control. Optus supports adopting wholesale SLAs that reflect the retail obligations imposed on RSPs – especially for faults that lie with NBN Co.

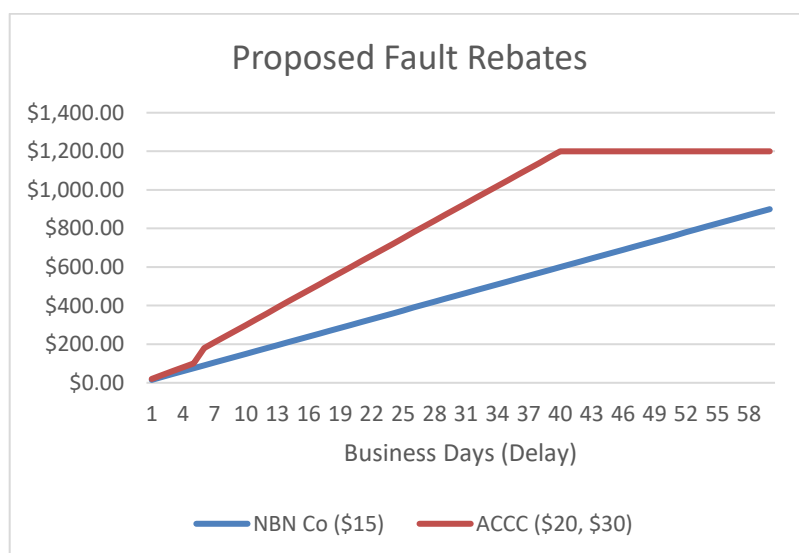
⁵ ACCC, NBN Wholesale Service Standards Inquiry Position Paper, April 2020, p. 9.

- 3.35 Optus acknowledges the ACCC's comments that connections are likely to become less prominent an issue as the NBN rollout has neared its completion. In which case, revisiting the connection service level timeframes may not be appropriate at this late stage of the WBA4 negotiation process.
- 3.36 However, Optus considers that the disparity between wholesale arrangements and retail obligations should be borne in mind when considering any retail pass-through. Whether NBN Co's proposed connection rebates offer sufficient performance incentives will only be known by tracking NBN Co's performance over time. Optus reserves the right to revisit these connection arrangements in future, particularly in light of any changed retail regulation.

Proposed fault rebates

- 3.37 In relation to proposed fault rebates, the comparison between the ACCC's proposed approach and NBN Co's proposed approach can be seen in the chart below.

Chart 2: Proposed fault rectification rebates – ACCC v. NBN Co.



- 3.38 The ACCC's proposed fault rebates escalated after Day 5 to provide incentives to NBN Co to address faults as soon as possible given that consumers may be experiencing disruption in their services (e.g. loss of or reduced service).
- 3.39 Optus notes that the rebates are only available once NBN Co misses a service level and NBN Co's service level timeframes continue to be subject to a range of exclusions and conditions (most likely due to matters that may be outside of NBN Co's control that may impact their ability to fix the fault) which means the service level timeframe may be suspended for a period of time or may not apply. This means that a consumer could be without an NBN service for a number of days and NBN Co could still assess it has fixed the fault within the service level timeframe if an exclusion or condition is available and not have to pay any rebate.
- 3.40 Given the exceptions that apply to fault service levels mean the service level timeframe can be suspended or not apply where matters outside of NBN Co's control occur, Optus considers that NBN Co actually missing a fault rectification service level timeframe will be the result of poor performance by NBN Co. Therefore, Optus considers there should be robust incentives for NBN Co to meet its performance to address service faults and minimise potential impact on end-users.

