

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

Submission in response to
ACCC Second Discussion
Paper

**NBN wholesale service
standards**

Public Version

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Section 1. EXECUTIVE SUMMARY

- 1.1 Optus welcomes the opportunity to provide further comment to the ACCC as part of its inquiry into NBN Wholesale Service Standards.
- 1.2 The key focus of this inquiry should be to ensure that NBN Co's wholesale service standards support good consumer experience through timely resolution of issues, and by supporting RSPs in meeting their retail obligations. An effective service level framework should be robust, transparent and with real consequences for poor performance; such that these provide an incentive to address issues and drive improvements.
- 1.3 Optus submits wholesale regulatory intervention is required. Such intervention should be guided by the following principles:
 - (a) Safeguards need to be directed at the party who is best placed to address the issue.
 - (b) Ensuring that any retail obligations are supported by wholesale arrangements. This is critically important in the context of a vertically separated market structure.
 - (c) Ensuring there is adequate overall coordination to ensure that good customer outcomes are achieved across the supply chain.
- 1.4 These principles have been advocated by the ACCC and are supported by most, if not all, RSPs. They should form the basis of the proposed wholesale SLAs. Importantly, and consistent with the views of the ACCC, Optus supports the introduction of back-to-back obligations that flow from consumer-centric outcomes down the vertical supply-chain to clear obligations on the wholesale network provider.
- 1.5 To that end, Optus supports clear and simple overarching wholesale obligations that mandates NBN Co:
 - (a) Delivers services that are capable of meeting the minimum services levels required by retail standards (that is 50 Mbps services only available on lines that can support 50 Mbps speeds);
 - (b) Cannot charge for a wholesale service which RSPs are not permitted to charge end-users;
 - (c) Develops automated processes that support retail speed testing and service continuity obligations; and
 - (d) Is liable for costs incurred by RSPs as a result of non-working NBN services, where the fault lies with NBN Co.
- 1.6 Optus provides more detailed comments on specific SLAs below. However, given the size and complexity of NBN Co's wholesale agreements, we submit it would be more efficient and effective for the ACCC to focus on simple back-to-back principles which, if are not met, result in meaningful penalties on NBN Co.
- 1.7 ACCC should adopt the overarching principles outlined above in a regulatory instrument, and mandate that terms and conditions are only valid insofar as they are consistent with the overarching principles.

Section 2. OVERARCHING PRINCIPLES

- 2.1 Optus submits that regulatory intervention is required for wholesale service levels to support retail outcomes and ensure end-users receive better outcomes. The need for direct wholesale intervention in the fixed-line market is largely due to the vertical separation of the market into a monopoly wholesale access layer and a competitive retail layer.
- 2.2 Vertical separation of the fixed-line industry has some clear competition benefits but can present new challenges to the effective delivery of network standards. No longer can consumers rely upon integration between network and retail businesses to ensure market incentives flow through to the necessary network standards.
- 2.3 It can already be observed during the transition to a separated structure that this has led to the wholesale-only network provider not always being responsive to the needs of retail customers.

Overarching principles for wholesale standards

- 2.4 Optus observes that the Department of Communications (the Department) is undertaking a review of the consumer safeguards in the fixed-line market concurrently with this inquiry into NBN Co Wholesale SLAs. Both of these inquiries touch on similar issues.
- 2.5 In response to the Department's consultation, the ACCC has proposed the following principles should guide regulatory safeguards for communications markets:
 - (a) Safeguards need to be directed at the party who is best placed to address the particular issue.
 - (b) Ensuring that any retail obligations are supported by wholesale arrangements. This is critically important in the context of the changed market structure.
 - (c) Ensuring there is adequate overall coordination to ensure that good customer outcomes are achieved across the supply chain.¹
- 2.6 Optus agrees with these principles. In fact, the principles above largely reflect the views in Optus' and many other RSPs' submissions to the Department. This view also reflects Optus' submission to the 2018 discussion paper.
- 2.7 It is important that the ACCC give effect to these principles in this current inquiry.

Back-to-back regulation is required

- 2.8 One of the key outcomes required is for wholesale processes to fully support retail consumer obligations. Market experience demonstrates that relying on commercial agreements between NBN Co and RSPs has not delivered the appropriate back-to-back processes required to deliver good customer outcomes. The view has been accepted by the ACCC:

Applying such safeguards in a similar way to the RSPs are unlikely to be effective in an NBN context without appropriate consideration of NBN Co's

¹ ACCC, 2019, Submission to Part B of the Consumer Safeguards Review – Reliability of services, p.3
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responsibilities in the supply chain and the imposition of appropriate safeguards at the wholesale level.²

- 2.9 Optus submits that the key objective of this SLA inquiry should be to ensure rules are in place to deliver obligations at the wholesale level that align with the above principles.
- 2.10 Optus has previously submitted to this inquiry that wholesale service standards should focus on promoting customer outcomes; and that there be appropriate incentives on NBN Co to achieve their service levels. Neither exist under the current contractual arrangements. Optus submitted:
- In the NBN environment, RSPs remain responsible for managing the customer relationship and fulfilling contractual and retail regulatory obligations. However, RSPs' ability to comply with retail obligations is largely dependent on the actions of, and information provided by, the network operator, NBN Co. Importantly, NBN Co are not subject to corresponding regulatory obligations – and have no commercial obligations to support RSPs to meet these retail requirements.³*
- 2.11 These views remain relevant. Optus welcomes the ACCC's support of back-to-back regulation through the imposition of appropriate safeguards at the wholesale level. Optus submits that any wholesale standards should be informed by consumer outcomes. Putting the consumer first should be the key test as to whether any wholesale obligations should be adopted.
- 2.12 To that end, we observe that the ACCC has published its views on consumer retail safeguards, including that:
- (a) Consumers should not be billed when they do not have a working service;⁴
 - (b) RSPs should also remain liable to be compensation for non-working services;⁵
 - (c) Consumers should get the service that they pay for.⁶
- 2.13 Optus submits these consumer outcomes are non-controversial, and consistent with the views of most RSPs. Adopting wholesale obligations that support these consumer outcomes would result in material improvements in the fixed-line market.
- 2.14 Importantly, Optus agrees with the ACCC that rules should target the right vertical segment of the market and that there should be suitable coordination to ensure that good customer outcomes are achieved across the supply chain.
- 2.15 The outcomes listed above should also apply to the wholesale provider – this is especially the case where the RSP is reliant on the wholesale provider for the network and services which the RSP re-sells.
- 2.16 The principles outlined by the ACCC in its submission to the Department's inquiry into consumer safeguards should form the base level intervention proposed in this inquiry.
- 2.17 The set of commercial documents that govern the wholesale relationship between NBN Co and RSPs is large and complex. The timeframe of this inquiry reflects this

² ACCC, 2019, p.1

³ Optus, 2018, Submission in response to ACCC Discussion Paper NBN wholesale service standards, para.2.17

⁴ ACCC, 2019, p.4

⁵ ACCC, 2019, p.4

⁶ ACCC, 2019, p.5

complexity. Optus is concerned that it may not be feasible to review, and where required, propose regulatory alternatives, on a clause by clause basis – or even on an issues by issues basis.

