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Report to Department of Communications: ACCC consultation on proposed information disclosure carrier licence condition

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Australian Competition and Consumer Commission
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Executive Summary

The Australian Competition and Consumer Commission (ACCC) has been asked by the Department of Communications to advise on a proposed carrier licence condition for NBN Co that would require the disclosure of certain information.

The ACCC recommends that, under the proposed licence condition, NBN Co be obliged:

- to prepare regular management-style reports disclosing specified information about the national broadband network (NBN), and to make these reports directly available to all service providers intending to supply over the NBN;
- to maintain a register of documents disclosed by NBN Co to Telstra, and to provide to access seekers, on request, copies of documents; and
- to conduct ongoing consultation/engagement with interested parties in relation to the disclosure of information about the NBN.

The management-style reports should be based on a reporting framework that NBN Co developed in May 2014. The ACCC recommends additions be made to this reporting framework in order to recognise the move to the multi-technology mix (MTM) model for the NBN, to provide stakeholders with further relevant information sooner.

The management reports should be available to all parties intending to supply services over the NBN, which include application service providers such as over-the-top providers, as well as retail service providers/access seekers. Access to the NBN register of documents, and the ability to request copies of these documents, should be limited to access seekers. Some conditions may be attached to the disclosure of information (such as confidentiality requirements), but these should not be onerous.

The proposed licence condition should preclude NBN Co from providing Telstra (or other service providers) with commercially sensitive information about the 'gaining service provider' in the daily migration feed data regarding copper services that are cutover from Telstra's legacy network to the NBN in FTTN/B areas.

NBN Co should also be required to implement processes for monitoring and reporting on compliance with the licence condition.

The ACCC considers that this proposal will meet the Government's objectives of 'information symmetry' and of ensuring Telstra does not gain an unfair competitive advantage as a result of the information it receives from NBN Co under the Definitive Agreements. This proposal also takes into account the desirability of minimising the cost impact on NBN Co and other stakeholders, and of maintaining the security of confidential network data.

The ACCC recommends that two further types of reporting which were raised in submissions be further considered, with a view to them being introduced. These are the reporting of 'in-train' migration orders in a region as each 'migration window' is closing, and of market share information. Specifying these reports in the carrier licence condition may be unnecessary however, except where there were impediments to NBN Co proceeding to implement this reporting that could otherwise not be overcome.

Background

Following recommendations from the strategic review of the national broadband network (NBN or 'the network') in December 2013, the Government issued a new Statement of Expectations instructing NBN Co to transition from a primarily fibre to the premises (FTTP) model to an optimised multi-technology mix (MTM) rollout model. The MTM model allows NBN Co to use fibre-to-the-node (FTTN) and fibre-to-the-basement (FTTB) technology in addition to FTTP, and to integrate existing hybrid-fibre coaxial (HFC) networks into the rollout where feasible and economically beneficial.

On 14 December 2014, NBN Co and Telstra executed amendments to the Definitive Agreements to facilitate the shift to an MTM NBN. The amended Definitive Agreements provide for the sharing of additional information between NBN Co and Telstra, including in relation to the design and construction of the MTM network, and the commencement of supply to premises.

Restrictions in Telstra's Migration Plan remain in place to ensure that FTTP information is ring-fenced by Telstra and will not be used to gain an unfair commercial advantage over its wholesale customers. These restrictions will not however apply to the additional FTTN, FTTB, and HFC information shared under the amended Definitive Agreements. Instead, it is intended that any competition concerns will be met by existing mechanisms (including the *Competition and Consumer Act 2010*, Telstra's Structural Separation Undertaking and relevant provisions of the Definitive Agreements) and the imposition of a new carrier licence condition on NBN Co. The proposed carrier licence condition will require NBN Co to share rollout and related information with all retail service providers.

Consultation

The Department of Communications (the Department) requested the ACCC consult with interested parties on the proposed licence condition, including on the information sought to be disclosed.

Following the receipt of necessary information from NBN Co, the ACCC released a discussion paper on 24 March 2015. Submissions were sought by 24 April 2015. The ACCC left open the prospect of holding a face-to-face forum with stakeholders to discuss the issues raised in the paper but did not proceed with this step.

In response to the discussion paper the ACCC received a number of submissions. Formal submissions were made by:

- AT&T Global Network Services Australia Pty Ltd;
- the Competitive Carriers' Coalition (the CCC);
- iiNet;
- NBN Co (public and confidential versions);
- Optus (public and confidential versions);
- Telstra; and
- TPG Telecom Group.

Each of these submissions were provided by the ACCC to the Department.

Proposed licence condition

This section sets out the ACCC's views on the key aspects of the proposed licence condition, specifically:

- the objectives of the proposed licence condition;
- guiding principles for the proposed licence condition;
- information to be disclosed under the proposed licence condition, and the manner and form of disclosure;
- the treatment of 'gaining service provider' data;
- the parties to whom information should be disclosed;
- measures to monitor and enforce compliance with the proposed licence condition; and
- the implementation, costs and benefits of the proposed licence condition.

Objectives of the proposed licence condition

As noted earlier, the shift to the MTM model for the NBN means that Telstra will now have a much closer involvement in the network design and construction. As a result, Telstra will have access to sensitive information about the network that could provide it with an advantage over other service providers, or which could give rise to the perception that Telstra has such an advantage. This information is provided pursuant to the Definitive Agreements between Telstra and NBN Co. This may in turn have implications for competition for downstream telecommunications services as the industry undergoes major structural reform.

