

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

Submission in response to  
DoCA Discussion Paper

**Consumer Safeguards  
Review: Part B –  
Reliability of Services**

Public Version

January 2019

## EXECUTIVE SUMMARY

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1. Optus welcomes the Department of Communications and the Arts' (the Department) second review into consumer safeguards dealing with reliability of services. This review presents an opportunity to examine the existing safeguards in the context of a vertically separated market for provision of fixed-line services.
2. Optus supports the Department's view that the role of government is to facilitate competitive market environments as the primary mechanism for achieving public policy goals and then to intervene further only where clear evidence exists of market failure. This reflects the regulatory best practice principles of the Australian Government.
3. It is therefore appropriate that the focus of this review is on the fixed-line market and services – which are dependent upon one wholesale-only separated network. This can be contrasted to the mobile sector, which is highly competitive, with three established integrated networks competing to provide services to consumers; driving consumer outcomes and high levels of investment. There can be little doubt that the mobile market is delivering on network reliability, network performance, and efficient pricing.
4. The fixed-line market, however, does not face sufficient levels of infrastructure competition. Both legacy copper and next generation networks are effectively monopoly networks. This is the reason why fixed-line networks have been subject to greater regulation.
5. Historically, Telstra was subject to multiple fixed-line service reliability obligations, not because it was a Retail Service Provider (RSP), but because it owned the monopoly fixed-line PSTN network. The migration to the NBN and the vertical separation of the industry changes the relationship between RSP and network provider.
6. 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.
7. 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. Many of the proposed interventions in the Discussion Paper are justified with regards to the fixed-line market due to the separated market structure and the lack of infrastructure competition.
8. Optus agrees with many of the statements in the Consultation Paper that the focus of the review and interventions is on the fixed-line market. Optus submits there is a strong case for direct regulation of the wholesale service standards over the NBN. Optus welcomes this review and supports outcomes that will provide RSPs the necessary processes and network guarantees so they can deliver better consumer outcomes.

## OVERVIEW

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9. This submission will discuss the following issues:
  - (a) First, we outline the regulatory best practice principles that should guide the review;
  - (b) Second, these are applied the network reliability framework, emphasising the important role that market competition plays;
  - (c) Third, we address the six principles on which the proposals in the Discussion Paper are based; and
  - (d) Fourth, the four proposals listed in the Discussion Paper are discussed.

## REGULATORY BEST PRACTICE PRINCIPLES

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10. Optus notes the problems identified in the Consultation Paper and we support some of the proposed options. However, we are of the view that further work is required to identify the problems to be addressed, whether any additional regulation is required in the transition to the NBN and how this would interact with existing regulatory obligations.
11. Optus submits that the analysis would benefit from a statement and acknowledgement of regulatory best practice principles to ensure that the proposed solution maximise benefits to society, consumers and industry.
12. To that end, it is important that the analytic framework against which the assessment of options is taken is clearly outlined and discussed during the review process. Without greater analysis and a framework
13. Optus highlights the first two principle for Australian Government policy makers, as stated in the Australian Government's 'Australian Guide to Regulation':
  - (a) Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option; and
  - (b) Regulation should be imposed only when it can be shown to offer an overall net benefit.<sup>1</sup>
14. We also observe the statement in the 'Australian Guide to Regulation' that "there are a relatively small number of situations that justify direct government intervention in the form of regulation", starting with:
  - (a) Market failure;
  - (b) Regulatory failure; or
  - (c) Unacceptable hazard or risk.<sup>2</sup>
15. The approach to best practice policy making is summed up as seeking to:

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<sup>1</sup> <https://www.pmc.gov.au/resource-centre/regulation/australian-government-guide-regulation>

<sup>2</sup> Op cit., p.18

*... ensure that regulation is never adopted as the default solution, but rather introduced as a means of last resort.*<sup>3</sup>

16. We find that the analysis in the Consultation Paper could be improved by more clearly identifying the policy problem that is attempting to be solved; and a more complete explanation of why government action is needed. For example, further explanation on the following questions would assist the development of the proposals and ensure benefits to consumers are maximised:

- (a) Clearly identify and define the problem trying to be solved.
- (b) Clearly identify why there is a legitimate reason for government to intervene.
- (c) Demonstrate that government has the capacity to intervene successfully.
- (d) Identify alternatives to government action.
- (e) Clearly identify what the objectives, outcomes, goals or targets are.