- 2.18 Optus' experience with negotiating with NBN Co on even 'simple' changes to agreements is that there are often technical legal drafting or other implementation issues which lead to practical outcomes different from that original intended. **[CIC]**
- 2.19 Optus is concerned that this experience is likely to repeat itself under any scenario where regulatory intervention is approached on a clause-by-clause basis. Even if such drafting could be achieved, the timeframe required would likely result in regulatory action missing the WBA4 window, and therefore would render intervention ineffective.
- 2.20 However, this could be overcome by adopting the overarching principles outlined above in the regulatory instrument, and by giving these principle hierarchy over detailed terms and conditions. That is, terms and conditions are only valid insofar as they are consistent with the overarching principles.

Timing of final decision

- 2.21 We remain concerned how the issues identified through the course of this inquiry will be addressed in a timely fashion to have a real impact on consumer experience for the remainder of the rollout. **[CIC]**

Section 3. THE SERVICE LEVEL FRAMEWORK

- 3.1 The above section outlines a proposed approach which sets overarching obligations and requiring that detailed terms and conditions are only valid insofar as they are consistent with the overarching principles. Optus suggests this is the most practical way forward giving the tight timeframes to finalise this inquiry before WBA4 is finalised in November.
- 3.2 The following sections look at the detailed clauses in more detail, consistent with the structure of issues in the further consultation paper.
- 3.3 This section looks at the framework for service levels. Specifically:
- (a) Adopting appropriate service level thresholds;
 - (b) Structure of service level rebates;
 - (c) Implementation of NBN Co's s.87B Undertaking.
- 3.4 In addition to these comments, we refer the ACCC to our March 2018 submission which addressed these issues in more detail.

Service level thresholds

- 3.5 Optus submits that any service level regime should include robust and challenging objectives with strong and clear consequences for failure that encourages a right first-time approach.
- 3.6 At this stage of the rollout we expect NBN Co to be more responsive to addressing consumer experience issues. NBN Co should address deficiencies with existing service performance and improve the connection experience, notwithstanding the ambitious rollout targets it has set itself.
- 3.7 We continue to be concerned that there are ongoing consumer experience problems, particularly with connections. We consider the proposed change to connection and fault rectification performance objective to 100% (instead of 90%) in NBN Co's s.87B Undertaking is a step in the right direction; but that there should also be measures to address aged fault tickets and delayed connections.
- 3.8 We consider other performance objectives should be reviewed to ensure these are set at appropriate levels. The proposed rebates for missed appointments as part of NBN Co s.87B Undertaking (while necessary given the scale of missed appointments)⁷ could encourage more rescheduling of appointments. While this is not as poor an experience for a consumer as a missed appointment, it is still not a good experience. Therefore, there should be objectives regarding rescheduling of appointments to reduce the likelihood of repeated rescheduling.
- 3.9 There should be stronger performance requirements to address existing underperforming services, instead of just focussing on adding new connections. Current performance of existing services can be patchy, yet it can be difficult to raise a remediation request for FTTN/B/C services given the low service performance objectives

⁷ See "NBN Co technicians missed 430 appointments a day" <https://www.itnews.com.au/news/nbn-co-technicians-missed-430-appointments-a-day-516824>
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NBN Co has set itself (during co-existence and afterwards). Further, service performance objectives do not exist for fixed wireless services.

- 3.10 Such measures would also assist RSPs in meeting their retail obligations. Ensuring a good consumer experience at the retail level is only achievable where retail obligations are supported by wholesale commitments. This is true for performance and line capability requirements, reliability of services, resolution of faults and completion of connections in a timely fashion, and to provide information about service performance at point of sale.
- 3.11 A service level framework should be transparent with visibility over how outcomes are measured. Currently, it is not always clear, for example, what conditions or criteria have been applied to determine that a service level has been met. To try and determine whether a service level has been met and why the service level clock has been paused, or stopped, requires examining three different reports from NBN Co. If it is still unclear after reviewing reports clarifying instances with NBN Co is manual, resource intensive and time consuming.
- 3.12 Changes in the WBA to address consumer experience should involve RSP consultation and acknowledge implementation cost to RSPs. We note there have been issues with the proposed implementation of measures in NBN Co's s. 87B Undertaking that have delayed Optus' sign up to NBN Co's proposed variation agreement. Addressing consumer experience issues requires input from both NBN Co and RSPs. Unilateral changes by NBN Co to address consumer experience issues that cannot be implemented by RSPs do not benefit consumers.
- 3.13 We also believe the best way to hold NBN Co accountable is for NBN Co to be subject to transparent independent oversight. Quality of service monitoring regimes have been imposed on other regulated industries where quality of service has been a concern. Telstra used to be subject to key performance indicator regime to see if it was favouring its own retail unit over other RSPs. Airports have also been subject to quality of service monitoring. The ACCC could impose a quality of service record keeping and reporting rule to provide additional transparency and accountability.
- 3.14 NBN Co could be required to report on real world experience, rather than a high-level overview of whether a service level is met. An example of this is the current dashboard reports on how NBN Co has met service level timeframes for connections (excluding accelerated or priority assistance connections). This number has decreased for the quarter to January 2019, below a reasonably consistent level during 2018.⁸ However, this number does not reveal the longest connection delays faced by consumers, whether this was caused by matters such as an infrastructure shortfall or whether there is one particular area or technology type that has contributed to this poorer performance.

Structure of service level rebates

Rebates should address aged faults and connections

- 3.15 Optus provided extensive comment in its initial submission and subsequent engagement with the ACCC on our concerns regarding the apparent lack of incentives for NBN Co to address aged faults or connections. This is because there was no accruing rebate

⁸ Performance during 2018 ranged from 93-97%, then dropped to 87% for January 2019. See NBN Co dashboard summary <https://www.nbnco.com.au/corporate-information/about-nbn-co/updates/dashboard-january>

structure and once a service level timeframe was missed there was no incentive for NBN Co to address the issue in a timely fashion.