The rationale for the proposed licence condition derives from these circumstances. By ensuring that information about the network is available to all relevant parties, Telstra should not obtain, or should not be perceived to obtain, any advantage by reason of the information it receives from NBN Co under the Definitive Agreements. The proposed licence condition therefore has a pro-competitive rationale, seeking to support competition between downstream users of the NBN. The Minister for Communications, the Hon Malcolm Turnbull MP, has noted that handling of information by NBN Co and Telstra is a critical issue in realising the competition objectives of the Government's NBN reforms.¹

This rationale is closely linked to the stated objectives of the proposed licence condition. The Department has stated that the over-arching object of the proposed licence condition is to ensure symmetry between Telstra and all other retail service providers in respect of relevant NBN-rollout and related information. The Department considers this will ensure that Telstra does not have any actual or perceived information advantage by virtue of its role as the owner of copper and HFC networks being acquired by NBN Co.²

¹ Minister for Communications, 'Regulatory instruments for NBN Migration Plan finalised' (Media release, 27 January 2015) at http://www.minister.communications.gov.au/malcolm_turnbull/news/regulatory_instruments_for_nbn_migration_plan_finalised#.VMrf6tS4bzU

² Department of Communications, *Variation of Telstra's migration plan – regulatory instruments: exposure drafts* (Discussion Paper) (December 2014) p. 10, at

The ACCC Discussion Paper sought stakeholder views on this objective and whether there were any limitations to achieving it. Stakeholders supported the aim of the proposed licence condition, either by supporting the notion of 'information symmetry' between Telstra and other service providers, or by supporting the general aims of ensuring that Telstra does not obtain, or is not perceived to obtain, any unfair advantage by virtue of the information it receives from NBN Co. In its submission iiNet expressed the view that there are limitations to the existing means of preventing Telstra gaining this advantage (that is, via the *Competition and Consumer Act 2010* or other avenues), and that the proposed licence condition is a necessary step to overcome those limitations.

Some stakeholders also noted that effective information disclosure about the NBN will facilitate better outcomes for end-users, particularly in the migration to the new network. Optus suggested that the proposed licence condition have an additional objective to focus on this, suggesting that information disclosure should seek to facilitate the seamless transition of all end-users to the NBN.

Clarifying the objectives

The notion of 'information symmetry', used in the Department's announcement for the proposed licence condition, provides a clear framework for the proposed licence condition. Implemented literally - wherein all stakeholders receive the same information NBN Co provides to Telstra under the Definitive Agreements - it would also constitute a strong means to safeguard against Telstra obtaining any advantage. The ACCC considers that the notion of symmetry should be pursued as far as practicable.

A number of submissions did however highlight potential issues with a literal interpretation of 'information symmetry'. Telstra will receive a large volume of information from NBN Co under the Definitive Agreements, some of it in a disaggregated form, and some of it only sensible once incorporated into existing systems. To receive and make sense of this information, other interested parties may need to invest in additional IT infrastructure. Further, some of this information may in fact be of little relevance to material aspects of the NBN. Given the volume of data, there is a risk that interested parties may struggle to discern what is relevant from what is not. There may also be issues around widely promulgating detailed network information, as this may have ramifications for the security of the network. As such, an approach where NBN Co broadcasts all of the information that has been provided to Telstra may be counterproductive.

The ACCC therefore supports the objectives of ensuring that no one party has an unfair advantage by reason of its participation in the transition to the NBN. Consistent with the overall aims for the structural reform of the telecommunications sector, the ACCC supports measures to ensure all parties have access to information about the network and the opportunity to compete on an equal footing. The ACCC would recommend that the objectives of the proposed licence condition be stated in terms of the benefits to competition, particularly as the telecommunications sector undergoes major structural reform. To the extent practicable, these objectives should be sought to be achieved via information symmetry under the proposed licence condition. Given there may be practical limitations to making all information available to all parties, the information disclosed should at the very least allow all service providers an equivalent opportunity to make business planning decisions to take advantage of the new network.

The ACCC also supports measures to ensure that end-users are migrated to the NBN efficiently and with minimal disruption. In this regard, it is likely that information disclosed under the proposed licence condition will be of benefit to migration processes regardless of whether this is specified as an objective of the condition. That is, to the extent that the proposed licence

condition supports competition between service providers during the transition to the NBN, then those competitive processes should also lead to benefits for consumers.

That said, there are separate processes underway to promote better migration outcomes for end-users (such as the Migration Assurance Process), and hence there would be other opportunities to promote broader migration objectives.

Nevertheless, if Government considers that there is a particular information flow that should occur in order to promote consumer migration outcomes, then a licence condition requiring the provision of that information would provide a means by which to provide greater assurance that the information can be available as and when it is needed.

Guiding principles for the condition

The ACCC's Discussion Paper outlined possible guiding principles for inclusion in the proposed licence condition, and sought views on whether and what principles the licence condition should incorporate, or that should be taken into account in the development of the condition.

Stakeholders were supportive of developing guiding principles for the proposed licence condition, with many agreeing that such principles should be included in the drafting of the condition itself. NBN Co saw merit in developing principles, but did not support including those principles in the condition. A number of stakeholders endorsed the particular principles outlined by the ACCC in its Discussion Paper, while others suggested variations or additions to those principles.

The ACCC recommends that the proposed licence condition incorporate principles to guide its application. This will help to ensure the objectives of the condition are met in circumstances that are likely changing and uncertain. As noted in the Discussion Paper, the Definitive Agreements detail substantial information flows between NBN Co and Telstra, disclosed at different points in time and in varying formats. Presently, the full array of information flows has not been identified and it is likely that the type of information, its timing and format will be mutable to meet their particular purpose, namely the construction of the NBN. It may therefore be difficult for the proposed licence condition to specify upfront all relevant information that NBN Co should disclose such that Telstra does not obtain an advantage. Certain additional measures (discussed below) are designed to address this issue, but including principles in the proposed licence condition should also assist NBN Co and other relevant parties in the application of the licence condition over time.

Principles to include in the proposed licence condition

While the ACCC's Discussion Paper flagged many possible principles, it may be appropriate for the proposed licence condition to incorporate a small number of principles that encapsulate key considerations. Additional explanation can though be provided to elaborate each principle.