17. These principles have been summarised and applied to the communications market by the Department in its Review of the Australian Communications and Media Authority, where it established high level intervention principles that guide decisions about when and how governments should intervene in the market. The Department stated that:

*... the role of government is to facilitate competitive market environments as the primary mechanism for achieving public policy goals and then to intervene further only where clear evidence exists of market failure, or if a public policy goal is unlikely to be delivered by the market*<sup>4</sup>

18. Further Government policy towards regulating the industry is articulated in section 4 of the *Telecommunications Act 1997*. Section 4 explicitly states that it is intended that telecommunications be regulated in a manner that promotes the greatest practicable use of industry self-regulation and does not impose undue financial and administrative burdens on participants, without compromising the effectiveness of achieving the objectives on the Telecommunications Act. We note there are many instances where industry self- or co-regulation has worked well and black letter/administered law should not necessarily be seen as the default solution when considering regulatory best practice.

19. Optus submits that these regulatory principles should be more explicitly stated in the review and used to guide the analysis of problems to be addressed, and assessment of proposed policy options.

## APPLYING REGULATORY BEST PRACTICE TO THE RELIABILITY FRAMEWORK

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20. This section applies the regulatory principles outlined above to the reliability framework discussion and highlights key conclusions that impact on the application and design of policy proposals.

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<sup>3</sup> Op. cit., p.i

<sup>4</sup> Department of Communications, Review of Australian Communications and Media Authority, Final Report, October 2016, p.87 <https://www.communications.gov.au/what-we-do/television/media/acma-review/acma-review-final-report>

21. Optus submits there are two key factors that impact on the development of policy options for future reliability framework. There are:
- (a) Infrastructure Competition drives the best outcomes for consumers; and the
  - (b) Mobile market is the ‘gold standard for infrastructure competition’ and should not be the focus of these proposals
22. Importantly, these are the public views of the expert competition regulator, the Australian Competition and Consumer Commission (ACCC). Optus strongly supports these views and submits these should be reflected in the analysis of this review.

### **Infrastructure Competition drives the best outcomes for consumers**

23. Competitive market environments are the primary mechanism to deliver public policy objectives. The ACCC has been consistently clear that “*it is competition, after all, which drives innovation and the use of technology.*”<sup>5</sup> The importance of competition is perhaps best highlighted in the key take-away from the ACCC Chair’s keynote address to the 2018 Radcomms Conference:

*First, competition, competition, competition. If Australians are to keep the high standards of mobile services that they currently enjoy, competition is the only way to achieve that. We cannot become complacent.*<sup>6</sup>

24. The ACCC Chair similarly spoke at an ACCAN conference on the affordability of communications and the role of efficient markets, emphasising that competition between networks is important for driving good consumer outcomes:

*In communications markets the ‘gold standard’ is infrastructure-based competition. Infrastructure-based competition is essentially networks being built to provide services in competition with one another. Where this is efficient – often in highly populated areas – it leads to the best outcomes in terms of prices and quality of services for consumers.*<sup>7</sup>

25. Optus submits that there can be little doubt that where competition, and especially infrastructure competition, exists within a communications market, consumer outcomes are maximised through market mechanisms. In such a situation, as per regulatory best practice set out above, there can be little justification for regulatory intervention.
26. Optus submits that the first task of this review should be to identify in which communications market there is scope for regulatory action (in any of its forms) to improve on market outcomes. As per the Government’s regulatory principles, and as stated by the Department, regulatory intervention should only occur where clear evidence exists of market failure, or if a public policy goal is unlikely to be delivered by the market.<sup>8</sup>

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<sup>5</sup> ACCC Chair, Rod Sims, “Regulating for competition: stepping up for platforms & stepping back from media?”, International Institute of Communications – Telecommunications and Media Forum, 3 July 2018, <https://www.accc.gov.au/speech/regulating-for-competition-stepping-up-for-platforms-stepping-back-from-media>

<sup>6</sup> ACCC Chair, Rod Sims, “Competition & the 5G spectrum”, ACMA Radcomms 2018, 30 October 2018, <https://www.accc.gov.au/speech/competition-the-5g-spectrum>