- 3.41 Optus is concerned that the fault rebates proposed by NBN Co do not offer sufficient incentives for NBN Co to deliver a high standard of performance in fixing faults. At the very minimum with NBN Co's proposal there should be an escalation at Day 5, as per the ACCC's approach. Failing to address faults quickly compromises the objective of achieving any-to-any connectivity. Further, this rebate does not just promote the achievement of any-to-any connectivity, it also encourages investment and maintenance in the network, to minimise the likelihood of service dropouts and disruption due to poor maintenance practices in future.
- 3.42 As faults may be the most prominent issue in future (given the rollout is nearing completion) it is also likely there may be future retail regulation regarding faults. RSPs need to have confidence in NBN Co's ability to quickly rectify faults.
- 3.43 Optus considers the ACCC's proposed fault rebates provide more robust incentives for prompt fault rectification. If the ACCC is minded to accept NBN Co's fault rebate proposal, Optus considers that NBN Co's rebates should escalate after Day 5 to encourage prompt resolution.

Missed appointments

- 3.44 In its April position paper, the ACCC maintained its views from the draft FAD that NBN Co should pay \$75 for a missed appointment. It noted:

We maintain our view in the draft decision that NBN Co should be incentivised to meet its appointment service levels on a per-service basis by paying a rebate of \$75 to RSPs and that this rebate should in turn, be paid to end-users. In reaching this view, we have taken into consideration stakeholders' (in particular ACCAN's) view that the impact on the end-user should be the primary consideration in setting an appropriate value, as well as NBN Co's legitimate business interests. We have considered the views of some submitters that the rebate value should be higher. On balance however we consider that a \$75 rebate is high enough to adequately compensate consumer harms while also providing a strong incentive for NBN Co to improve its performance for keeping appointments.⁶

- 3.45 NBN Co has since proposed that the WBA include a missed appointment rebate of \$50 for the first missed appointment, and \$75 for each subsequent rescheduled missed appointment. NBN Co proposes to reduce this amount by 50 per cent where it attends the appointment on the same day with the end-user's consent, despite missing the appointment window for the service level. NBN Co will pay the rebate automatically without requiring the RSP to submit a claim for it.

- 3.46 The ACCC now holds the view that:

While NBN Co's proposed access arrangements for the first missed appointment is less than the \$75 proposed in the draft decision, we consider it is a closer reflection of the harm than the current \$25 rebate. Additionally, NBN Co's proposed access arrangements provides a new incentive to attend appointments on the same day if it misses the service and it is convenient to the end-user. We consider that while this option adds some complexity, it could also result in better outcomes for end-users. Consistent with the draft decision, RSPs would also be required under the WBA to take reasonable

⁶ ACCC, NBN Wholesale Service Standards Inquiry Position Paper, April 2020, p. 11.

steps to ensure that they pay or credit missed appointment rebates to the relevant consumer.⁷

- 3.47 Essentially under NBN Co's approach an end-user will receive:
- (a) \$50 for a first missed connection or fault appointment, but, only \$25 if NBN Co attends that same day and the end-user consents to NBN performing the end-user connection, Professional Wiring Service or fault rectification activities at a time other than the required time under the relevant service level; and
 - (b) \$75 for a subsequent missed connection/fault appointment, but, only \$37.50 if NBN Co attends that same day and the end-user consents to NBN performing the end-user connection, Professional Wiring Service or fault rectification activities at a time other than the required time under the relevant service level.
- 3.48 Optus understands this to mean that if NBN misses the appointment but then turns up later that day and gets the end-user to agree to performance of the works outside of the service window then the end-user is only entitled to half of the rebate.
- 3.49 It is not clear how this would work in practice. Optus is concerned that while there may be some benefits to consumers, depending on how this is executed, it may also lead to poor consumer experience. Optus's observations and concerns are:
- (a) Given NBN Co's appointment windows, it is likely only missed morning appointments could also be done on the same day.
 - (b) Optus would have concerns if technicians turned up to end-users' premises late at night seeking to take advantage of this process. It is unclear if NBN Co would be in contact with the end-user to advise they will be missing the appointment but can attend later in the day and make an alternative time or if the RSP will need to be in contact with the end-user. Optus would prefer if there was some clear guidance, timeframes or parameters around contact with end-users and when technicians will seek to perform the missed appointment on the same day.
 - (c) Optus also has concerns if technicians have incentives to perform same day follow up for missed appointments as this could lead to technicians applying undue pressure on end-users (particularly if it is a vulnerable end-user) to undertake the appointment at an inconvenient time. While we note this is not the majority of technicians, we are aware of instances where technicians have caused poor customer experiences by not following proper practices or procedures.
 - (d) Optus requests further clarification on how an end-user (or end-user's representative) would give consent as required by the proposed arrangements and how that consent would be recorded. Optus is concerned that end-users may not understand what they have consented to.
- 3.50 Based on the current level of detail, Optus is not confident that this proposed process could be implemented. There should be serious consequences for technicians if they were to unduly pressure or mislead customers.