The ACCC considers that a fundamental principle for the proposed licence condition is that Telstra will not obtain a competitive advantage by reason of its receipt of information from NBN Co. This reflects the overall objective of the condition to support competition. In effect, this principle would mean that all relevant parties are to receive information from NBN Co about the NBN to place them in an equivalent position to plan for, and commence supplying, equivalent services over the NBN fixed line network generally, and in individual NBN service areas that comprise a part of the NBN fixed line network. Stakeholders - including NBN Co and Telstra - were supportive of this principle.

Related to this is a further principle that encapsulates the need for information provided pursuant to the proposed condition to be relevant, accurate and timely. Stakeholders should be entitled to rely on the information made available by NBN Co, and the provision of relevant, accurate and timely information should support the overall competitive objectives of the

proposed licence condition. This encompasses providing current information, meaning that the regime imposed by the proposed licence condition should be responsive to changing circumstances. It also encompasses measures to ensure that the disclosure regime is robust and effective; that is, that NBN Co is complying with its obligations and that stakeholders can have confidence to make decisions and rely on the information disclosed.

These principles underpin the key features of the proposal outlined in subsequent sections of this report. That is, that:

- NBN Co disclose certain information via management reports, and make other information available on request;
- NBN Co must regularly consult with stakeholders to ensure that information disclosed remains relevant to their needs, and to achieving the objective of the proposed licence condition; and
- NBN Co must implement compliance systems and processes to monitor and report on compliance with the proposed licence condition, again to ensure that the proposed licence condition is effective in achieving its objectives.

Additional principles

Other principles flagged in the ACCC's Discussion Paper could provide useful guidance for developing the proposed licence condition (or for inclusion in explanatory material), but may not necessarily need to be incorporated into the drafting of the condition itself. These include:

- information disclosed should be in an appropriate format so that it is readily able to be interpreted by each relevant person; and
- there should be no unnecessary restrictions on each relevant person gaining access to the information.

Again, these principles received some support from stakeholders. NBN Co stated though that it should not have to tailor information to suit the needs of individual organisations. The ACCC agrees that a general requirement to tailor information for each interested party would potentially constitute an unreasonable impost on NBN Co. However, it is appropriate that information is disclosed in a manner that is accessible by interested parties, and may require some explanatory statements by NBN Co. Additionally, as discussed further below, NBN Co should respond to individual requests for information in appropriate circumstances.

Optus also suggested two additional principles:

- the systems, processes and formats for disclosing information should not impose undue cost burdens on service providers; and
- NBN Co should consult and take reasonable account of the views of service providers in relation to the detail of the information disclosed, the timeliness of disclosure and the format of disclosure.

The ACCC considers that there is merit in these suggestions. As discussed further below, there should not be any impediments to parties with a legitimate interest in the NBN from gaining access to relevant information. Similarly, the ACCC considers that the proposed licence condition should incorporate a process for ongoing consultation between NBN Co and interested parties about information disclosure (also discussed below).

Telstra suggested that key principles for framing the proposed licence condition should address the information service providers need to most effectively promote migration to the NBN to their end-users, and the information needed to improve the end-user migration experience. As noted

above, the ACCC supports measures to improve the migration experience for end-users, and it is likely that effective information disclosure via the proposed licence condition will contribute to positive outcomes in this respect. It may however be preferable for the proposed condition to focus on competition objectives, and if there is a need for further measures around migration, for these to be implemented via an alternative mechanism.

Information to be disclosed

Verbatim reports or management style reports

The ACCC's Discussion Paper sought views on whether NBN Co should be required to disclose 'verbatim-style' reports or 'management-style' reports. Verbatim reports would essentially involve disclosure of all of the information that is provided to Telstra, whereas management reports would mean more targeted disclosure, summarising and highlighting key information. The style of reporting reflects underlying considerations about how much information NBN Co should disclose, and what is necessary to disclose to meet the objectives of the proposed licence condition.

A number of stakeholders supported full disclosure of all information that is provided to Telstra. TPG viewed equivalence as all access seekers having access to the same information as Telstra. Optus and iiNet were of the view that verbatim reports should, at a minimum, be available on request. The CCC favoured the creation of a virtual data room via which parties could access all information.

Other stakeholders supported more targeted disclosure. The CCC agreed that it is important the information is provided in such a way as to be useable by access seekers, none of whom have the resources available to Telstra in order to interrogate what may be high volumes and frequencies of data exchanges between NBN Co and Telstra. The CCC supported the proposal that NBN Co be required to report specific, competitively important information by way of management and operational style reports.

As noted earlier, the ACCC considers that 'information symmetry' should be pursued as far as practicable within the framework of the overarching competitive objectives of the proposed licence condition. Given, however, the practical challenges associated with a literal interpretation of 'information symmetry', the ACCC recommends that NBN Co be obliged, via the licence condition:

- to prepare management-style reports on specified information, and to make these reports available, on a regular basis, to all parties with a legitimate interest in the NBN;
- to maintain a list or register of information disclosed by NBN Co to Telstra, and to provide to access seekers, on request, copies or further details of this information; and
- to conduct ongoing consultation/engagement with interested parties in relation to the disclosure of information about the NBN.

This proposal incorporates a mix of management-style and verbatim reports. In essence, the information disclosed via the management-style reports should be the key information about the NBN that is of primary relevance to service providers. Much of this information is already made available via reports NBN Co promulgates, and the ACCC recommends that NBN Co's reporting framework be retained with some important adjustments.

This may not, however, be sufficient to guard against Telstra obtaining an advantage from the information it receives under the Definitive Agreements, or of dealing with the perception that Telstra is obtaining this advantage. The document register seeks to address this point. The

ongoing engagement between NBN Co and relevant parties should ensure that the first two measures remain effective, particularly as circumstances change.

In its submission NBN Co suggested that the relevant test for determining whether information should be disclosed via the proposed licence condition is whether retail service providers would be able to use that information at the time it is provided to Telstra to make decisions that impact on their ability to compete in the market for retail broadband services. Applying this test, NBN Co suggested that almost all of the information flows outlined in the schedule to the ACCC's Discussion Paper would not be relevant and should not be disclosed to other service providers.