<sup>7</sup> ACCC Chair, Rod Sims, “Communications affordability and the role of efficient markets”, ACCAN National Conference 2015, Sydney, 1 September 2015, <https://www.accc.gov.au/speech/communications-affordability-and-the-role-of-efficient-markets>

<sup>8</sup> Department of Communications, Review of Australian Communications and Media Authority, Final Report, October 2016, p.87 <https://www.communications.gov.au/what-we-do/television/media/acma-review/acma-review-final-report>

## Mobile market is ‘gold standard for infrastructure competition’ and should not be the focus of these proposals

27. As noted above, the first task for this review should be to identify where competition and the market has not been able to deliver consumer outcomes. To assist this task, Optus provides evidence from the expert competition regulator demonstrating that there is strong competition within the mobile market and that this is delivering good consumer outcomes, through increased investment and lower prices.
28. The competitive nature of the Australian mobile industry is well acknowledged by the ACCC, where it states:
- ... our MNOs have superb networks. All three Australian networks rate consistently among the best in the world. Network investment has meant that Australian MNOs are well placed to rollout 5G with the extensive small cell deployment and fibre required by these networks.*<sup>9</sup>
29. This has been the consistent view of the ACCC for over a decade. For example, the ACCC concluded in 2009 that the retail mobile services market had strong competition, and there was a general consensus amongst MNOs that the retail mobile services market has become more competitive or is improving in its competitiveness.<sup>10</sup>
30. This view was reiterated in 2013, with the ACCC acknowledging that “the three MNOs have all reached significant scale and have acquired key infrastructure assets, brand name and customer bases such that each has the ability to exert competitive pressure on the others.”<sup>11</sup>
31. More importantly, the ACCC has recognised that competition has resulted in “networks that differ from each other in terms of coverage, technology and quality provide more choice for consumers and more competitive tension between operators.”<sup>12</sup> Optus notes that regulatory intervention typically cannot result in such dynamic outcomes.
32. In addition to efficient pricing, competition in the mobile market benefits consumers through better non-price terms;
- (a) First, competition among MNOs is moving towards higher data inclusions in mobile plans, amongst other features to make offers more attractive, such as data sharing, data rollover and free subscriptions to media and entertainment services. Unlimited voice and SMS inclusions are also becoming common a feature in many mobile plans.
- (b) Second, the growth in data usage has re-focused the mind of consumers back to network quality and coverage as a key network differentiator. Market success depends on not only having a high level of network coverage, but also having a network that can provide consistent data services at the speed required. Market competition has caused Australian MNOs to continually invest in their mobile networks.
33. This has been recognised by the ACCC, where it stated:

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<sup>9</sup> ACCC Chair, Rod Sims, “Evolution or revolution? Why competition matters for 5G”, RadComms 2017, 1 November 2017, <https://www.accc.gov.au/speech/evolution-or-revolution-why-competition-matters-for-5g>

<sup>10</sup> ACCC, 2009, Mobile Terminating Access Service: An ACCC final report on reviewing the declaration of the mobile terminating access service, May, p.18

<sup>11</sup> ACCC, 2013, Domestic mobile terminating access service declaration inquiry, Final Decision, June, p.16

<sup>12</sup> ACCC, ACCC, 2017, Domestic mobile roaming declaration inquiry, Final Decision, October, p.2

*For mobile services, depth or quality of network coverage and geographic coverage are both important points of competition and product differentiation. The MNOs have undertaken significant investments to strengthen and expand their network coverage, reflecting the importance of coverage to remain competitive.<sup>13</sup>*

34. The weight of evidence clearly demonstrates that the Australian mobile market is highly competitive, driving consumer outcomes and high levels of investment. There can be little doubt that the market is delivering on network reliability, network performance, and efficient pricing.

#### **Fixed-line market is the focus of this review**

35. In contrast to the mobile market, with multiple mobile networks directly competing for consumers, the Australian fixed-line market is subject to monopoly-supply through the public-owned wholesale-only NBN. Optus submits it is important to highlight that many of the proposed interventions in the Discussion Paper can be justified with regards to the fixed-line market due to the monopoly market structure and the lack of infrastructure competition.
36. In practice, the monopoly wholesale provider of fixed-line communications is unregulated, giving it some flexibility to set price and non-price terms and conditions. Reliance on 'commercial incentives' for NBN Co to meet standards has not always proven to be effective.
37. For the reasons outlined above, Optus agrees with many of the statements in the Consultation Paper that the focus of the review and interventions is on the fixed-line market. Optus submits it is time for direct regulation over the wholesale service standards over the NBN. Optus welcomes this review and supports outcomes that will provide RSPs the necessary processes and network guarantees so they can deliver better consumer outcomes.
38. As explained above, Optus sees merit in the Department making more explicit its thinking with regards the role of competition and the need for regulatory intervention. Further, explicit statements that regulatory intervention is warranted only where it is demonstrated that the market cannot deliver the desired public policy outcomes would be welcomed.