- 3.16 The ACCC noted in its consultation paper that aged orders and trouble tickets are likely to represent the worst individual cases of customer experience. The ACCC states it sees strong merits to the suggested model of a daily rebate to provide additional incentives for timely connections and fault rectification, and to ensure appropriate management of consumer experience in these cases.
- 3.17 Optus supports a rebate structure that includes a daily rebate to provide greater incentives for NBN Co to resolve connection and fault issues in as timely a fashion as possible, even where the service level timeframe has been missed.
- 3.18 This could also support RSPs in meeting obligations where there is an absence of corresponding obligations on NBN Co. For example, under the ACMA's Service Continuity Standard an RSP must "take all reasonable steps to ... expedite the supply of an operational NBN service to the consumer".⁹ However, there is no corresponding obligation on NBN Co to expedite the supply of an operational NBN service. NBN Co is only required to provide reasonable assistance to the RSP upon the RSP's request, to assist the RSP in complying with that obligation.¹⁰
- 3.19 The installation of NBN infrastructure to connect a premises to the NBN is the responsibility of NBN Co. It is NBN Co's responsibility to install local infrastructure, ensure it has appropriate capacity and undertake any infrastructure work at the premises. Once an order is placed, the RSP's role is usually limited to arranging an appointment with a customer if required, sending out any CPE and final activation of a service.
- 3.20 An RSP has little control over the availability of NBN appointments. Further, connection delays can occur if there has been an addressing error, infrastructure shortfall, or service class mis-classification. In these cases, the RSP is not aware there is a problem until NBN Co provides notification and an order goes into held status. There is little an RSP can do to address the issue and progress the connection and it is up to NBN Co to resolve this issue.
- 3.21 We believe that if NBN Co cannot get the connection right first time, there should be greater incentives, such as a daily rebate, so that NBN Co addresses the issue promptly and completes the connection, because if a service continuity issue has arisen the RSP faces direct obligations to the customer.
- 3.22 We are aware that NBN Co anticipates that this year will be the peak of the rollout.
[CiC]
- 3.23 **[CiC]**
- 3.24 Optus submits a daily rate should also apply for faults. This would provide support to RSPs in minimising potential migration issues where a 'New Service Never Worked' (NSNW) fault arises after a completion advice has been provided to the RSP. If the customer's legacy service has been disconnected (for example, where the legacy copper service must be disconnected in order to connect the NBN FTTB/N/C service) the RSP would have to provide an alternative service, compensation or come to some other agreement with the customer¹¹ if the issue is not fixed within 3 business days.

⁹ Clause 7(1), Telecommunications (NBN Continuity of Service) Industry Standard 2018.

¹⁰ Clause 25, Telecommunications (NBN Continuity of Service) Industry Standard 2018.

¹¹ Clause 9, Telecommunications Service Provider (NBN Service Migration) Determination 2018.

- 3.25 While NBN Co says these situations are likely to be addressed within existing fault service levels, we note there are significant obligations on RSPs if they are not. We consider that in these scenarios, where there are direct obligations at the retail level there must be a greater impetus on NBN Co to resolve the fault than what currently exists.
- 3.26 Optus also considers that as well as a daily rate, it is worthwhile exploring an escalation of that daily rate (similar to how the CSG Standard compensation payments increase after 5 business days). This would provide greater incentive for NBN Co to meet its obligations in a timely fashion.
- 3.27 At a minimum NBN Co should not be permitted to levy wholesale access charges for the period in which the NBN service was not operational. If RSPs are not permitted to charge consumers due to the NBN not working; NBN Co should not be permitted for charge RSPs. Wholesale SLAs must reflect retail obligations.

Service levels should address more performance objectives

- 3.28 We support the proposed rebate for missed appointments, as a missed appointment is an extremely poor customer experience. However, we are concerned missed appointment rebates could lead to unintended consequences such as an increase in rescheduled appointments.
- 3.29 While a rescheduled appointment with the customer is a slightly better experience than a missed appointment, we note NBN Co is only required to give 26 hours notice to reschedule the appointment. This means a customer could have made plans or rescheduled their usual arrangements to be home for a technician yet at the last minute have to again rearrange plans.
- 3.30 We also note NBN Co is only required to report on rescheduled initial appointments and there is no reporting for additional reschedules or where an appointment may be rescheduled multiple times. We consider this is also not a desirable outcome for consumers and are concerned that if NBN Co does not manage the appointment scheduling appropriately, it will lead to an increase in consumer complaints for RSPs.

Rebates for standard connections with SLA of one business day

- 3.31 We note the ACCC seeks comment on whether standard connections with a service level of one business day should have rebates attached to them. At this stage, we consider this may be an issue for consideration once the NBN is completely rolled out. We would expect most issues to occur where premises are being connected to the NBN for the first time. Once premises are already connected to the NBN, it should be relatively simple for services to be transferred between providers.
- 3.32 During the rollout we would prefer the emphasis be on addressing connection experience for those in other service classes, where it is more likely there may be a connection issue, service class mis-classification, infrastructure shortfall or some other matter leading to a connection delay. We consider it a higher priority that NBN Co address delayed connections, particularly where these delays are the responsibility of NBN Co.
- 3.33 There should continue to be performance objectives attached to these connections, so that performance can continue to be monitored and, the issue of rebates for these connections, revisited if needed.

Rebates should be automatically applied in more cases

- 3.34 There are more instances where we believe that rebates should be automatically applied by NBN Co instead of requiring the RSP to raise claims. In particular, where potential rebate liability is determined by simply reporting against a service level (as met or missed), we believe RSPs should be automatically compensated where those service levels are not met where possible.
- 3.35 For example, RSPs can pay for Enhanced Fault Rectification service levels. [CiC]. However, processes require the RSP to follow claims processes,¹² despite the fact that rebate liability can be determined by the proportion of missed service levels. This seems inefficient, as NBN Co is aware of its rebate liability given it reports whether it has met or missed the service level. This is not like CSG liability which is unrelated to service level timeframes and where RSPs must lodge claims for NBN Co to assess what it considers to be its liability. This is a clear met or missed service level which NBN reports against.
- 3.36 It is unclear why for matters where a rebate is determined by whether NBN Co has simply met or missed a service level, the RSP must follow claims processes in section 7.5 of the Operations Manual. We consider this to be inefficient and unnecessarily burdensome on RSPs.
- 3.37 Further, where an RSP (and therefore the end-user) pays for enhanced service levels (such as for enhanced fault rectification) we believe performance objectives should also be set at 100%.

NBN Co's s. 87B Undertaking

- 3.38 The ACCC has sought comment on the pass through of benefit to customers related to the proposed variation to WBA3. The ACCC noted that the benefit could be in monetary or other form. The ACCC considered this requirement would ensure consumers would benefit from the improvements in NBN's service standards and rebates should not simply function as a transfer of value from NBN Co to RSPs.
- 3.39 While the undertaking is a first step in addressing some of the inherent issues with NBN Co's Service Level framework, in that it makes NBN Co accountable for all service level misses rather than just those below 90% and addresses missed appointments, Optus has some concerns over the proposed variation and at the time of this submission had yet to sign the proposed variation to our access agreement.

Practical implementation issues

- 3.40 The proposed amendments to give effect to the undertaking requires RSPs to undertake significant work to pass on such a rebate (in part or full) and NBN Co's proposed implementation method is impractical. NBN Co proposes using a 'dummy identifier' where a technician misses a connection appointment. This is because an AVC identifier is not attached to a service until after the connection is completed.
- 3.41 The use of a 'dummy identifier' means that, in many instances where a customer is a new customer, it will not be possible to pass on a rebate until after the connection is completed and the NBN service is working. This is because RSPs have recently amended their systems to implement new requirements in the ACMA's NBN Service Migration Determination which require an RSP not to charge a customer until a post-migration test confirms the service is working.¹³ There is also a real risk with the use of

¹² See clause 9.4 of the Service Level Schedule, Wholesale Broadband Agreement

¹³ Clause 15, Telecommunications Service Provider (NBN Service Migration) Determination 2018.
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dummy identifiers that RSPs may not be able to correctly identify the service that should receive this rebate at all.