⁷ ACCC, ACCC inquiries into NBN access pricing and wholesale service standards - Consultation paper, August 2020, p. 20.

- 3.51 In addition, Optus is not convinced that the proposed rebate amounts (including \$25 where NBN Co attends on the same day) adequately compensates end-users for the inconvenience or cost incurred.
- 3.52 Optus recognises there could be benefits to consumers as a result of this process as it would mean a consumer may not have to reschedule their NBN appointment for another day and could ensure a service fault is rectified more quickly.
- 3.53 However, Optus would like to see more detailed operational guidance that discusses the concerns we raised above around this process before Optus could support this process.

Underperforming service speed rebates

- 3.54 In relation to underperforming service speeds, the ACCC has focussed on three elements:
- (a) Provision of information (particularly for services with technological limitations);
 - (b) Speed performance rebates and
 - (c) PIR objective rebate
- 3.55 These are discussed further below.

Speed performance information FTTN/B/C services

- 3.56 In the April position paper the ACCC commented that it is important for NBN Co to provide timely and reliable service speed information to RSPs to enable them to advise customers on service speed expectations and suitable retail products given capabilities of their line.⁸ However, the draft FAD did not include specific terms of this nature for fixed line services and the ACCC sought further information on initiatives undertaken by NBN Co.
- 3.57 NBN Co's proposed access arrangements includes the provision of a daily line rate report and weekly speed reports available to RSPs through its 'service health' platforms and application programming interfaces (APIs) to help RSPs manage service speeds post connection. This creates a Historical Supported Speed (HSS) and a minimum assured speed (assured rate) which is then available for subsequent connections on the line at the time an RSP runs a service qualification prior to placing a new connection order.
- 3.58 In the ACCC's August consultation paper, the ACCC has again noted its support for NBN Co to provide accurate and timely speed information. The ACCC also considered NBN Co's introduction of the HSS baseline and the incorporation of this data into its service qualification system is a significant improvement and resolves speed information concerns for services that have been connected to the NBN. The minimum assured speed also serves to clarify service speed commitments. The ACCC is seeking stakeholder views on NBN Co's new approach on speed performance information.
- 3.59 Optus is still waiting for further information about NBN Co's proposed Dynamic SQ process. The Dynamic SQ process is currently under trial and we understand not all RSPs have signed up (or are participating) in the trial. Information is only shared to participants in the trial. Optus notes that understanding the Dynamic SQ process may also be relevant to the operation of the proposed PIR objective.

⁸ ACCC, NBN Wholesale Service Standards Inquiry Position Paper, April 2020, p. 16.

- 3.60 In general, Optus' view is that it is a better customer experience if information is available at point of sale that will confirm the customer's line capability. This way a customer can make an informed decision about the plan best for them.
- 3.61 However, our understanding so far is that NBN Co's Dynamic SQ process may have some limitations and may only present a large range to the RSP (e.g. 45Mbps – 65Mbps) regarding the customer's line capability. In this case, consideration will have to be given as to processes and policies an RSP implements to ensure it acts consistently with the Australian Consumer Law and the Broadband Speed Claims guidance.
- 3.62 Further, it's not clear if NBN Co will proactively provide updated line information where an area comes out of co-existence as part of these obligations. Optus considers that where NBN Co is proactively able to determine this information it should then provide updated information to RSPs.
- 3.63 It is difficult to make a judgment as to the adequacies of this information when there are still a number of unknowns about this information.