#### **Problems in the fixed-line market are present now**

39. Further work in identifying problems may assist in determining whether concerns have arisen as a result of migration issues to the NBN, and therefore, whether additional regulation should be implemented during this transition period, or whether review of regulation should wait until post-2020.
40. The Consultation Paper identifies delayed connections as one of the key concerns, but, in reviewing this data more closely, the majority of these complaints were made about NBN services (58.2%).<sup>14</sup> Only 11% of complaints were made about mobile services, further evidence that a competitive market leads to best outcomes for consumers.<sup>15</sup> Optus considers that the majority of the NBN complaints are likely due to delays related to initially installing new infrastructure at a premises to enable supply of an NBN service. Therefore, some of the issues identified the Consultation Paper may be most prevalent prior to completion of the NBN rollout.

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<sup>13</sup> ACCC, 2018, Communications sector market study, Final Report, April, p.35

<sup>14</sup> TIO Annual Report 2017-18, p. 37.

<sup>15</sup> TIO Annual Report 2017-18, p. 37.

41. However, this raises questions as to whether the existing framework in the transition to a completed NBN is appropriate.

### **Existing commercial arrangements are inadequate**

42. At present, there is a range of regulation addressing performance standards and network reliability. However, much of this regulation was designed many years ago and no longer remains fit for purpose given significant changes to industry structure and how services are now delivered to consumers.
43. Along with the existing retail obligations, RSPs rely on NBN Co to deliver connections, repair faults, meet appointments and provide reliable wholesale services and network infrastructure for fixed-line services. Yet, there is very little direct regulation on NBN Co as the network operator of the monopoly access network in relation to service standards or network reliability. As acknowledged by the Consultation Paper, the majority of direct regulation is on retail operators who rely on commercial agreements with a network operator (like NBN Co) to fulfil these obligations.
44. The Department acknowledges that commercial arrangements do not appear to be adequate to address customer experience issues. Optus agrees with this observation. It is Optus' experience that RSPs generally have very little bargaining power in negotiating commercial arrangements with NBN Co.
45. It is Optus' view that the service level framework in NBN's commercial agreement (the Wholesale Broadband Agreement) does not adequately address consumer experience issues raised by the ACMA, Department and the ACCC. Optus has provided detailed submissions to the ACCC on its concerns with the existing service level framework in the Wholesale Broadband Agreement (WBA), including that it does not place sufficient incentives or obligations on NBN Co to address and minimise consumer experience issues. Further, Optus does not consider that the service level framework in the WBA provides sufficient support to retailers for them to meet CSG performance standards during this transition period or creates sufficient obligations on the network operator (it only creates a secondary liability regime for the network operator).
46. These issues have been explored in some detail as part of the ACCC's service level inquiry. However, this inquiry is still some way away from being completed. Further the ability of the ACCC to influence outcomes is limited to the terms of the WBA.
47. We firmly believe the existing WBA has not been an effective or appropriate framework for adequately addressing consumer experience issues in the transition to the NBN. It is Optus' view that more direct regulation is now warranted on NBN Co as a matter of urgency during the migration phase of the NBN rollout and that this should not wait until 2020.

### **Existing regulatory arrangements require review**

48. As noted, there are already significant legislative obligations, industry standards and codes and record keeping and reporting rules in place dealing with various performance and reliability issues.
49. It is not clear how the proposed measures discussed in the Consultation paper will interact with existing regulation including, the CSG framework, Priority Assistance obligations, the Network Reliability Framework, the existing Universal Service Obligation or proposed Universal Service Guarantee, the Statutory Infrastructure Provider of last resort regime, recently implemented ACMA instruments addressing complaints handling, consumer information, service continuity and service migration on the NBN, and various record keeping and reporting rules that have already been imposed by the ACCC and ACMA.



