Telecommunications Service Provider (NBN Line Testing) Determination 2018

Submission to the Australian Communications and Media Authority

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About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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# Introductory Comments

ACCAN would like to thank the ACMA for the opportunity to submit on the *NBN Line Testing Determination 201*8.

ACCAN supports the draft *NBN Line Testing Determination* as representing a marked step forward in addressing the challenges that consumers face in using telecommunications services. The absence of communications services - even for short periods - can result in social isolation, reduced economic livelihood and participation in social life, insecurity, and can potentially pose a risk to safety -­ a cost to the community which is often undervalued.[[1]](#footnote-1)

Currently RSPs and NBN Co have limited incentive to identify and rectify faults in a timely manner or in keeping with their contractual obligations to their customers. As a consequence, consumers have suffered significant detriment through unnecessary delays in fault rectification, poor service and disconnection.

ACCAN supports the current drafting of the Determination and the constraint on service providers from charging for services which are not being provided in keeping with consumer expectations or contractual obligations. Restricting the capacity of service providers to charge in the absence of services provides strong financial incentives for service providers to identify and rectify faults in a timely fashion.

The Determination will facilitate better outcomes for consumers through the early identification and rectification of network faults and allow for faster, more convenient switch-over. In the absence of the Determination and supporting consumer information and service continuity standards, consumers have faced significant detriment as a result of disconnection and poor service quality, set out in more detail below. ACCAN welcomes the package of reforms put forward by the ACMA in order to address these issues.

***Consumer losses from disconnection***

Estimating the losses to consumers as a result of disconnection of service is a difficult task, made more complex by the absence of comprehensive reporting on prices, population statistics for consumers affected by disconnection and time periods of disconnection faced. [[2]](#footnote-2) Despite these difficulties estimates can be made of the losses consumers have experienced through the use of survey, pricing and population data.

From a theoretical standpoint the loss accruing to the consumer as a result of disconnection can be estimated using a simple back of the envelope calculation:

*Consumer loss = price x time disconnected x population affected by loss of service*

Currently comprehensive data concerning the population affected by disconnection and the period of disconnection are not available. However recent ACMA survey data indicates that 34% of households reported being left without the phone and/or internet services when connecting to the NBN and provided detailed breakdowns of the period of disconnection experienced by households.[[3]](#footnote-3)

If the experience of consumers from the survey was replicated across the 790,569 premises connected to the NBN in 2016-17, [[4]](#footnote-4) this would imply a minimum loss of between $3.6 million to $5.5 million as a result of disconnection and delays in rectifying connection problems.[[5]](#footnote-5) This figure represents the loss to consumers as a result of non-performance of contractual obligations and does not include the inconvenience or time costs that consumers face is seeking to organize fault rectification and is therefore likely to be well below the actual level of detriment experienced by consumers.[[6]](#footnote-6) The losses faced by consumers during this period and historically have been material and far in excess of what consumers reasonably expected.

***Consumer losses from slow services***

Losses also accrue to consumers where services are not provided at the speeds contracted and paid for. There is currently insufficient publicly available information to facilitate a robust estimate of this loss; however the consumer loss may be conceptualized as:

*Consumer loss = [price paid for service – price for speed provided] x population affected x time[[7]](#footnote-7)*

Assessing the loss for consumers suffering from slow speeds is a challenging task in the absence of detailed information concerning the speeds of services. However, consumer survey responses indicate that 68% of consumers are suffering from slow data speeds often or very often.[[8]](#footnote-8) Recent enforcement action by the ACCC in seeking enforceable undertakings for misrepresentation of actual speeds available to consumers further highlights the detriment experienced by consumers.

The loss to consumers paying for higher speeds which they are not receiving is driven by a fundamental information asymmetry that exists between consumers, RSPs and NBN. This information asymmetry is leading to consumer detriment in the short-term as consumers end up paying prices in excess of what would be accepted were service quality known.

In the short-term the distortions to the market are limited and the losses are materially borne by consumers. However in the longer term the distortionary effects of asymmetrical information lead to losses accruing to both buyers and sellers. As consumers become aware that they are receiving services well below the quality that they were promised under contract their willingness to pay for services of unverifiable quality will decline. At a technical level this has historically led to consumers becoming unwilling to pay more than the average price based on an estimate that all services are of average quality. This in turn has negative effects on the level of cost recovery by high quality service providers, who as a result of their higher cost structure will be driven out of the market.[[9]](#footnote-9) The long term losses that accrue as a result of information asymmetries are well documented, and the risks that insufficient transparency concerning speed outcomes poses to the sustainability of the market, are significant.