Speed performance rebate

- 3.64 In the April position paper, the ACCC noted that for fixed line services, a speed performance rebate of \$20 per month balances a number of factors, including the potential financial impact on NBN Co, fixed line bundled product prices, implementation costs and efficiencies. A flat rebate amount avoids complexity in the rebate structure.
- 3.65 In accordance with the draft FAD, the ACCC's view was that there should be no obligation on an RSP to first lodge a Trouble Ticket for NBN Co to investigate and resolve an underperformance issue on its network. This is because the LTIE is best served by the quick resolution of underperforming issues by the party best placed to resolve them. The ACCC considered this is because NBN Co has access to all relevant information concerning the performance of its network, it is best placed to monitor, investigate and resolve speed issues.
- 3.66 Under NBN Co's proposed access arrangements a speed performance rebate is not payable where the RSP knows at the time of order the maximum speed the line is capable of, as well as the minimum assured rate.
- 3.67 However, where speed performance information is not available to the RSP via NBN Co's service qualification system at the time of placing a connection order, or that information proves to be inaccurate, NBN Co will provide a once-off \$20 rebate to the RSP if the line achieves lower than 50 per cent of the high end of the 25-50 Mbps or 25-100 Mbps bandwidth profiles selected by the RSP.
- 3.68 NBN Co proposes to provide a rebate on a once-off basis for the purpose of compensating the RSP for their costs of managing the customer in accordance with the ACCC Broadband Speed Claims Guidance. Accordingly, NBN Co has not proposed a pass-through requirement for this rebate.
- 3.69 The ACCC considers that
- ...the availability of accurate and timely information on service speeds and capabilities by NBN Co will support RSPs in the marketing and sale of the most appropriate product to an end-user, relative to what their connection can support. Where RSPs are able to make informed choices when purchasing wholesale service products with respect to a line's speed capabilities, remedies such as the speed performance rebate proposed by the ACCC in the draft FAD and position paper may not be appropriate where the service does not perform in accordance with the ordered product. We note that the one-off

speed performance rebate that is proposed by NBN Co is the same amount as that proposed in the draft FAD and position paper and that RSPs would be able to adjust wholesale service products that underperform. We welcome stakeholder views on NBN Co's new proposal with respect to the speed performance rebate and availability of HSS information.⁹

- 3.70 Optus notes that NBN Co is proposing to remove the previous proposal that NBN Co have the right to downgrade a customer's speed tier itself. Optus supports NBN Co not having the right to downgrade a customer's speed tier. Ultimately there should be flexibility and discretion for a customer to remain on a speed tier and if that enables the customer to achieve the maximum speed their line is able to achieve if the customer wishes. Optus notes the ACCC has also previously acknowledged that customers may simply want to stay on their plan (even where a downgrade is possible) because they want to achieve the best speed they can.
- 3.71 Optus notes the concerns it raises above about information still not known about the Dynamic SQ process. It is not clear if there will be further refinement to NBN Co's processes over time.
- 3.72 Optus notes RSPs have had to put in place processes to ensure compliance with the Australian Consumer Law and the duplicative ACMA's line capability requirements (in the Service Migration Determination). That is, where NBN Co is not able to provide accurate line speed information to RSPs prior to the customer's line being connected to the NBN. In those cases Optus considers it appropriate for there to be a rebate as RSPs must take action and provide options to end-users to address the fact the customer did not have full information about the potential speed their line could achieve (and therefore which plan may appropriate to them) when ordering their service.
- 3.73 NBN Co has also proposed a PIR objective rebate to address potential ongoing performance issues (discussed further below).