50. Much of this regulation exists on RSPs and legacy network operators. The ACMA's recent regulatory instruments impose a number of prescriptive and direct regulatory requirements on RSPs during the migration of customers to the NBN. However, these instruments have relatively few direct obligations on NBN Co. For example, there is a direct obligation on RSPs to 'take all reasonable steps to manage the migration', minimise disruption to the continuous supply of services and expedite the supply of an operational NBN service.<sup>16</sup>
51. However, there is only a general obligation for NBN Co to manage the migration at the premises in a way that minimises disruption to the supply of carriage services to the customer.<sup>17</sup> NBN Co is not required to expedite 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.<sup>18</sup>
52. It is unclear the extent to which existing regulation will be amended or repealed if new and largely duplicative obligations are introduced. We do not support direct regulation that largely duplicates existing requirements, or regulation that is drafted slightly differently to existing regulation that proposes to address the same issue.
53. We do support the clear identification of problems in the market and at this stage consider that more direct regulation on NBN would go some way to addressing consumer experience issues prior to the rollout's completion.
54. Optus considers further engagement with industry would assist the Department in better understanding nuances and complexities in the supply of telecommunications services in a changing industry. We support the suggestion by Communications Alliance that a working group should be established to more fully explore issues before any final recommendations are made.

## PRINCIPLES OUTLINED IN THE DISCUSSION PAPER

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55. In this section, we address the six principles on which the proposals in the Discussion Paper are based. The regulatory best practice principle and their application to the reliability framework, discussed above, are used to inform the discussion.
56. At this stage of the review process, Optus notes that thought is required for what may need to be done in the short term (prior to the completion of the NBN rollout) and what needs to be considered for the long term (once the NBN rollout is completed).

### **Telecommunications is an essential service, and the entire industry needs to be responsible for keeping consumers connected**

57. Optus generally supports the principle and recognition that retail providers depend on action from network operators in the supply of telecommunications services to end-users. Where obligations exist on retail providers, there must be supporting obligations on network operators to enable RSPs to fulfil their obligations.
58. As fixed-line services are now delivered by multiple parties in a vertically separated industry, where there are obligations on retail providers to meet certain performance standards, there must be corresponding obligations on the network operator to enable RSPs to meet their obligations. As the Consultation Paper notes, commercial agreements are not always appropriate and effective in establishing such a framework

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<sup>16</sup> Clause 7(1), Telecommunications (NBN Continuity of Service) Industry Standard 2018.

<sup>17</sup> Clause 8(1), Telecommunications (NBN Continuity of Service) Industry Standard 2018.

<sup>18</sup> Clause 25, Telecommunications (NBN Continuity of Service) Industry Standard 2018.

(particularly where RSPs do not have bargaining power with a ubiquitous monopoly network operator) and in providing sufficient incentives on the network operator to support retail obligations.

59. Optus notes the existing CSG framework is an example of where wholesale arrangements are insufficient to adequately support the retail obligations and there is inadequate direct regulation on the network operator, merely a regime for secondary liability. Optus has provided detailed submissions to the ACCC's service level inquiry on the inadequacies of the service level framework in NBN Co's Wholesale Broadband Agreement in supporting RSPs in delivering a good customer experience.
60. Optus notes obligations should be applied consistently, not just on NBN Co, but on other fixed-line network operators to ensure consistent application across fixed-line services.

### **Consumer safeguards are best delivered through direct regulation**

61. Optus does not support this principle. Optus supports regulation where specific problems or market failure are clearly identified, other measures (such as co-regulation) have failed to address the problem. and the regulation addresses these in the most efficient and least burdensome way.
62. As noted, where there is strong network competition, there are clear incentives for industry participants to address performance, reliability and service matters. For example, competition in the mobile sector has provided and continues to provide incentives to MNOs to improve and address performance, reliability and service issues, without the need for direct regulatory intervention (such as specific performance standards). NBN Co does not face that level of network competition as the ubiquitous access network provider of telecommunications services.
63. For reasons discussed earlier, Optus considers that any direct regulation designed to address consumer safeguards issues should first clearly identify the issue/problem to be addressed, be limited to those issues where other measures have not proven effective and follow the best practice regulatory principles as discussed previously in this submission.
64. At present this would suggest fixed-line services are in greatest need of review to ensure additional safeguards in the transition to the NBN are appropriately targeted and address clearly identified issues.