3.42 [CiC]

3.43 [CiC]

3.44 [CiC]

3.45 [CiC]

Determining 'fair value benefit' could be difficult

3.46 The ACCC has sought RSPs' views on how RSPs expect to apply the pass-through of fair value benefit in practice. We note 'fair value benefit' is not defined with the intention that RSPs could interpret this flexibly. The ACCC has acknowledged that RSPs incur an operational cost when NBN Co misses a service level, including in relation to managing the customer experience.

3.47 Currently, Optus provides a range of potential payments or benefits to customers, depending on the circumstances and applicable law.

3.48 Optus provides CSG eligible services and does not seek a waiver of customer's CSG rights. Optus seeks agreement to an alternative connection arrangement for which customers receive the benefit of a lower bundled price for the voice and broadband services. For other CSG eligible events, Optus can provide compensation in accordance with the CSG Standard or supply an interim service (such as, a prepaid mobile handset). We note that compensation payments under the CSG Standard accrue, that is, these are calculated on a (business) daily rate and, for connection and fault delays, the daily amount payable increases after 5 business days. The CSG Standard also requires payments for missed appointments (\$14.52 for residential/charities or \$24.20 for business customers).¹⁴

3.49 If customers have had a poor customer experience related to their NBN experience, Optus can also provide goodwill payments or credit an account. In addition, under the ACMA's Service Continuity Standard and NBN Service Migration Determination, if a customer experiences a service continuity issue in migrating to the NBN, RSPs must reconnect (if possible) or provide an alternative service or another compensation arrangement with the customer.

3.50 Unfortunately, there is considerable difficulty and implementation complexity in considering if there has already been some other 'fair value benefit' provided to the customer as some sort of 'off-set' to the proposed \$25 rebate. To enable Optus to off-set the value of the rebate against any other CSG payments, other benefits (such as an interim services) or goodwill payments would require a system so complex it would take many months to build and implement [CiC].

3.51 [CiC]

3.52 [CiC]

3.53 Optus notes the number of events eligible for the NBN rebate could be significant. [CiC]

¹⁴ Schedule 2, Part 2, *Telecommunications (Customer Service Guarantee) Standard 2011*.
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Managing customer expectations

- 3.54 Optus also has concerns about the expectations that have been created in relation to the proposed rebate arrangement. The rebates are only available where NBN Co misses the proposed service level timeframe. As Optus pointed out in its previous engagement with the ACCC, NBN Co's service level timeframes do not reflect calendar days as NBN Co can 'pause' the service level clock. For example, a service level does not apply if a customer does not choose the first available appointment, and a connection service level timeframe will also be paused if NBN Co requires action from a third party, such as council or body corporate approvals.
- 3.55 We are concerned there will be some customers who will think they are eligible for a rebate but are not because their connection or fault rectification timeframes were subject to a 'pause' and deemed by NBN Co to have met the service level.

The rebate does not address delayed connections or faults

- 3.56 The \$25 flat rate rebate provides no incentive to NBN Co to address issues of aged connections or faults. As noted earlier in this submission, Optus is of the view that rebates need to accrue and escalate to ensure timely performance. Without such consequence as soon as the service level timeframe is missed there is no incentive for NBN Co to resolve the issue in a timely fashion.

Record keeping obligations should focus on NBN Co's action

- 3.57 We note the ACCC is now also considering record keeping and reporting obligations in relation to checking RSPs' compliance with this obligation. This would be an additional compliance burden on RSPs, however, it is ultimately a matter for the ACCC if it considers there is a risk that RSPs will not pass on a fair value benefit.

Section 4. SERVICE SPEED AND PERFORMANCE

- 4.1 This section discusses issues around NBN service speeds and performance. Specifically, we discuss concerns around:
- (a) The level of information available of speeds delivered over NBN networks;
 - (b) The number of under-performing lines that still exist in the market several years after this issue first being identified; and
 - (c) Lack of wholesale commitments to supply minimum service performance.

Available information on speeds

- 4.2 We consider that gaps remain in relation to the information NBN Co provides on service performance to RSPs. NBN Co provides weekly line capability data to RSPs as part of the MTLs report, however, results can be blank if, for example, the end-user has not plugged in their modem and activated their service at the time tests were run. This means that RSPs are delayed in determining this information as required by the ACMA's Service Migration Determination.
- 4.3 The ACCC notes in its paper that NBN Co suggested its "birth certificates" for FTTN/B/C services could be used as speed information. However, the birth certificates containing line capability information are included in the notes field of the NBN portal for a service. This information does not appear in the Service Qualification portal. There is no automated way of extracting this information so that it is easily accessible at the time a customer places an order. The only way to access this information would be for staff to manually check portal notes, which is a resource intensive approach. This information could be better used if it was more easily available and automatically uploaded into the Service Qualification system. As currently provided it is of little use during the service sign up process.
- 4.4 The only real information an RSP has available at point of sale is an estimated range for a FTTN/B/C service. This range could be as broad as 40Mbps and it is our experience that this estimate is unreliable. [CiC]
- 4.5 Going forward, we would expect once a service has been connected to the NBN for the first time and NBN Co has more reliable line capability data available to it as a result of running tests to provide the MTLs file, that NBN Co would be able to provide more reliable data upfront about expected if customer chooses to change NBN provider. The only variation to the customer's service performance may be related to the RSP's modem, however, we would expect that to have a minimal impact as the underlying network technology has remained the same. Therefore, NBN Co could provide a more reliable indication with a small variance, rather than a broad estimated range, for future NBN transfers.

Inadequate information about fixed wireless performance

- 4.6 We note the ACCC has recently sought comments on its proposal to extend the Broadband Speed Guidance to fixed wireless services. Optus made a number of comments in that submission regarding the inadequacies of NBN Co's information regarding fixed wireless service performance.
- 4.7 A challenge for providing performance information to consumers is that NBN Co does not make information available in a way that enables an RSP to provide information regarding performance of an individual service. NBN Co can only provide information at

a cell level. It is difficult to determine if, at the time a cell is experiencing congestion, whether the customer's individual service is experiencing congestion or not.

4.8 As raised in our submission on the ACCC's Broadband Speed Guidance, Optus has raised a request (August 2018) via NBN Co's Product Development Forum for additional information to be provided by NBN Co about expected service performance. Optus suggested additional Fixed Wireless information be made available for RSPs in regards to FW services, including:

- (a) Mean up and down bitrate during peak;
- (b) Mean up and down bitrate during off-peak; and
- (c) Location of affected cell.