PIR objective rebate

- 3.74 In relation to the PIR objectives, NBN Co is proposing a graduated rebate for each month the service achieves less than the PIR Objective (downlink), depending on the number of months the service has been in remediation. This rebate is proposed as \$10 for months 0-3, \$15 for months 4-6 and \$20 per month after 6-months, backdated to the time the trouble ticket that initiated the remediation process was acknowledged. Automatic application of a rebate for services that are in remediation would ensure that there are financial incentives for NBN Co to deliver on the minimum speed requirements it has committed to within the WBA.
- 3.75 The ACCC notes that the rebate is initially less than the rebate amount proposed in the draft FAD and position paper but accept that the escalation would provide incentives to NBN Co to investigate and resolve remediation cases in a timely manner.
- 3.76 Optus has some concerns with what is proposed for the PIR objective rebate and process. This includes:
- (a) That when the PIR Objective Rebate comes into effect in WBA4, RSPs have to lodge a trouble ticket before NBN Co will action underperforming lines.
 - (b) That WBA drafting and related materials do not clearly explain the threshold criteria that NBN Co will use to reject or accept a fault ticket for PIR Objective

⁹ ACCC, ACCC inquiries into NBN access pricing and wholesale service standards - Consultation paper, August 2020, p. 21.

underperformance and where NBN Co will proceed with Network Activity (remediation).

- (c) It is unclear how effective the PIR Objective rebate would be in providing incentives for NBN Co to address underperformance.
- (d) It is also unclear whether NBN Co will provide updated information about line capability and whether services are achieving their PIR objectives where areas come out of co-existence.

3.77 These points are discussed further below.

3.78 In relation to (a) above, Optus notes that NBN Co can proactively determine which lines are underperforming as it has this information available where underperformance identification is based on NBN Co's own criteria (the new daily line rate and information rate reporting). Optus considers NBN Co should automatically log these faults itself on TC-4 services where it is able to identify that services are underperforming against the PIR Commitment.

3.79 However, Optus notes that NBN Co has not proposed to pay this rebate in cases where NBN Co proactively creates a remediation case but a fault is not logged by an RSP. Optus considers that in circumstances where there is an underlying technical deficiency with the network's performance NBN Co should be required to pay a rebate regardless of which party identifies the problem. As the operator of the network, NBN Co is the party that determines when a premises is serviceable and is responsible for network performance.

3.80 In relation to (b) above, at this stage the WBA drafting does not clearly explain the threshold criteria that NBN Co will use to accept or reject a Speed/Remediation Fault for PIR Objective underperformance and proceed with Network Activity (remediation). It's unclear if a Trouble Ticket will be accepted just based on the defined PIR Objectives or if there will be other criteria taken into account. Further, RSPs are still waiting for further information relating to the information that will be provided regarding line performance which is also relevant to the PIR Objective Rebate. Optus understand this information will be contained in the Service Health Summary and are still expecting further drafting and engagement with NBN Co over what if any definitions or relevant terms may be included in WBA4.

3.81 In any case, in relation to (c) above, the above points mean it is unclear how effective the PIR objective rebate could be in providing incentives for NBN Co to address underperforming services. The proposed rebates may not be as effective as anticipated, for example, if cases are rejected because thresholds are low for FTTN services in co-existence areas or if NBN Co considers there are in-home wiring issues.

3.82 It is also unclear (point (d) above) whether NBN Co will provide updated information about line capability and whether services are achieving their PIR objectives once areas are no longer classed as being subject to co-existence. Processes related to co-existence and the impact if/when services are no longer classed as being in co-existence will likely become an increasingly important issue. Once co-existence has lifted NBN Co should be required to provide updated information to RSPs about whether services are achieving their PIR Objectives.

3.83 Overall, whether there are any real incentives on NBN Co to address ongoing underperformance of lines depends on the defined PIR Objectives themselves. Under the current WBA, NBN Co only commits to a PIR Objective of:

- (a) 12/1Mbps (for the 12/1/ speed tier) and 25/5Mbps (for all other speed tiers) for FTTB/C services; and