While this has some similarities with the ACCC's recommended approach, it differs in some important respects. It would be less certain under NBN Co's approach that the management reporting would properly support 'over the top' application service providers, in addition to providers of retail broadband services, notwithstanding that Telstra would also compete with these service providers, or that information would be reported to others proximate to when it was provided to Telstra.

More fundamentally, the absence from this model of visibility over the documentation that is being provided to Telstra, and the opportunity to request access to those documents, would provide less assurance that Telstra would not receive privileged access to relevant information and leave unaddressed the existing perceptions that this was occurring.

Consequently, the ACCC would have difficulty supporting an approach to information disclosure that relies heavily on NBN Co determining what information it believes is in the interest of service providers to receive. The prospect of an advantage to Telstra - or any other service provider - is more likely to be mitigated where information that service providers themselves consider relevant is readily available.

As outlined earlier in relation to relevant principles for the proposed licence condition, the ACCC considers that all relevant parties should receive information about the NBN to place them in an equivalent position to plan for, and commence supplying, equivalent services over the NBN generally, and in individual NBN service areas that comprise a part of the NBN. Similarly, while there may be legitimate reasons why some information should not be made available, issues of cost or inconvenience do not of themselves appear to be insurmountable barriers to information disclosure.

Information to be disclosed via management style reports

Existing arrangements

In May 2014 NBN Co published a 'communications pack' for access seekers setting out the scope and timing of reporting of the 'NBN Co Network Rollout Plan'. This document summarised the disclosures that NBN Co makes (or intends to make):

Rollout Plan Document	Scope	Release Date	Release Frequency
3 Year Construction Rollout Plan	Outlines the areas expected to commence build within 36 months from 1st July. Includes Brownfields Fibre only.	On or before 31 March of each year	Annually
1 Year Construction Rollout Plan	Outlines the areas expected to commence building within the next 12 months. Includes Brownfields Fibre,	January; April; July; October	Quarterly

	Greenfields Fibre (where available) and Wireless.		
Monthly Ready For Service Rollout Plan	Outlines the areas that have commenced build (i.e., the contract instruction has been issued) and hence have an expected Ready For Service date. Includes Brownfields Fibre, Greenfields Fibre and Wireless.	Within 10 working days from the start of the month	Monthly
Proposed Footprint List	The list of premises in a Rollout Region that will be Ready for Service in at least 6 months' time. Includes Brownfields Fibre, Greenfields Fibre and Wireless.	Within 15 working days from the start of the month	Monthly
Historical Footprint List	List the premises within the live Brownfields Fibre, Greenfields Fibre and Wireless footprints and their status.	Start of each week	Weekly
Historical Rollout Region List	Lists the live Brownfields Fibre, Greenfields Fibre, and Wireless rollout regions.	Start of each week	Weekly
Points of Interconnect Rollout Plan	Outlines the status of all the NBN Points of Interconnect.	Within 10 working days from the start of the month	Quarterly

The detail of precisely what NBN Co discloses under each of these reports is set out in the 'communications pack'. In summary though, pursuant to these reports NBN Co discloses different categories of information:

- Stage information, that is, the particular stage the rollout has reached, or is forecast to reach (such as when construction has commenced or when a rollout region is ready for service);
- Geographic information about the region, such as the polygon boundary and the premises within the region;
- Technology information about the particular mix of technology to be used within a region;
- Service information, such as the service class available per premises; and
- Progress information about the status of the rollout in particular regions.

In its submission, NBN Co put forward the following proposal for meeting the objectives of the proposed licence condition, which would represent a variation to the reporting framework contained in the May 2014 'communications pack':

- NBN Co would provide a nine-quarter rollout plan to RSPs showing the fixed-line serving areas that are completed, in-build, or in-plan, with

estimated dates for commencement of build, estimated ready-for-service (RFS) dates and a premises count (enabling a view of the volume expected in each area);

- NBN Co would continue to provide monthly updates on RFS dates once construction has commenced in each area; and
- NBN Co would conduct further consultation with RSPs on the type of information they require regarding the technology to be used in each serving area, and will continue to develop its MTM deployment plans in parallel with this consultation process (with changes made to the Wholesale Broadband Agreement to reflect developments).

The ACCC considers that the reporting framework set out in NBN Co's May 2014 communications pack provides a sound basis for the disclosures that should be made pursuant to the proposed licence condition, subject to the inclusion of some additional disclosures outlined below. Some of the additional disclosures feature in NBN Co's nine-quarter rollout plan.

The ACCC considers that the information disclosed in these reports is that of most immediate relevance to service providers about the NBN. Timely availability of this information should enable service providers to undertake necessary activities associated with the NBN, such as product development, marketing, and other commercial arrangements, including negotiating backhaul agreements and/or investment in additional infrastructure. Ongoing consultation by NBN Co with service providers, as NBN Co has indicated it would intend to undertake, should also ensure that information meets their needs and remains current.

Additional disclosures to be addressed in NBN Co's reporting framework

The ACCC considers that certain additional disclosures should be made via these existing mechanisms in order to promote the objectives of the proposed licence condition. That is, each of the reports outlined in NBN Co's May 2014 reporting framework should be retained, with some additional data to be included and some data to be provided sooner. Aligning the new requirements with the current reporting framework is likely to reduce the administrative and implementation burden on NBN Co and the recipients of the information.

As a starting point, it is appropriate that information disclosed cover each of the new technologies now incorporated in the MTM NBN. This simply reflects the change in focus away from the FTTP rollout and to the MTM model.