4.9 We continue to remain concerned that there are no PIR objectives for Fixed Wireless services. As noted in our submission on the Broadband Speed Guidance:

4.10 [CiC]

4.11 [CiC]

4.12 [CiC]

4.13 Further, there are no remediation processes defined for addressing underperforming FW cells. All remediation processes set out in the WBA are for FTTN/B/C services and do not cover circumstances for FW cell remediation/upgrade.

4.14 NBN Co provided public comment on its threshold for upgrading FW cells last year when it noted that it generally aims to trigger upgrades to sites so they do not drop below 6Mbps per user at peak times. The 6Mbps level is judged by measuring the average throughput of all end-users in a cell in the busiest hour averaged over a month. NBN Co noted that sites are deemed 'critical' where demand exceeds capacity to the extent that performance falls below 3Mbps per user during peak.¹⁵

4.15 However, we note these thresholds are not specific commitments in the WBA. We remain concerned about the experience of FW users and the lack of any agreed thresholds for upgrading cells. We consider more commitments are required to address FW performance.

4.16 We again reiterate the concerns we raised in our submission to the ACCC's consultation on extending application of the Broadband Speed Guidance to fixed wireless services. Currently there is insufficient information available at the wholesale level to support increased obligations on disclosure on RSPs.

Underperforming services continue to be a concern

4.17 We note that underperforming services continue to be a concern. Optus is aware that as at mid-January 2019 we had approximately [CiC] services that cannot even achieve either 12 Mbps downstream, 1 Mbps upstream or both. Further, there were approximately [CiC] services that cannot achieve either 25 Mbps downstream, 5 Mbps upstream or both. The majority of these are FTTN services.

4.18 We believe NBN Co is aware of these faults yet we cannot raise a batch (bulk) fault request to address these services. NBN Co requires that each of these services be

¹⁵ See <https://www.itnews.com.au/news/nbn-co-fixes-wireless-when-users-go-below-3mbps-peak-485295>
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processed individually, in case the fault is due to something like in-premises wiring. However, we expect the majority of the issues with these services to be caused by underlying network problems, such as, long copper lines from the node, particularly where the line capability data clearly shows the line is underperforming. (We would expect CPE or in-premises wiring to only have a relatively minor effect on the result). To process these faults individually is extremely resource intensive and time consuming.

- 4.19 We believe that where NBN Co is aware of issues with long copper lines contributing to underperforming services NBN Co should be proactively implementing programs and taking steps to fix these lines. We are aware NBN Co has some projects underway, but, these are slow moving to address these existing performance issues. We consider addressing such performance issues with existing services is just as important as adding new connections to the network in a timely fashion.
- 4.20 Notwithstanding this, Optus has provided compensation and options to those customers on underperforming services (where the speed tier selected in their plan could not be achieved due to limitations in line capability)¹⁶, yet NBN Co is not required to provide any compensation to RSPs in those circumstances.
- 4.21 Optus' experience demonstrates the need for wholesale SLAs to provide back-to-back support to RSPs to manage issues around underperforming lines; and specifically RSPs' legal obligations. Optus would support rules that prevent NBN Co from selling wholesale services that deliver speeds that cannot be achieved over NBN connections. We note for example, where a customer orders a 50 Mbps service but their NBN connection cannot deliver that speed, RSPs are liable for compensation – but there are no rights to claim money back from NBN Co. There are no consequences for NBN Co for failure to deliver services sold.

Dropouts

- 4.22 There continues to be a high threshold for dealing with dropouts (modem resynch events) for FTTN/B/C VDSL NBN services. That is, NBN Co will not investigate if a VDSL service is experiencing modem resynch events (that would present to the end-user as a 'dropout') unless at least 5 resynch events occur within 24 hours. Optus is concerned that this threshold is too high, and that a consumer could experience repeated dropouts over several days and still not meet this threshold. For example, three dropouts one day, four drop outs the next may still not meet the threshold. A modem resynch event can be caused by some sort of interference on the line or at the bridge tap. These previous modem resynchs may not even be considered at the time NBN Co accepts a fault ticket. The signal on the line is interfered with and once it is restored the modem must resynch to establish a connection. This can take up to 5 minutes in some cases which means the customer experiences a dropout until the connection is re-established. This is a quality of service issue for the customer.
- 4.23 To improve end-user experience Optus has raised via a PDF request in September 2018 that the threshold instead be 3 modem resynchs within 24 hours or 5 modem resynch events over 72 hours. This would allow services experiencing repeated problems (that may otherwise not meet NBN Co's criteria) to be addressed more quickly and help deliver more reliable VoIP and broadband services to end-users. We consider NBN Co should investigate the underlying cause of the interference and address it to improve the quality and reliability of the customer's service.

¹⁶ In accordance with the obligations in our s. 87 Court Enforceable Undertaking provided to the ACCC and clause 14 of the Telecommunications Service Provider (NBN Service Migration) Determination 2018.
Public

4.24 [CiC]

4.25 We remain concerned about NBN Co's willingness to address consumer experience issues.

Wholesale commitments that should apply where service performance falls below what is ordered or reasonable expected

4.26 Optus considers that there should be wholesale commitments that better address service performance of the underlying network. This includes the following:

- (a) Commitments as to service performance (better PIRs for FTTN/B/C)
- (b) Commitments to support line remediation to improve FTTN/B/C line capability;
- (c) Rebates where FTTN/B/C lines are not capable of delivering the speed tier

4.27 Currently, NBN Co only commits to a peak information rate (PIR) for FTTN services of 25 MBPS, even if the RSP has ordered (and paid for) a 50 Mbps or 100 Mbps service. During the co-existence period (that is, the time where legacy DSL services may still be being supplied in an NBN ready area before Telstra permanently disconnects the copper network) NBN Co only commit to a peak information rate of 12 Mbps.¹⁷

4.28 Therefore, during this transition period, if an end-user orders a 50Mbps service and the FTTN line is only capable of a maximum rate of 15 Mbps, the RSP must meet specific legal requirements and provide options to the end-user. However, NBN Co has no obligations under the WBA to address the line. It does not have to provide any compensation or rebate to the RSP despite having sold the RSP a service the line is technically not capable of achieving. Nor would NBN Co be required to remediate the line as the line is achieving the co-existence PIR objective, so the RSP is unable to lodge a remediation request.¹⁸

4.29 These PIR commitments are far too low, meaning it is difficult to get lines remediated. Further, we believe remediation processes are flawed as these require RSPs to keep the customer on the higher speed tier in order to actually get the line remediated. However, RSPs are legally required to move customers down speed tiers, as a result, customers who are on affected lines cannot request remediation. This outcome appears counter-intuitive.

4.30 Remediation processes should be changed so that underperforming lines (i.e. those that cannot achieve 12/1 or 25/5) are addressed more promptly.