- (b) 12/1 for all FTTN services in co-existence (if there is no co-existence then 12/1 for the lowest speed tier or 25/5 for all other speed tiers).
- 3.84 The concern is there are still around an estimated 70% of FTTN/B lines in co-existence in August 2020. Therefore, for the majority of FTTN lines, remediation and the PIR Objective may only be available if the line is achieving less than 12/1Mbps.
- 3.85 In addition, Optus understands NBN Co can also reject a trouble ticket if it believes there is an in-home wiring issue. Optus is concerned that RSPs will be expected to assume responsibility for in-home wiring.
- 3.86 Given the vagueness of the arrangements and the low PIR commitments it is difficult to see how this will provide robust incentives to NBN Co to address underperforming lines regardless of whether the rebate escalates over time or not. It's unclear what percentage of lines will actually benefit from the escalating rebates.
- 3.87 In a situation where a customer chooses a 50/20 plan but subsequent information shows the customer's line is capable of achieving 45Mbps/10Mbps, the RSP must comply with the ACL, Broadband Speed Claims guidance and ACMA line capability requirements and provide the customer with the information about what their line can support and options. The customer may be happy to stay on their plan and achieve the maximum speed available, but, Optus notes that the line would not be considered underperforming having regard to NBN Co's PIR objectives and we understand the service would not be eligible for remediation or the PIR Objective rebate.
- 3.88 Optus understands any FTTN service in co-existence achieving a PIR objective above 12/1 would not be considered underperforming, would not be eligible for remediation and would not be eligible for the PIR Objective rebate. We note the Service Health Summary contains a number of different measures, and it's not clear at the time of drafting which of these will be relevant to determining if the PIR Objective is being met. Further, it is not clear that once co-existence is removed whether NBN Co will be providing updated information on the service's performance. Without minimum performance standards or robust incentives in place for NBN Co to address poor performing services consumers will continue to be short-changed on their high speed broadband.

Consumer safeguards

Customer service guarantee and Priority Assistance

- 3.89 NBN Co's proposed access arrangements include a simplified calculation and claims process for CSG compensation. This should help to facilitate RSP claims where NBN Co has contributed to the RSP's CSG liability to the consumer.
- 3.90 The ACCC also acknowledges that NBN Co's proposed rebate framework for delayed connections and unresolved faults features greater rebate amounts for PA customers than non-PA customers. The higher rebates should provide incentives to resolve connections and faults for PA customers that complement operational processes that prioritise those consumers.
- 3.91 Optus supports changes put in place to simplify CSG claims processes.

Adapting to new or changing consumer safeguards

- 3.92 NBN Co has proposed changes to two clauses that deal with how the WBA may respond to changing regulations.
- (a) Clause F4.8 would be amended to allow NBN Co to change the WBA where it is necessary to comply with any applicable law or 'reasonably necessary or

desirable to comply with, respond to or is otherwise required by a Regulatory Event, but giving as much notice as is reasonably practicable' of that change to wholesale customers (proposed insertion is underlined); and