### **Consumers should get what they pay for**

65. Optus supports this principle. Importantly, we note that this principle applies at both the retail and wholesale level of communications markets.
66. With regards to retail providers, this principle already exists in legal obligations, for example, in the Australian Consumer Law and consumer guarantees. There are already sufficient regulatory obligations in place on retailers to deliver what end-users pay for. If end-users do not receive what they pay for, the retailer is the one who must compensate the end-user and address this issue in some way.
67. However, there is no legislative protections in relation to wholesale services, these are governed by the terms in commercial agreements. This means there can be a disparity in what applies at the retail level compared to what applies at the wholesale level and can ultimately impact delivery of services to the end-user.
68. For example, where a fixed-line retail broadband service delivered over FTTN/B/C technologies cannot technically deliver the speed in the customer's plan, the RSP must contact the customer, advise what maximum speed can be delivered and then provide

the customer with various options (including switching speed tiers, allowing the customer to exit without cost, refunds or compensation).

69. Yet we note that NBN Co only commits to a peak information rate (i.e. maximum information rate) 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 area before Telstra disconnects the copper network) NBN Co only commits to a peak information rate of 12 Mbps downstream.<sup>19</sup>
70. Therefore, during this transition period, if an end-user orders a 50 Mbps service and the FTTN line is only capable of maximum rate of 15 Mbps, the RSP must address specific requirements and provide options to the end-user,<sup>20</sup> NBN Co has no obligations under the Wholesale Broadband Agreement. It does not have to provide any corresponding compensation to the RSP. Nor is NBN Co required to even remediate the line as the line is achieving the co-existence PIR objective, so the RSP is unable to lodge a remediation request.<sup>21</sup>
71. Further, if the RSP moved the end-user to the lowest speed tier and the co-existence period ended, the line would be considered to be delivering the 12/1 service and an RSP could not lodge a remediation request. It is only by keeping the customer on the higher speed tier (which if it does so the RSP must meet the regulatory requirements and the RSP must pay NBN Co the higher price for this higher speed tier) could the RSP then lodge a remediation request to address the technological limitations of the line.<sup>22</sup>
72. The disparity between retail legislative obligations and wholesale contractual obligations in just this example for underperforming services is clearly significant. It is examples like these where we believe commercial arrangements are inadequate and there should be additional regulatory requirements on the network operator.

### **Network reliability should be transparent**

73. In general Optus supports this principle, but, notes that competition in the mobile sector has already driven improvements in network reliability, coverage and performance. MNOs have a clear commercial incentive for consumers to know their network is reliable.
74. However, Optus considers there is scope for improved transparency on network reliability where fixed-line networks do not face the same level of competition. As the ubiquitous access network operator, NBN Co should be held more accountable for fixed-line network reliability and performance. Currently there are some network reliability measures in the Wholesale Broadband Agreement's service level framework. However, there is little transparency over NBN Co's network performance. New reporting requirements on NBN Co for network reliability to improve transparency could be implemented by the ACCC.

### **Arrangements should incorporate public accountability and data collection, analysis and reporting should drive improved outcomes**

75. Reporting obligations should be imposed carefully, where it is clearly meeting an identified purpose, such as improving transparency on network reliability. For example, information reported at a retail level should not be used as a comparison between retail

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<sup>19</sup> See Definition of 'PIR Objective', Dictionary, Wholesale Broadband Agreement.

<sup>20</sup> As required by clause 14 of the Telecommunications Service Provider (NBN Service Migration) Determination 2018.

<sup>21</sup> See Definition of 'Remediation', Dictionary, Wholesale Broadband Agreement.

<sup>22</sup> We note this issue has also been raised with the ACCC during its wholesale service level inquiry.

providers performance, where retail providers rely on network operators to fulfil connections, attend appointments and rectify faults.

76. There is already a significant amount of data reported to the ACCC and ACMA under various record keeping rules and reporting obligations. For example, retail providers who supply CSG services are already required to report to the ACMA detailed information about those CSG services and their missed connections, faults and appointments, including for example, compensation paid. This information is then published by the ACMA.
77. Optus considers there is a general lack of transparency over matters related to the NBN. One way of driving greater accountability for NBN Co in delivering its services would be for there to be additional reporting requirements on NBN Co that are then published. This is one area where Optus considers additional reporting and transparency requirements would be beneficial.
78. As previously noted in this submission, it would be useful if there is clear identification of a problem, such as what additional information is needed besides the information already provided to the ACMA, why information currently provided is insufficient, and how this will drive improvements and enable best regulatory practice in future.