NBN Co currently reports its Construction Rollout Plans, Monthly Ready For Service Rollout Plans and Historical Rollout Region Lists by technology - Brownfields Fibre, Greenfields Fibre, and Wireless, with some variations as to contents between each technology/deployment scenario. The ACCC recommends that NBN incorporate the MTM technologies by way of a separate Construction Rollout Plan, Monthly Ready For Service Plan and Historical Rollout Region List for each of FTTB, FTTN and HFC respectively. Doing so will make abundantly clear the technology to be used by NBN Co to service that location.

Further, the ACCC recommends that these new MTM reports be modelled on the reports NBN Co has previously specified for Brownfields Fibre, so that they contain the equivalent information as NBN Co has indicated it would supply for Brownfields Fibre (as well as the further information specified below). This is because the FTTN, FTTB and HFC networks will be deployed in areas currently served by the Telstra networks and hence will be deployed in 'Brownfield areas'.

NBN Co's May 2014 reporting framework provides for reporting to commence for a specified service area when NBN Co anticipates it will commence construction activities in that region within three years. This information is updated on a yearly basis, until NBN Co reaches the view that it will commence construction activities within the next year, at which point the information is updated on a quarterly basis.

When NBN Co commences construction activities in a service area, the service area is added to the Monthly Ready For Service Plan. From this point, further particulars for the service area are reported, and the report is updated on a monthly basis.

The ACCC considers that it would be appropriate to retain a graduated model whereby further information is provided as NBN Co's planning for a service area becomes more detailed and information regarding that service area becomes more certain. That said, the ACCC considers that the move to more detailed reporting by way of the Monthly Ready For Service Rollout Plan on service areas could come too late to counter potential advantages to Telstra that could be triggered at earlier stages. The addition of a service area to this Report is currently referable to the commencement of construction of the network. Given the closer involvement of Telstra at earlier stages of the network rollout - including planning and design - the ACCC considers that disclosures should be referenced to an earlier stage.

An appropriate gateway could be the commencement of the Detailed Design Document process. The Detailed Design Document is a milestone that is defined, and hence would be an appropriate trigger that could be adopted for the purpose of the CLC. This would also provide an appropriate point, as the network design will be less speculative than earlier planning and design stages, while also reflecting a point at which key decisions are being made about the design of the network in a particular region.

Turning to the additional information to be provided, the ACCC recommends that the Monthly Ready For Service Rollout Report, and the Historical Rollout Region List, be augmented to provide for each Service Area Module a premise count by Service Class.

NBN Co's reporting framework provides for the Service Class for individual premises to be specified in its Footprint Lists, indicating that this count could be readily performed by NBN Co. Further, NBN Co's reporting framework provides metrics in the Historical Rollout Region List for premises at Service Class 0 and Service Class 3.

The significance of providing these metrics in the Monthly Region Ready For Service Rollout Report is that NBN Co has stated that the percentage of premises at both Service Class 1 and Service Class 2 are factors it takes into account in declaring a region Ready For Service.³ By making this information available during the network construction stage, service providers will be able to make their own assessment of NBN Co's progress towards this key milestone.

The ACCC also recommends that NBN Co include in the Monthly Ready For Service Rollout Report the status of that Service Area Module by way of Milestone reached. The Milestones could comprise Detailed Design Document commenced; Detail Design Document Completed; Construction Order issued; Construction Commenced.

The ACCC recommends that NBN Co include an alphanumeric field in the Monthly Ready For Service Rollout Report that indicates whether a specific exception event had occurred, such that the completion of the construction at the location was impacted such that there was a material uncertainty as to whether the Ready For Service date would be met. This could be due to difficulties in remediating ducts or other infrastructure, or obtaining services from third parties such as infrastructure access rights or other services.

This reporting would counter potential advantages accruing to Telstra by reason of knowing at what stage in the planning and construction cycle the service area sat by virtue of its involvement in the early planning and design phase, and being able to infer progress (or otherwise) made in the construction process from reports received as to NBN Co's access to particular Telstra infrastructure.

³ NBN Co, Revised Fibre Footprint Release Model - Service Class 2 Threshold, Connections account bulletin, 26 August 2014

In relation to other progress information, NBN Co could include in its reports the forecast disconnection date for rollout regions. While service providers would be able to estimate this date by reference to Ready For Service dates (that is, disconnection date is around 18 months after the Ready For Service date), it may nonetheless be useful to service providers for the Historical Rollout Region List to specify this date, and update it as necessary, so that service providers can access this information in one source.

In relation to additional geographic information, it may be appropriate for service providers to assess how a rollout region/SAM corresponds to existing exchange and DSL areas. This could be achieved by comparing polygon boundaries for the SAM with those for the exchange or DSL area, such as by accessing the polygon boundary of each area in open source mapping software. In this regard it will be important that NBN Co make available the polygon boundaries for its network as already provided for in its May 2014 reporting framework. Consideration could also be given to NBN Co procuring the polygon boundaries for the existing exchange and DSL areas and providing this information to NBN service providers, given it is an analysis that Telstra can readily perform. However the benefit would be dependent upon access to the polygon boundaries of the existing DSL networks being otherwise unavailable to NBN service providers.

In relation to service information, additional information could be provided in connection with the points of interconnect report. Specifically, NBN Co should disclose details of rack space available at POIs, including whether there are any impediments to service providers making use of a POI (for instance because of capacity constraints) and if so the works underway to address those constraints. This would overcome the potential for Telstra to gain greater insight into those matters due to many of the POIs being located in Telstra exchanges. NBN Co states that, while it does not accept that including POI related information in a CLC is required to address the Government's policy objective, it is willing to consider providing reports on a voluntary basis that cover total rack space capacity and existing spare rack space capacity. NBN Co proposes to provide this information on a six-monthly basis, but will review this following feedback from RSPs on the utility of this information.

The ACCC notes that Optus suggested that NBN Co disclose details of customers that have lodged an NBN order ('in-train orders'). The ACCC acknowledges that information regarding 'in-train' orders would assist with providing a smoother migration experience for end-users, particularly towards the end of the migration process, particularly where there is a long delay between an order being submitted and being fulfilled. Nonetheless, there would need to be safeguards in place to prevent the misuse of this information (for instance, prohibitions on 'win-back' activities). These issues are perhaps better explored and settled via the Migration Assurance Process than the proposed licence condition.