- (b) Clause F3.2(c) is proposed to be inserted which would provide that NBN Co will conduct a consultation in accordance with the WBA if each of the following is met:
- (i) The proposed change to the agreement relates to a regulatory event which has occurred within 6 months before the wholesale customer's proposed change; and
 - (ii) The wholesale customer has notified NBN Co that they consider, acting reasonably, that it will be unable to comply with an obligation imposed under an applicable law as a result of that Regulatory Event and comply with the WBA, unless the WBA is changed
- 3.93 In relation to the proposed changes to clause F4.8, Optus does not support NBN Co's proposed change and considers that the existing wording is adequate. The proposed change provides NBN Co with significant discretion as to whether, how and to what extent NBN Co changes the WBA. Clause F4.8 seems focussed on ensuring that NBN Co's interests are protected without taking into account its wholesale customers' interests. Further, the proposed reference in the clause that would allow NBN Co to 'respond to' a Regulatory Event is vague and unclear.
- 3.94 Optus could only support proposed changes to clause F4.8 if the changes were limited to those only where the change is beneficial to, and has no adverse effects on, NBN Co's wholesale customers.
- 3.95 The ACCC notes the proposed inclusion of Clause F3.2(c) would provide RSPs with a contractual commitment to conduct a four week consultation period with RSPs with respect to potentially changing the WBA if a regulatory event occurs and the RSP identifies that they cannot comply with an obligation imposed under an applicable law as a result of a regulatory event and comply with the WBA, unless the WBA is changed
- 3.96 However, Optus considers that as drafted, this clause is unreasonable. This is because:
- (a) The 6 month time limit is unreasonable. It may only be some time after implementing new requirements does an RSP determine that there is a gap or deficiency in WBA arrangements. Further, it may not be known how the regulator will interpret new regulations within the first 6 months.
 - (b) Whether the WBA allows RSPs to 'comply' with a regulation is a different matter than whether risk and responsibility is spread appropriately across the industry. For example, under the current ACMA service continuity obligations if a customer experiences a connection issue and their legacy service has been disconnected, then the RSP must provide options to the customer (e.g. interim service or alternative arrangement) if the issue is not resolved within 3 working days, regardless of whether the RSP is responsible for the legacy service disconnection or the delay in the connection issue being resolved. But NBN Co's connection service levels do not support this (where the connection issue happens prior to NBN Co providing the RSP with completion advice notice of a successful migration). Because connection service level timeframes within the fixed line footprint can be up to 14 business days (without even applying the exceptions available or stopping the clock) NBN Co could still meet its service level timeframe, not have to pay a rebate, yet the RSP has had to provide an option/remedy to the consumer.

- 3.97 In these cases risk and responsibility is not spread across industry because an RSP is able to 'comply' with retail obligations yet there are no requirements for NBN Co to reimburse the RSP those costs of complying because it has 'met' the service level timeframes.
- 3.98 Approaching changes in consumer safeguards when considering whether the WBA needs to be changed to allow RSPs to comply is simply the first step, but, it is not the only step in ensuring there are appropriate obligations in place across industry as a whole to deliver the desired outcomes of consumer safeguards.

Pass-through of wholesale rebates to consumers

- 3.99 The ACCC agrees with the principle that consumers should be compensated where they have suffered a detriment due to poor performance of the NBN. However, with the exception of missed appointment rebates, the ACCC did not propose to include a provision within the wholesale terms requiring general pass through of rebates to consumers.
- 3.100 The ACCC noted that pass-through terms within NBN Co's wholesale contract would have several drawbacks. The ACCC's primary concern was that a general pass through requirement may limit the ability of RSPs to offer differentiated remedies to customers in cases of poor experience. Additionally, as a term within the wholesale contract, NBN Co would be put in the position of 'policing' RSPs compliance with the pass-through terms.
- 3.101 The ACCC considered that if there were to be stronger requirements, this is likely to be best achieved through direct retail regulation (by the ACMA) rather than wholesale arrangements.
- 3.102 The ACCC noted that NBN Co proposes to consult with RSPs to develop guidance on what constitutes 'fair value' pass-through. This recognises that some RSPs offer remedies that mitigate the impact of service faults, such as offering back-up services to ensure consumers remain connected.
- 3.103 NBN Co has not proposed RSP pass-through requirements for the FTTN/B/C speed performance rebate on the basis that the purpose of the rebate is to compensate the RSP for their costs of managing the customer in accordance with the ACCC Broadband Speed Claims Guidance.
- 3.104 Optus considers that rebates can serve two purposes:
- (a) Compensate those who have suffered loss or harm as a result of NBN Co's performance; and
 - (b) Provide incentives to NBN Co to improve their performance.
- 3.105 Optus considers that both RSPs and end-users can suffer harm and loss as a result of NBN Co's poor performance.
- 3.106 Optus considers that where RSPs are required by retail regulations to offer remedies to customers for poor NBN experiences, RSPs should also be compensated for losses they incur. In particular, as regulations are imbalanced and obligations are stricter at the retail level than in the WBA, there will likely be instances where an RSP may have to offer an end-user a remedy even though the RSP is not responsible for the end-user's issue and the end-user's service is not eligible for a rebate. In that case the RSP bears the cost of providing a remedy to the consumer on their own.
- 3.107 At the time of writing this submission NBN Co had provided initial draft guidance to RSPs in relation to fair value benefit.