## THE FOUR PROPOSALS LISTED IN THE DISCUSSION PAPER

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79. The Consultation Paper sets out four broad proposals regarding consumer safeguards in a structurally separated next generation fixed-line industry:
  - (a) Proposal 1: Mandatory rules will cover how consumers and small business are connected and stay connected to fixed telecommunications networks including appointments;
  - (b) Proposal 2: Providers must focus on keeping customers connected to a service if timeframes cannot be met;
  - (c) Proposal 3: Network infrastructure providers that support the supply of retail services to consumers will be required to publish network reliability metrics and to report to the ACMA on network performance and
  - (d) Proposal 4: The ACMA will be responsible for the collection of data relating to fixed connections, repairs and appointments, with reporting obligations applying at both the wholesale and retail level. The ACMA will publish the results.
80. The broad proposals contain a number of specific suggestions for each proposal. Optus' comments and these suggestions are discussed further below.

### **Proposal 1: Mandatory rules for fixed network connections, repairs and appointments**

81. Optus has the following observations on the suggestions included in the Consultation Paper under this proposal.
82. Optus notes it is unclear how any new Standards would interact with existing regulations, such as the CSG Performance Standards. If new standards dealing with connections, fault rectification and appointments are introduced and apply at the retail level as well as the wholesale level we assume the Government will take the necessary steps to repeal the CSG performance standards. Otherwise, this would simply add essentially duplicative obligations on providers such as Optus, who does not require customers to waive CSG rights. Optus supports the comment that RSPs should not be

held accountable for matters outside of their control, nor should wholesalers be held accountable for matters outside of their control, however, depending on how such obligations are crafted, it could be time consuming to administer such a regime.

83. Optus considers that any requirements addressing billing for customers should be flexibly worded so that refunds or credits are available as options to RSPs, while also ensuring the consumer ultimately suffers no harm. To require changes to billing systems to cease billing entirely is impractical and would be costly to implement.
84. We support obligations that wholesalers should not be able to charge (or should provide refunds or credits) where there are connection or fault issues that are the fault of the wholesaler. For example, where customers migrate to the NBN, RSPs are prevented from charging customers until a post-migration test confirms that the service is operational.<sup>23</sup> However, we note NBN Co begins charging RSPs as soon as it provides a completion advice to the RSP. In some cases services experience a fault before becoming operational. This is classified as a 'New Service Never Worked' fault. It is Optus' experience that the majority of these faults are resolved by NBN Co, which suggests there was an issue with the NBN connection and a completion advice should not have been provided to the RSP. Despite the issue being NBN Co's responsibility, NBN Co is not required to provide a refund or a credit to the RSP for the time the fault existed, even though the RSP is not able to charge their customer. We consider this same obligation should apply at the wholesale level.
85. Optus notes the timeframes proposed in the Consultation Paper for connections and fault rectification are quite short. While we agree that where an issue is known and does not require attendance by a technician, it should be possible for repairs to be fulfilled within that timeframe, we note that sometimes faults can be difficult to diagnose (including determining whose responsibility it is to address the fault). We do not believe an RSP should be considered to have contravened such performance standards where the fault lies outside their control, including where this is a network fault or an in-premises or non-RSP supplied CPE issue. Similarly, an RSP should not be considered to have contravened a connection standard where the RSP relies on a network operator to install new infrastructure at a premises.
86. There are suggestions presented in the paper that may be best deal with via an Industry Code or similar. For example, a requirement to tell consumers about timeframes for delivery of additional equipment (if needed) would seem like an obligation that would be better incorporated into an Industry Code. Optus is not aware of significant issues where RSPs may fail to advise of anticipated delivery timeframes.
87. We note the Consultation Paper's suggestions that industry could compete on service levels. We also note that for services supplied over the NBN, NBN Co must make available terms and conditions (including product offerings) on a non-discriminatory basis and RSPs are unable to offer to end-users an option that NBN Co does not support. We note that accelerated connections are already available under the Wholesale Broadband Agreement, but these are strictly limited (they cannot make up more than 10% of an RSPs monthly connections) and the connection must meet the necessary definition and conditions for an 'accelerated connection'.<sup>24</sup> We note that NBN Co also supplies an enhanced service fault rectification product, however, this is at an additional charge.
88. Optus has some concerns about the practicality of requiring network rectification plans to the ACMA where natural disasters arise. We note that RSPs have no visibility over the access network and assume such an obligation would fall on the network operator to

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<sup>23</sup> See clause 15, Telecommunications service Provider (NBN Service Migration) Determination 2018.