It has also been suggested that NBN Co provide information about line quality and other information regarding services at particular premises, such as service numbers. This information would assist service providers to ascertain the services that could potentially be provided to the end-user when taking and receiving enquiries from end-users, and otherwise assist a service provider in validating orders and meeting the end-user's expectations.

Unlike other service providers, Telstra will have access to historical data concerning the copper network and information from NBN Design Documents that would allow it an alternative means to ascertain much of the information needed to interact efficiently with end-users.

Consequently, the ACCC supports disclosure of this information to promote competition, but notes that this operational information could better be provided by online tools that are available via a business interface, rather than in a monthly report.

In this regard, NBN Co has stated an intention to make available an online service qualification tool and other online interface tools that will provide operational information to support retail service providers in their dealings with end-users.

That said, to the extent, however, that NBN Co may potentially face contractual or other legal impediments in providing operational information to the satisfaction of its retail service providers, there would be a potential role for the proposed licence condition to overcome those impediments.

Register of other information provided to Telstra

The ACCC notes that, while the disclosure of the information outlined above should provide interested parties with a range of information about the NBN, it is difficult to identify upfront all information that may be of relevance. Additionally, there is a concern amongst some stakeholders that, without knowing exactly what information NBN Co will provide to Telstra, it will be difficult to overcome the perception that Telstra is obtaining an advantage by reason of the information it receives.

Disclosure of the full suite of information that NBN Co provides to Telstra is one option to address these issues, though for the reasons outlined earlier, this is not the preferred approach.

An alternative is to require NBN Co to maintain a list or register of the information it provides to Telstra, and to make this register visible to access seekers. This would provide transparency over the information that NBN Co is providing to Telstra, and address the perception that Telstra is obtaining an unfair advantage.

It is highly likely that NBN Co would maintain such a register for its own purposes (as part of a prudent document management system), and as such it appears unlikely to be a major impost on NBN Co. It will be important for the register to describe the documents in a way that it is understandable by access seekers, (for instance, with 'plain English' descriptions for documents, not internal NBN Co reference numbers), such that an access seeker does not need to have specialised knowledge, skills or training in order to comprehend it.

In addition to maintaining the register, NBN Co should be obliged to provide copies of the documents listed on the register where an access seeker makes a request to NBN Co. Interested parties could individually make these requests to NBN Co, or they could be made via the consultation process outlined below. As an ongoing compliance measure, NBN Co should be required to keep a record of requests made for further information, and of NBN Co's response to such requests.

A further benefit of this approach is that access seekers would also be able to identify from the register any further information flows that should be made available more widely via NBN Co's management style reports.

In implementing this measure it may be appropriate to limit the visibility of the register, and the availability of information on it, only to access seekers (that is, parties who have executed a wholesale broadband agreement with NBN Co). This reflects that access seekers are likely to have stronger grounds for needing to know the details of the network than other service providers, who are acquiring services from access seekers or operating 'over the top' services. This would also limit the scope of the obligation placed on NBN Co to make this information available, and put it in a stronger position to ensure the information was not being accessed in a manner that potentially compromised the security of the network.

Ongoing consultation and engagement

Some parties also suggested that further consultation is needed between the Department, NBN Co and other stakeholders to settle the exact terms of the proposed licence condition. In its submission iiNet encouraged the Department to undertake further consultation before finalising the proposed licence condition, while Optus suggested that NBN Co should be obliged to

consult and take into account the views of stakeholders in regards to various aspects of information disclosure.

The ACCC considers that there is merit in the proposed licence condition including an obligation on NBN Co to regularly consult or engage with interested parties about the information it makes available. The benefit of this type of engagement is that it helps ensure that information disclosed under the proposed licence condition remains current. Interested parties would have the opportunity to put forward suggested changes or refinements to the information disclosure regime as the rollout progresses, and in light of the information that NBN Co makes available via the management-style reports and the document register.

The nature of the consultation could involve NBN Co using an existing forum with multiple stakeholders for the purpose of discussing and obtaining feedback on information disclosure to date, and on additions or refinements to information disclosure into the future. Forums should be held regularly (perhaps quarterly), and should be open to all parties with a legitimate interest in the rollout of the network (as discussed further below). Consultation regarding the register of documents could occur during account management meetings with individual access seekers.

Manner and form of disclosure

NBN Co already has in place a secure portal that provides access seekers with information. This is a suitable platform by which NBN Co can make available the proposed management-style reports (including making these available to a broader range of stakeholders), and to provide access to the document register. Making information available via this portal would limit additional cost to NBN Co.

In terms of the particular reports, it may be appropriate for NBN Co to have some discretion in how to present the information, provided there are no impediments to it being used by stakeholders. Allowing some flexibility around the format of the information may also facilitate NBN Co making refinements over time, particularly in response to further suggestions from stakeholders.

In general though, it would be expected that the applicable reports are placed on the portal for interested parties to download. The reports should continue to be made available in formats that have been found acceptable by stakeholders to date and which allow for data to be readily used in the recipients information systems without manual re-keying (for instance, Excel spreadsheets).

In relation to the timing of disclosures, as a general proposition, NBN Co should supply information to service providers in a timely manner, as this will allow service providers to use the information in their business planning, and it should also mitigate Telstra obtaining a competitive advantage. This does not imply that access seekers should receive information contemporaneously with Telstra, as there are likely to be times when this is not practical or feasible, provided any delay is not material.

Gaining service provider data

Pursuant to the Continuity Deed agreed between Telstra and NBN Co, NBN Co will provide to Telstra a 'daily migration feed' that will identify each copper service (for FTTN&B areas) supplied by Telstra to a premises that has been migrated to the NBN. Most of the information in this daily migration feed will assist Telstra in more promptly cancelling the legacy services that cannot be supplied as a consequence of the copper tail being cutover to the NBN.