4.31 Where an FTTN/B/C line is not capable of delivering the wholesale speed tier sold to the RSP, NBN Co should have to pay a rebate to RSPs. In these cases, RSPs have retail obligations to contact the customer, explain the maximum attainable speed on the line and provide the customer with options (such as, switching speed tiers, allowing the customer to exit without cost, refunds/compensation or other arrangements).¹⁹

4.32 Some customers may wish to stay on the same speed tier to receive the best possible speed they are able to receive. However, as RSPs have had to incur the cost of setting up processes to contact customers, as well as potential costs associated with either losing a customer or providing refunds, NBN Co should provide a rebate to RSPs for these underperforming services. We note that NBN Co continues to encourage the take

¹⁷ See definition of "PIR Objective", Dictionary, Wholesale Broadband Agreement.

¹⁸ See Definition of 'Remediation', Dictionary, Wholesale Broadband Agreement.

¹⁹ Clause 14, Telecommunications Service Provider (NBN Service Migration) Determination 2018.

up of higher speed tiers, yet, RSPs must subsequently incur costs if lines are unable to achieve these higher speeds. Where RSPs are required to pay compensation to customers due to their limited maximum attainable line speed, these costs should be recoverable from NBN Co.

Fixed wireless rebate framework

- 4.33 Optus notes there is a lack of wholesale performance commitments for fixed wireless services.
- 4.34 Optus' view is that there should be a range of binding wholesale commitments on NBN Co in regards to fixed wireless services. This should include:
- (a) Obligations to disclose to RSPs factors that are affecting service performance within a cell;
 - (b) Commitments and information obligations regarding cell upgrades, where cell congestion impacts service performance, including timeframes and criteria for cell upgrades; and
 - (c) Commitments around minimum service performance.
- 4.35 Importantly, this information should be available at point-of-sale through the NBN SQ system. This would enable RSPs to inform customers when they order services whether their address is located within a congested cell. RSPs would then be able to have an informed conversation with the customer. Currently, we understand NBN Co has no intention of developing such a system.
- 4.36 Where NBN Co cannot meet these commitments, NBN Co should be required to pay compensation or rebates to RSPs. Consistent with requirement of the ACCC, Optus provides compensation to its fixed wireless customers who may be affected by cell congestion (where the cell the service is located in appears on NBN Co's congestion report, even if it's unclear whether the customer used their service during times of congestion or not). **[CiC]**
- 4.37 NBN Co has no commitments for minimum fixed wireless service performance or in regards to cell congestion, is not required to provide rebates to customers for cell congestion and has no commitments regarding timeframes for cell upgrades. **[CiC]**

Section 5. RETAIL CONSUMER SAFEGUARDS

- 5.1 The ACCC has indicated its support for the imposition of appropriate safeguards at the wholesale level.²⁰ Optus strongly agrees with this. There are some instances where Optus believes there is an imbalance between wholesale and retail obligations, including the ACMA's NBN regulatory instruments. Specifically relating to obligations on RSPs to:
- (a) Not charge for a non-working service;
 - (b) Expedite supply of an NBN service;
 - (c) Compensate for underperforming services.
- 5.2 In addition, we have concerns that NBN Co's CSG processes lack transparency and should be improved.

Obligation on RSPs not to charge for a non-working service

- 5.3 Firstly, RSPs are not able to charge for an NBN service unless the service is operational (that is, a post-migration test has determined the service is working).²¹ This can cause problems as there is no such restriction on NBN Co and NBN Co begins charging an RSP as soon as NBN Co issues a completion advice, regardless of whether the end-user activates the service or not.
- 5.4 We consider NBN Co should not be able to commence charging RSPs until there is an active NBN service being supplied to the end-user. We are particularly concerned where services are subject to a 'New Service Never Worked' fault immediately after the connection has apparently been completed.
- 5.5 In these circumstances, as well as an RSP not being able to charge the customer for the service, it may be that the end-user does not have a working legacy service, in which case the RSP could be subject to additional service continuity obligations (e.g. providing an interim service or other compensation). We believe, where an RSP incurs additional cost in meeting its obligations as a result of an issue that is NBN Co's responsibility, RSPs should receive some form of rebate from NBN Co. At the very least, NBN Co should not charge (or should refund/credit) an RSP for the time a service is not operational where there is a NSNW or other fault that is the responsibility of NBN Co.
- 5.6 We consider that at the very least there should be enhanced service level commitments for resolving new service never worked faults. While NBN Co notes that fault resolution has a commitment of 1 business day, we note this is only for 90% of cases. We believe all new service never worked faults should have a service level commitment of 1 business day or NBN Co should have to rebate RSPs.

5.7 [CiC]

5.8 [CiC]

²⁰ ACCC, 2019, p.1

²¹ Clause 15, Service Migration Determination.

Obligation on RSPs to expedite supply of an NBN service

- 5.9 Optus also has concerns about the general obligation of overarching intent in the Service Continuity Standard that an RSP minimise disruption to the continuous supply of carriage service and expedite supply of an NBN service.²²
- 5.10 There is no corresponding obligation on NBN Co to expedite supply of an NBN service. NBN Co is merely obliged to provide “reasonable assistance” to an RSP in fulfilling their obligation. Yet for a new connection to the NBN, NBN Co has responsibility for ensuring that the local network infrastructure has been installed, has appropriate capacity, and any infrastructure works at the premises are completed to connect the NBN service. An RSP is not able to influence the speed of these works.
- 5.11 The best an RSP can do to expedite an order is lodge an accelerated connection (assuming the order meets requirements for an accelerated connection), noting that accelerated connections cannot make up more than 10% of a monthly total. The service level for an accelerated connection is 4 business days and we note [CiC] We further note that accelerated connections are excluded from the connection rebate, although may be eligible for secondary CSG compensation.
- 5.12 Otherwise there may be informal escalation channels, where staff can raise an escalation with staff contacts. However, whether this results in any quicker connection will depend upon the availability of technicians in the area.
- 5.13 We consider there needs to be greater incentives on NBN Co to get things right first time.

Compensation for underperforming services

- 5.14 We note that the ACMA’s Service Migration Determination requires that where an FFTN/B/C line is not capable of supporting the speed sold in the customer’s plan that an RSP must take certain steps to contact the customer, advise the customer of the maximum speed the line can achieve and provide the customer with options, which may include downgrading speed tiers, compensation or some other arrangement.
- 5.15 As noted earlier in this submission, there are very low commitments for NBN Co to meet in terms of the speed or performance of services. Further, it is difficult to raise remediation cases for underperforming lines. There are currently limited obligations on NBN Co in relation to line performance. We consider there needs to be greater wholesale commitments on NBN Co in regards to service performance and abilities for RSPs to be compensated where the underlying performance problems is the line capability.

CSG processes lack transparency

- 5.16 Generally, Optus has found that over the last year there has been some improvement in NBN Co’s attempts to minimise delays that would contribute to CSG claims. This may be due to the pause in selling HFC services. That said, there is definitely room for improvement in regard to CSG processes.
- 5.17 Optus has found there are particular challenges with unclear or missing information in the portal – that is, where exemptions or specific reasons as to why a delay may be occurring are missing. Where this information is missing (if NBN Co has not provided this in the portal) we can either miss the timeframe to claim the exemption (under the CSG

²² clause 7(1), Service Continuity Standard.
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Standard) or we may pay compensation to the customer but be unable to claim it back from NBN Co.