ACCAN also considers that these losses are likely to be significant, and though in the short-term are borne by consumers, will flow through the system in the absence of effective regulation. To this end, consumers that would otherwise purchase faster, higher speed services may be holding off on doing so due to the paucity of reliable information concerning the actual speed of services, and high levels of public concern about speeds – to the detriment of both consumers and industry. We strongly argue that by ensuring that consumers can assess the quality of the services that they are paying for through transparent testing as provided in the Determination the current and potential economic losses arising as a result of this perpetuation asymmetry can be rectified.

# Responses to consultation questions

2.1 Question 6

**Are there any elements of the draft Line Testing Determination that cannot be implemented or complied with for technical, operational or other reasons? For example, what are the feasible time frames for the Determination to take effect? Please provide details.**

ACCAN has undertaken consultation with technical and industry specialists concerning potential constraints associated with the implementation of the Determination. Although the Determination will require industry stakeholders to engage in collaboration and co-operate in order to meet its objectives, we are not aware of material technical or operational constraints that would preclude implementation. Co-operation and co-ordination between service providers, service aggregators and the wholesaler will continue to be essential for the operation of services following the transition.

ACCAN considers the Determination should be capable of being implemented within the three month timeframe proposed in the consultation paper. The line testing Determination imposes two primary obligations on service providers, the first is to co-ordinate to undertake initial post-activation of lines and the second is to undertake speed testing where requested by a consumers.

The obligation to undertake post-activation service testing requires future connections to be tested following activation and involves minimal co-ordination between RSPs and NBN Co at the time of connection to ascertain service functionality. ACCAN’s understanding is that this type of connectivity test is technically straightforward. Procedures for the implementation of the Determination can be established within the nominated period on an ad-hoc basis if necessary, followed by more formalized arrangements over the coming months.

ACCAN considers that although testing connected lines for speed may involve more administrative complexities than those associated with post-activation line testing, that the administrative burden will be low as testing will only be triggered occasionally. Accordingly only consumers facing speeds that are greatly disproportionate than those expected or contracted for will trigger testing, limiting the applicability of this element of the Determination and consequently lowering the costs of compliance.

ACCAN considers the cost impacts of the Determination will be less than the benefits that accrue. Where administrative costs arise they will form part of the cost structure inherently required to ensure that services are provided in accordance with service providers’ contractual and statutory obligations.

2.2 Question 7

## **Are the number of tests required under Part 3 of the Determination appropriate for determining the speed of a consumer’s service?**

ACCAN considers the number of tests required under Part 3 of the Determination is adequate for assessing the speed of a consumer’s service. The Determination envisions that in some instances further testing may be appropriate where significant variance in speeds is observed and there is continued consumer loss due to unreliable performance.

The current drafting of Part 3 is in keeping with sound regulatory practice and provides a proportionate and balanced approach to addressing the problem of insufficient speeds.[[10]](#footnote-10) ACCAN considers the current drafting to provide sufficient protections, whilst avoiding unnecessarily onerous regulatory costs.

2.3 Question 8

**Are there any additional measures that you would recommend including in the Determination? If so, what are those measures and why do you think they should be included?**

ACCAN considers the current drafting of the Determination to be adequate to achieve the stated objectives. However ACCAN supports broadening the scope of the Determination to encapsulate all broadband service providers including non-NBN providers.

The inclusion of non-NBN broadband providers is essential in order to ensure that all consumers are provided protection and do not face the problems experienced in switching to the NBN. The problems associated with the NBN rollout merely highlight an underlying problem concerning information asymmetries between consumers, RSPs and wholesale network providers which is not unique to the NBN. ACCAN considers that including non-NBN providers will mean that consumers suffer less detriment as a result of insufficient monitoring of connection speeds.

The extension of the scope of the Determination requirements to non-NBN broadband providers is also in keeping with sound regulatory principles concerning the neutral treatment of competitors in markets. In particular there is a need to preclude regulatory treatment that distorts the market place by favoring any particular participant or technology.

# Conclusion

ACCAN supports the provisions within the Determination as currently drafted and considers that these requirements are essential to addressing the high rates of failure reported by consumers in switching to the NBN. The draft line testing Determination provides a strong framework for ensuring the provision of valuable services to consumers in alignment with RSPs contractual obligations and represents a prudent and proportionate regulatory response in alignment with best practice principles.[[11]](#footnote-11)

In the light of high rates of fault experienced by consumers when initially switching to the NBN the requirement to undertake post-activation line testing is fundamental to addressing the loss in consumer that occurs as a result of disconnection and slow service. The adoption of post-activation testing represents the least cost solution to the ongoing problems experienced by consumers by fixing them in the first instance.

The framework of customer-initiated line testing provides an ongoing mechanism to ensure the accountability of service providers to consumer for the services they have promised to provide. This requirement is essential for both the protection of consumers but is also important to ensure the long-term health of the market for NBN services and to avoid losses to consumers and firms.