However, of particular concern is that the daily migration feed is intended to include the identity of the 'gaining service provider', that is, the identity of the NBN access seeker that will be providing the NBN service to the end-user at the address.

Addressing Telstra's informational advantage as network operator is a key objective for the government's industry reform agenda, and gaining service provider information is of obvious commercial sensitivity. Receipt of gaining service provider information will provide Telstra with highly current market information on competing service providers operating in particular regions, thereby providing Telstra with a significant advantage over its competitors in FTTB and FTTN areas (who will not receive information of the same breadth).

Communications Alliance has established a subcommittee to consider what industry wide operational arrangements should be put in place to address FTTN&B migration from the Telstra network. This process is yet to reach a conclusion, and Telstra contends in its submission that this is the appropriate forum to address the treatment of gaining service provider information.

The ACCC's view is that there is no operational need for Telstra to receive the gaining service provider information from NBN Co in relation to FTTB and FTTN areas as part of the daily migration feed. Telstra has confirmed during the aforementioned Communications Alliance process that the gaining service provider information is not required to disconnect or cancel services to particular premises. It can also be noted that Telstra has not sought a daily migration feed including this information in relation to FTTP areas, nor in relation to HFC areas where it will similarly be cancelling services.

NBN Co noted in its submission that, under existing industry churn processes, Telstra notifies the losing provider of the churn and the name of the gaining service provider. NBN Co expressed the view that providing gaining service provider information could identify incorrect churn, allowing the losing service provider or end user to contact the gaining service provider and have the initial service reinstated.

While the general circulation of gaining service provider information may have been appropriate in an historical context where the operator of the ubiquitous access network was vertically integrated – and hence had visibility of the market - this is no longer the case given the industry reform process that is underway. It would be clearly counterproductive to this industry reform for a standing information flow to place Telstra in a position where it again had similar visibility over the market as though it were still vertically integrated.

Further, most recent data are that there are relatively few cases of 'incorrect churn', i.e., end-user customers migrated without their authority. In any case, the provision of gaining service provider information would be unlikely to provide a strong safeguard against this occurring to a greater or lesser extent.

The ACCC accepts that there may be some very exceptional circumstances in which a migration error (or other issue) can only be resolved when the losing network provider has knowledge of the identity of the gaining service provider.

The relevant scenarios (if any) in which it may be appropriate for gaining service provider information to be made available by the network operator to a losing service provider can be identified via the Communications Alliance process that is on foot, as well as the process to be followed to obtain that information on an exceptions basis where that situation arises.

An important aspect of that process would be that the information is provided by NBN Co to the relevant service provider and not via Telstra, and that it is available only on an exceptions basis. Further, consistent with the position adopted in the Local Number Portability industry code (C540:2013)⁴ reflecting the commercially sensitive nature of this information, there would

⁴ The Code details the process where a customer switches from one service provider to another and retains its existing geographic telephone number. The Code includes restrictions on the use that can be made of gaining service provider information, such as prohibiting its use for marketing purposes. The Code is registered with the ACMA and hence carries fines upon breach.

need to be protections established against use of the information other than to resolve the end-user's concerns.

Consequently, the ACCC considers that the proposed licence condition should prohibit NBN Co from providing the gaining service provider information to Telstra in the daily migration feed, and restrict NBN Co from otherwise providing this information to Telstra (and to other service providers) other than on an exceptions basis and where it cannot be obtained from another source such as the end-user or LNP records. The licence condition would consequently override the requirements in the Continuity Deed that oblige NBN Co to provide this information.

Further, the ACCC considers that it is appropriate for the proposed licence condition to address this issue rather than the current Communications Alliance process. That process has been established to manage operational aspects of disconnecting customers and migrating them to the NBN, rather than to address the availability of gaining service provider information within the daily migration feed data. Also, a final industry code will require a consensus between all parties before implementation, and as such there may be a period of time before arrangements are established. In this regard, the relevant working group is not intending to finalise its work until 2016.

Somewhat connected to this issue, the ACCC notes that the Competitive Carriers Coalition has suggested that NBN Co publish 'before and after' market shares of service providers in regions where cutover from the Telstra network to the NBN has occurred. The ACCC has commenced collecting information from NBN Co via a record-keeping rule that may in part provide an indication of changes in retail market shares as NBN Co takes over as network provider.

Presented at an appropriate level of aggregation, this information could provide an appropriate level of transparency to all participants about how market conditions are developing, without providing an advantage to any one provider. Given there may be alternative means of making this information available, the ACCC would not propose obliging NBN Co to collect and disseminate this information via the proposed licence condition.

Recipients of information

The ACCC sought views on the parties to whom NBN Co should disclose information, and whether any requirements or pre-conditions should be placed on parties seeking to access the information.

Few parties responded on this issue, though AT&T commented that it had experienced difficulty when seeking to obtain information from NBN Co. AT&T described itself as a second tier operator, one that provides services to customers by reselling wholesale services acquired from operators such as Telstra, Optus and AAPT. AT&T stated that, notwithstanding its preparedness to execute a non-disclosure agreement, NBN Co declined to provide coverage information.

Under current arrangements, information is provided on request to "access seekers" as defined in the *Telecommunications Act 1997*. This definition includes:

- service providers that have entered into a wholesale broadband agreement (WBA) with NBN Co;
- a provider that has not, but intends to, enter into a WBA; or
- a provider that wants access to, or is proposing to make a request for the supply of a declared NBN Co service under the WBA (or other access agreement), and has (or is prepared to where required by NBN Co) signed an appropriate non-disclosure and confidentiality agreement with NBN Co for the purposes of the provision of the information.