<sup>24</sup> Section 4.6.3.3, WBA Operational Manual, Wholesale Broadband Agreement and Definition of 'Accelerated Connection' Dictionary, Wholesale Broadband Agreement.

prepare and provide such a plan. RSPs do simply not have the necessary network information available to them to prepare and provide such a plan.

**Proposal 2: Providers must focus on keeping customers connected to a service if timeframes cannot be met**

89. Optus has a number of concerns about the suggestions related to Proposal 2. We note there are already obligations under the CSG framework and the ACMA's recent regulatory instruments requiring either provision of an alternative service or arrangements where service continuity issues may arise in migration to the NBN. It is unclear how any new obligations would work with existing regulations, so we therefore assume existing regulation would be reviewed and amended where necessary to avoid duplication and allow RSPs to take advantage of any existing processes.
90. Any such requirements to provide alternative services need to be practical, flexible and measured (for example, it is unclear why an RSP would not be able to charge a basic usage cost, particularly if the RSP is having to meet the cost of this obligation where the delay in connection or repair may be due to factors outside of the RSPs control). Similarly, if RSPs do not have easy access to an alternative service there should be flexibility in how an RSP can address this (for example, whether the RSP could provide a credit towards an existing mobile service). Optus supports the notion that if a delay is due to a third party (for example, the network operator) that third party should have to reimburse the RSP the costs of any alternative service or end-user compensation. We consider such a requirement should be added to the ACMA's regulatory instruments to encourage NBN Co to expedite the supply of NBN services.
91. We are concerned by the apparent suggestion that RSPs cannot refuse to supply a service with priority performance standards for those with a medically diagnosed life threatening medical condition. This in effect, amounts to a universal service obligation with higher performance standards on all RSPs regarding those customers – without a corresponding obligation on the network provider to support these services. We note the current Priority Assistance framework involved carrier license conditions on Telstra and an Industry Code setting out requirements for other provider who elected to provide Priority Assistance services. Optus submits that further work is required (which could occur separately from this review) to finding a workable solution where RSPs could have confidence that requirements would be supported at the wholesale level.
92. Optus considers that the issues raised under proposal 2 require further thought and engagement with industry. As we have noted, careful consideration is required to identify the problem to be solved and regulatory options should be appropriately targeted.

**Proposal 3: Network infrastructure providers will be required to publish network reliability metrics and to report to the ACMA on network performance**

93. Optus supports the suggestion that there be additional network reliability reporting requirements on fixed-line network operators. We do not believe, for example, that additional reporting requirements are required on mobile network operators given there is strong network competition between providers and all mobile network providers are prepared to make network or coverage commitments for customers.
94. We note that measures RSPs have put in place to provide better customer service, such as hybrid modems where the modem contains an in-built SIM roams onto a mobile network should the fixed-line connection drop out, may in fact mask performance problems in the underlying fixed-line network. Requiring the network operator to report on reliability measures would be beneficial to industry and consumers.

**Proposal 4: The ACMA will collect and publish data relating to fixed connections, repairs and appointments, applying at both the wholesale and retail level.**

95. Optus notes that there is already considerable reporting that must be done by RSPs to the ACMA and ACCC. Before the introduction of any new reporting requirements, there should be a review of information already reported by RSPs to ensure there is no unnecessary duplication. In some cases, largely similar information is required for different obligations, except in a different format or covering a different timeframe or slightly different subject matter. Such inefficiencies in reporting requirements adds to the cost of meeting reporting requirements.
96. Optus considers any reporting of information should be done carefully and should not be encouraged by the ACMA as a comparison measure for consumers as to the relative performance of RSPs, particularly where RSPs rely on the network operator for addressing faults, meeting appointments and delivering connections.