Consumers as buyers must have confidence in the quality of the services being offered to them by retailers and the NBN as sellers. As this confidence and trust is eroded consumers will become increasingly unwilling to pay for notionally high value, high quality services that provide the greatest benefits and revenue to service providers and not consumers. This represents a loss to both those consumers that would otherwise benefit from higher value services but who are unwilling to pay for services of unknown quality, as well as service providers who lose the opportunity to sell higher margin, higher value services to consumers but still face the same underlying fixed infrastructure costs.

The draft Determination creates strong incentives for service providers to take appropriate steps to ensure that they are providing the service they promised by precluding charges from being collected. For the most vulnerable consumers this provision provides strong protections from unnecessary hardships and allows for access to be maintained.

All regulatory decisions entail an element of cost;[[12]](#footnote-12) however the fundamental economic test for assessing whether a policy should be implemented is whether total welfare is enhanced as a consequence of implementation – that is the net benefit test.[[13]](#footnote-13) ACCAN considers that although costs will be imposed through the adoption of the draft Determination that these costs are outweighed by the significant benefits that will accrue to consumers, the broader community and industry in the longer term.

1. . Garnham, Nicholas. "Amartya Sen’s capabilities approach to the evaluation of welfare: Its application to communications." Communication, citizenship and social policy: Rethinking the limits of the welfare state (1999): 113-124; Viscusi, W. Kip, and Clayton J. Masterman. "Income Elasticities and Global Values of a Statistical Life." *Journal of Benefit-Cost Analysis* 8, no. 2 (2017): 226-250. [↑](#footnote-ref-1)
2. . In economics this is conceptualised as the loss to a consumers ‘welfare’ which encapsulates the intangible utility or wellbeing of consumers that arises through receipt of goods or services. [↑](#footnote-ref-2)
3. . ACMA 2018, *NBN consumer experience – residential research snapshot*,

   <<https://www.acma.gov.au/-/media/Research-and-Analysis/Research/pdf/Research-snapshot_NBN-pdf.pdf?la=en>> [↑](#footnote-ref-3)
4. . Telecommunications Industry Ombudsman 2018, *2016-2017 Annual Report,*

   *<*<https://www.tio.com.au/__data/assets/pdf_file/0018/250911/Telecommunications-Industry-Ombudsman-Annual-Report-2017.pdf>> [↑](#footnote-ref-4)
5. . This figure is prefaced on the survey data being representative of the experience of the population as whole. In order to ensure the estimate is robust contract prices have been set below average prices at $1.65 per day [$50 per month], time for disconnection has been calculated on basis of the lowest number of days in any given category of disconnection [e.g. 1 day for the 1-3 days category] and the 0-24 hour period has been eliminated from the calculation. The upper bound estimate for the 2016-17 period was $5.5 million. [↑](#footnote-ref-5)
6. . The above figure is one of pure economic loss and does not include the administrative costs borne by consumers in organizing rectification of faults, nor the loss of value associated with the withdrawal of existing services or the increased risk consumers’ face in being unable to access emergency services due to prolonged disconnection of services. [↑](#footnote-ref-6)
7. . Willingness to pay figures may be elicited through various methods, but in the absence of such information price may be used as a proxy. [↑](#footnote-ref-7)
8. . ACMA 2018, *NBN consumer experience – residential research snapshot*,

   <<https://www.acma.gov.au/-/media/Research-and-Analysis/Research/pdf/Research-snapshot_NBN-pdf.pdf?la=en>>. [↑](#footnote-ref-8)
9. Akerlof, G 1970, ‘The Market for “Lemons” Quality Uncertainty and the Market Mechanism’, *Quarterly Journal of Economics,* vol. 84, no. 3, pp. 488-500. [↑](#footnote-ref-9)
10. . Organisation for Economic Co-operation and Development 2012, *Recommendation of the Council on Regulatory Policy and Governance,* OECD, Paris. [↑](#footnote-ref-10)
11. . Organisation for Economic Co-operation and Development 2012, *Recommendation of the Council on Regulatory Policy and Governance,* OECD, Paris. [↑](#footnote-ref-11)
12. . Marneffe, W & Vereeck, L 2011, ‘The meaning of regulatory costs’, *European Journal of Law and Economics*, vol. 32,

    no. 3, pp. 341-356. [↑](#footnote-ref-12)
13. Hicks, J 1939, ‘The Foundations of Welfare Economics’, *The Economic Journal*, vol. 49, no. 196, pp. 696-712; Kaldor, N 1939, ‘Welfare Propositions of Economics and Interpersonal Comparisons of Utility’, *The Economic Journal*, vol. 49, no. 195, pp. 549-552. [↑](#footnote-ref-13)