- 3.108 Optus agrees with the ACCC's comments that pass through is complex. Pass-through requirements can raise the following concerns:
- (a) That RSPs will be limited in their ability to offer differentiated remedies to consumers.
 - (b) That RSPs will not receive any (or insufficient) compensation for costs they incur in addressing consumer issues that are not the fault of the RSP.
 - (c) NBN Co ends up 'policing' what RSPs offer consumers.
- 3.109 Optus supports a principles-based interpretation of fair value benefit, but, Optus does not consider that NBN Co's initial draft appropriately reflects a principles-based interpretation of fair value benefit.

Fixed Wireless services

Wireless service speed information

- 3.110 NBN Co proposes to commit to providing fixed wireless backhaul reporting on a similar basis to the voluntary reporting it has been providing for the past year. In respect of its congestion reporting, NBN Co proposes that WBA4 terms allow for the development of an improved metric. It has also flagged that it is investigating the provision of granular, regularly updated visibility of actual service performance to RSPs.
- 3.111 Optus supports better reporting in relation to fixed wireless congestion.

Wireless speed performance rebate

- 3.112 NBN Co's proposed access arrangements includes a rebate of \$20 for each month that an Ethernet (Wireless) AVC TC-4 product is persistently congested during that month. A cell is persistently congested where its performance falls below NBN Co's 6 Mbps design standard, and for backhaul congestion, where the backhaul links operate below NBN Co's backhaul metric (i.e. where the link operates with average packet loss of 0.25 per cent or greater).
- 3.113 This is consistent with the approach proposed by the ACCC in its April Position Paper.
- 3.114 Optus supports the approach the ACCC adopted in its April Position Paper.

Service information and operational matters

Availability of operational service information

- 3.115 NBN Co currently provides RSPs with 'near to real time' connect order and incident progress information. NBN Co's proposed access arrangements includes a commitment to provide RSPs with service level activity outcomes and exclusion data and reporting via the Service Portal and business-to-business (B2B) APIs.
- 3.116 The ACCC considers that improvements to automated IT systems are consistent with the RSP requirements to be able to manage consumer services.
- 3.117 NBN Co has made some improvements in availability of information and Optus continues to engage with NBN Co via service governance and operational processes on such matters.

Service level measurement and exclusions

- 3.118 NBN Co's proposed access arrangements lists the circumstances under which measurement begins, ends, and the circumstances where it may be paused. NBN Co has set out a revised comprehensive set of exclusions in its proposal.
- 3.119 Overall, the ACCC considers that improved reporting commitments and IT capability to provide operational information in a more timely way and clarity about when NBN Co may 'stop the clock' on measuring its performance against a service level, will provide RSPs with greater confidence in the NBN Co's operational practices.
- 3.120 Optus notes there still remain a large number of exclusions and conditions attached to calculating service level timeframes allowing NBN Co to 'stop the clock' on service levels. This means that customers can still experience delays in having their issue addressed but the service may not be eligible for a rebate.
- 3.121 This continues to create disparity between wholesale obligations and retail obligations where there are strict timeframes or requirements as part of the retail regulations.
- 3.122 Optus understands why there are exceptions and conditions regarding service level measurement in NBN Co's WBA where matters may not be within NBN Co's control. However, RSPs have not been afforded similar flexibility in relation to retail regulations where matters may be outside of the control of an RSP. As such, this can mean the allocation of risk and responsibility is not appropriately balanced in industry.
- 3.123 The relationship between wholesale obligations and retail regulation has been raised throughout a number of processes over the past three years and presents a challenge to industry, policy makers and regulators going forward.

Reporting of service level metrics

- 3.124 NBN Co has proposed to adopt all changes proposed by the ACCC except where aggregating reporting results in NBN Co disclosing confidential information of an RSP.
- 3.125 Optus will continue to engage with NBN Co as part of service governance processes in relation to reporting.