- 5.18 The WBA and Operations Manual do not include specific obligations that support RSPs in meeting their retail CSG obligations. For example, in order to claim a Mass Service Disruption exemption for extreme weather, a CSP must provide notice (including to the ACMA, TIO, publish a notice in newspapers and on the internet and advise any resellers) within specified timeframes (8 or 9 business days) of the exemption becoming available to the CSP.²³ A CSP can have a provisional exemption for extreme weather but must comply with the relevant notification requirements in s. 24(1). If a CSP does not fulfil all of the notification requirements within the specified timeframes, the exemption will cease to be available.²⁴
- 5.19 To that end, it is essential that RSPs receive all the necessary information from NBN Co to meet its notification requirements, in order to be able to rely on the exemption in the CSG Standard. This includes, where the exemption is related to extreme weather, evidence in writing that the weather meets criteria for extreme weather conditions as specified in Schedule 3 of the CSG Standard.²⁵ Traditionally, Telstra always included reference to relevant Bureau of Meteorology advice regarding weather events which could be used as evidence 'in writing' of extreme weather conditions.
- 5.20 NBN Co can provide notice of a Risk of Network Impact (RONI) event or notice of a Force Majeure Event that can impact their ability to fulfil connections and rectify faults. Optus relies on either of these notices in order to advise of a Mass Service Disruption to gain an exemption from CSG obligations. However, we find there can be problems with NBN Co providing all of this necessary information in a timely fashion.
- 5.21 If NBN Co does not include all information it states it will and does not provide this in a timely fashion, we cannot claim an MSD exemption. Most recently NBN Co's Force Majeure Notice for the Townsville floods did not contain the full information Optus needed in order to claim an MSD exemption (including written evidence of extreme weather). We raised this issue with NBN Co and they have indicated they will address our concerns going forward.
- 5.22 However, having raised these issues in the past we are concerned that NBN Co does not have robust processes in place to support RSP retail obligations that have existed for years. This is evidence of the broader problem that NBN Co's arrangements do not take into account an RSP's obligations.
- 5.23 In addition, it can sometimes be unclear how NBN Co determines their liability (that is, when they have 'stopped the clock' on their calculation of contributory liability for delay). We find this is a particular problem for faults when NBN Co advises there is No Fault Found or closes the ticket stating the problem is resolved, yet it is not.
- 5.24 Further, NBN Co can 'stop the clock' if the customer does not select the first available appointment. NBN Co will not pay CSG compensation from the time of the first available appointment to the time of the appointment selected by the customer.
- 5.25 NBN Co also refuses to pay CSG compensation for events outside of its reasonable control. However, it is unclear what events it is referring to. In some instances, events, such as extreme weather events, may be obvious. In these cases, we would expect

²³ S. 24(1), Telecommunications (Customer Service Guarantee) Standard 2011.

²⁴ See Note to s. 21(1), Telecommunications (Customer Service Guarantee) Standard 2011.

²⁵ S. 23(1)(b), Telecommunications (Customer Service Guarantee) Standard 2011.

NBN Co to issue the appropriate notice so that an exemption from the CSG Performance Standards can be claimed by RSPs.

- 5.26 **[CiC]** Section 21 of the CSG Standard sets out some circumstances that could be considered beyond the control of a CSP, including extreme weather, natural disasters or damage to the CSP's facility not caused by the CSP. We are concerned that NBN Co applies too low a threshold as to the matters it considers outside of its reasonable control. Further clarification over NBN Co's approach would be appreciated.
- 5.27 NBN Co also only pays CSG compensation for accelerated connections and excludes standard connections from CSG. Where Optus is liable to pay CSG compensation (where Optus agrees with a customer to an alternative connection arrangement – namely the appointment time with NBN Co – if this alternative arrangement cannot be met), Optus pays CSG compensation on accelerated *and* standard connections.
- 5.28 We remain concerned that NBN Co's wholesale commitments and obligations are insufficient to enable RSPs to support their retail obligations. NBN Co will report a service level as met where the customer selects an appointment time suitable to the customer, but which may be outside of the service level timeframe. This means a customer would not even be eligible for a rebate. However, there is no exception under the CSG performance standard that would exempt a CSP from paying compensation in those circumstances.
- 5.29 However, in general this is simply further evidence that the CSG Standard needs to be reviewed and revised to be more appropriate in a vertically separated industry.

Section 6. MONITORING AND REPORTING OPERATIONAL OUTCOMES

- 6.1 This section comments on the need to monitor and report on operation outcomes. Specifically, we have concerns around:
- (a) Measuring service level performance;
 - (b) The reporting of service level performance; and
 - (c) The availability of operational information.

Measuring service level performance

- 6.2 Optus' primary concern with the measurement of service levels relates to NBN Co's 'stop the clock' procedures. Specifically, it is not always clear when NBN Co 'stops the clock' in measuring the service level and some of the conditions and criteria it applies for 'stopping the clock' or excluding the service level. For example, NBN Co specifies that where a customer does not select the first available appointment the service level does not apply. Yet we consider if the customer selects another appointment still within the service level timeframe (even if not the first one) the service level should continue to apply.
- 6.3 We have recently received 'stop the clock' reports from NBN Co and are reviewing these to determine if these assist in providing further clarity over measurement of service levels. Our initial review suggests it is still difficult to determine the reasons a clock was paused, even if this report contains the time the clock was paused.
- 6.4 We support the ACCC's view that service level timeframes for faults should begin at the time of trouble ticket acceptance rather than trouble ticket acknowledgment. We would support the reversion to the measurement of fault rectification service level timeframes as they applied prior to WBA3.
- 6.5 Our concern with New Service Never Worked faults is that these faults suggest the connection was not performed correctly in the first place or that there was inadequate testing during the connection process. We consider NSNW faults should be subject to strict service level timeframes and rebates to ensure that these are address promptly, because if a service continuity issue has arisen (where the customer has no working legacy service and no operational NBN service) additional obligations fall on RSPs to either reconnect the legacy service (if possible) or otherwise provide an interim service or come to some other alternative or compensation arrangement.²⁶

Reporting of service level performance

- 6.6 Since the ACCC's first consultation NBN Co has recommenced supplying supplementary information as part of its service level performance reports. This is some improvement as it provides insight over detail, such as whether performance problems are systemic to a particular technology or widespread across the network. NBN Co should never have

²⁶ Telecommunications (NBN Continuity of Service) Industry Standard 2018 and Telecommunications Service Provider (NBN Service Migration) Determination 2018.
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ceased providing this level of information in the first place. We would like to see these reporting commitments reflected in the WBA on an ongoing basis.

- 6.7 As mentioned NBN Co has made available a 'stop the clock' report. It outlines when the clock may be stopped, but, does not explain why. It would be useful if explanation of how the 'stop the clock' report is generated, and criteria and conditions applied to service levels were explained in the service level schedule of the WBA or the Operations Manual.
- 6.8 We note that to get some transparency over performance we need to examine 3 different reports or systems to try and get a picture about whether an SLA has been met and why. For example, we need to look at the fault history in the fault management portal (which doesn't tell you if the SLA was met or not); the raw data provided as part of the SLA report, which will tell you if the SLA for that particular fault was met or not and the 'stop the clock' report to determine when the SLA clock was paused (however, the report does not tell you why the SLA clock was paused). We understand that SLAs can be paused where an action sits with Optus, but, it shouldn't require examining three different reports and systems (and then asking follow up questions of NBN Co staff) to determine that.
- 6.9 NBN Co is not contractually obliged to provide the 'stop the clock' reports and while we welcome the additional information, transparency can still be improved, and requirements should be reflected in the WBA. The lack of transparency over how SLAs are measured and reported continues to be of concern to Optus.

Availability of operational information

- 6.10 We note that it can be difficult to obtain up to date information especially if issues arise in relation to connections or rectifying faults.
- 6.11 [CiC].
- 6.12 [CiC].
- 6.13 [CiC]
- 6.14 Some customers do want detailed information and want to understand why there is a delay or why the service is not working. Others don't care and just want the service fixed. However, if we don't have accurate information regarding an operational issue, it is very difficult to pass on any explanation to the customer including advice on timeframes as to when an issue may be resolved.
- 6.15 In particular, NBN Co's unplanned outage information is poor. The unplanned outage notification should be enhanced, and a process documented for unplanned outages that can be shared with RSPs.
- 6.16 Further, NBN Co's unwillingness to explore building APIs to be able to provide near real time information about appointments or order progress is disappointing. These are the measures that contribute to a better consumer experience, and RSPs are unable to do this without NBN Co's assistance.

Section 7. LIABILITY FRAMEWORK

- 7.1 Optus provided previous comments on the liability framework and indemnities regime in its first submission to the ACCC's inquiry.
- 7.2 There are two further issues Optus would like to make comment on in relation to the liability framework in the WBA:
- (a) NBN Co specifically limits its liability for service failures and performance issues, under clause E1.2(a); and
 - (b) Limitations of the Material Service Failures regime.
- 7.3 These are discussed further below.

NBN Co's limited liability for service failures/performance issues

- 7.4 Under clause E1.2(a) NBN Co limits its liability for failing to meet a service level or for any failure, defect or delays in supplying its services to the applicable commercial rebate or CSG compensation.
- 7.5 The fairness of such a clause depends on the strength of the service levels regime. The effectiveness of such regimes depend upon whether the supplier commits to challenging, transparent, measurable and robust service levels that relate to the key areas of service quality to the customer. These service levels must exist within a framework that with credits, rebates or compensation that provide a genuine incentive for the supply to get things right.
- 7.6 While we note there are fundamental differences in service levels that can be offered for residential customers as compared with business customers (who are prepared to pay more for enhanced service levels). However, the matters raised in this inquiry demonstrate that NBN Co's service level framework has not been providing genuine incentives for NBN Co regarding service and performance.
- 7.7 There continue to be low thresholds for performance. For example, there are limited circumstances for line remediation during the co-existence period or after, where NBN Co only commits to supplying 12 Mbps downstream during co-existence or 25 Mbps downstream after. Appointments are only subject to rebates after the proposed variation. While NBN Co reports against rescheduled appointments there are no consequences should NBN Co reschedule an appointment multiple times (an outcome we are concerned will become more prevalent given the appointment rebates).

Limitations of the Material Service Failure regime

- 7.8 There are a number of concerns with the Material Service Failures regime. The regime offers little in the way of compensation or rebates to customers in the event of a material service failure. It merely provides a right to claim damages up to a cap. Therefore, in the event of a significant failure an RSP must first establish that they have suffered direct losses as a result of the MSF and then bring a (successful) legal claim against NBN Co. There is the concern that an RSP's legitimate claim will be bogged down in technical legal argument, wasting both time and resources. IN those circumstances where an RSP and their end-users are not getting the services they have paid for, it is not unreasonable for there to be some form of compensation available.
- 7.9 Optus is concerned the MSF regime itself is highly restricted and likely to only be available in exceptional circumstances. We consider more realistic thresholds should be

established. For example, as currently drafted only General Failures and Component Failures trigger the regime. However, it is Optus' view that any event or failure caused by NBN Co, its personnel or suppliers could be considered a Material Service Failure. Further, some definitions related to General Failures and Components Failures seem arbitrary. For example, it is unclear why a failure would become a General Failure rather than a component failure (with the corresponding difference in restoration targets) simply because (for example), two items of the same type of equipment failed, rather than only one. Most concerningly, the regime only applies where the relevant event is "solely" caused by one of the specified causes. This means that should another factor contribute just 1 per cent towards the relevant event, the regime would not apply. It is Optus' view that the reference to 'solely' should be removed.

- 7.10 Optus also holds the view that the restoration targets in the event of a Material Service Failure are too long, given the importance of the services and the catastrophic extent of the outages that this regime covers.
- 7.11 Optus considers the criteria for resolution of an MSF event are too broad and leave too much discretion with NBN Co. We consider clause 22(c)(ii) of the ethernet Product Terms should be deleted as the resolution of an event should be determined by reference to criteria that is as clear and objective as possible. This paragraph creates considerable uncertainty because the meaning of "substantial portion" is not clear, and it allows NBN Co, in its sole discretion, to take into account any (unspecified) factors NBN Co may consider relevant, irrespective of whether those factors are actually relevant or reasonable.
- 7.12 Optus considers that the exclusions from an MSF event are too broad, as they still exclude causes where the fault lies with NBN Co. For example:
- (a) We consider clause 22(i)(A) to be unreasonable, because NBN Co should remain responsible where an event it caused by NBN Co even if it falls outside of NBN Co's technical definitions. Under the current drafting, an outage could be caused by software which has been incorrectly configured by NBN personnel. It would be arguable there is not 'component failure' and the MSF regime will not apply, even though NBN Co is at fault. Responsibility should lie with NBN Co where events are caused by NBN Co, its Personnel or suppliers.
 - (b) We believe cyber attacks by NBN Co personnel should be excluded from cl. 22(i)(B). We consider this to be an internal risk that should be managed by NBN Co and it is not reasonable to expect RSPs to bear the risk of acts by NBN Co's own personnel.
 - (c) We are concerned by references to 'third party' in clause 22(i)(C). This is because if NBN Co outsources the operation of part of its network to a third party vendor or decides to augment its network with a network owned by a third party, NBN Co would escape liability for any failure caused or contributed to by the outsourced or third party part of the network.
 - (d) We consider clause 22(ii) should be deleted as it's incumbent on NBN Co to keep the relevant spare equipment within Australia and if NBN Co decides not to do that, RSPs should not be left without redress as a result of that decision.