The effect of these arrangements is to essentially restrict access to certain information about the NBN to those parties who are prepared to enter a WBA with NBN Co. Parties with a legitimate interest in providing services over the NBN, but who are not access seekers (such as AT&T) or not prepared to enter a WBA, may therefore not have access to relevant information. Parties in this category include second tier providers, application service providers or over-the-top service providers (including, for instance, providers of medical alert services).

The ACCC supports information about the NBN being available more broadly than just to those parties prepared to sign a WBA, as it is clear that there are other market participants beyond RSPs or access seekers (however described) that are likely to have a legitimate interest in details of the NBN. This is not to suggest that NBN Co be obliged to provide information to any member of the public who requests it, but that those parties with a legitimate commercial or other interest in the network be able to access relevant information, and not be prohibited from obtaining such information.

NBN Co currently makes some information publicly available to a class of parties wider than access seekers via its online address tool. Through this tool an interested party can access information about the availability of the NBN at a particular street address, including whether NBN is undertaking pre-construction activities, whether NBN has commenced construction and whether a service is available. This tool is however targeted at end-users rather than service providers, and would not be a substitute for the disclosures outlined above.

The ACCC recommends that access to management-style reports should be directly available from NBN Co to all parties with a legitimate interest in providing services over the NBN, which would include application service providers and over-the-top providers, as well as retail service providers/access seekers. The ACCC does not consider that this information should be distributed via NBN access seekers to other service providers, given the implications this would have for equivalence in timing of receipt of information amongst service providers that compete with Telstra, and that 'over the top' operators would be unlikely to receive the information at all.

Access to the NBN register of information, and the ability to access copies or further details of this information, should be limited to access seekers/RSPs as described above.

Conditions on recipients obtaining information

A related issue is what conditions should be imposed on parties who seek or obtain information about the network from NBN Co. Optus commented that there should be no restrictions on who can access the information, or restrictions on the use of the information where that it has been disclosed broadly. Optus suggested that there should be restrictions on Telstra's use of information where that information has been disclosed only to Telstra.

The ACCC notes that it is typical for some restrictions to be placed on the use and/or further disclosure of information in these cases. These include, for instance, restrictions to protect commercial-in-confidence material, or to prevent further disclosure. It may be the case though that the more widely information is distributed by NBN Co, the less likely it is to be accurately called 'confidential', and therefore such restrictions may be inappropriate.

Nonetheless, the ACCC's view is that while it may be appropriate to impose conditions on the further use and disclosure of the information, those conditions should not be so onerous that they in effect preclude or discourage parties with a legitimate interest in the information from obtaining it. As such, the ACCC considers it should not be necessary for a party to enter a WBA prior to obtaining the management-style reports outlined earlier. A relatively concise and standardised term sheet should be an appropriate format for any necessary conditions.

The ACCC notes that in its submission NBN Co proposed to make its nine quarter rollout plan available to access seekers that signed an appropriate confidentiality agreement, but was not proposing that those parties need sign a wholesale broadband agreement, which suggests that alternate arrangements are possible. In contrast, access to information via the document

register should be limited to access seekers (or proposed access seekers) for the reasons discussed, and as such these parties will have entered a WBA.

Compliance monitoring and enforcement

The Minister for Communications, the Australian Communications and Media Authority (ACMA) and the ACCC all have the power to enforce a breach of a carrier licence condition. The Minister, the ACMA or the ACCC may institute proceedings in the Federal Court for the recovery of a pecuniary penalty of up to \$10 million for each contravention.

Enforcement of any breaches of the proposed licence condition will be important in ensuring its effectiveness. Commencing court proceedings is, however, a significant step, involving time and resource implications for all parties involved. It also typically occurs in exceptional cases, where the circumstances of the breach are serious enough to warrant a formal, court based response. It is also an ex post step that is taken in response to a breach, rather than an ex ante measure that promotes compliance from the outset.

Also, given that the scheme created by the proposed condition relies on NBN Co taking positive steps to promulgate information, and to identify what should be made available, it will be difficult for the ACCC (as enforcer) to monitor compliance.

The ACCC therefore considers that other measures should be included to promote compliance. These include requiring NBN Co (via the condition) to set up internal arrangements to monitor compliance and to report on any compliance issues. As a comparison, arrangements are in place under Telstra's Structural Separation Undertaking (SSU) by which Telstra provides regular reports to the ACCC on potential breaches of the SSU. The ACCC prepares an annual report for the Minister on Telstra's compliance, and will take appropriate action in relation to any reported breaches. The regime also affords Telstra the opportunity to address potential compliance issues and to report to the ACCC on the steps it has taken.

Similar arrangements could be included in the proposed CLC which could require NBN Co to:

- implement systems and processes to give effect to the proposed CLC, and to monitor compliance with the proposed CLC;
- record instances of service providers seeking information about the NBN, and NBN Co's responses to those enquiries, and to notify the ACCC in an annual report of these enquiries;
- identify instances of possible non-compliance with the proposed condition, and to report these instances to the ACCC in a quarterly report; and
- report to the ACCC annually on compliance with the proposed CLC, including on any enquiries received from third parties regarding the NBN (and NBN Co's response), and any self-identified instances of non-compliance with the CLC (and steps taken in response).

Optus supported a proposal for the proposed licence condition to detail internal and external checks and balances on NBN Co's compliance with its obligations. In addition to suggesting similar requirements to those suggested by the ACCC above, Optus suggested that NBN Co be required to:

- report periodically on the type of information that has been disclosed, and to whom it has been disclosed;
- where information has been provided to Telstra only, NBN Co should explain why that information has not been disclosed more broadly, and outline any restrictions placed on Telstra's use of the information; and

- certify periodically that NBN Co has complied with the licence condition.

Aspects of these suggestions are reflected in the ACCC's proposal that NBN Co maintain and provide relevant parties with access to a document register, and in the above recommendations regarding compliance. The ACCC also recommends that NBN Co be required to provide the ACCC and the Department with copies of, or access to, the reports and other materials it prepares pursuant to the licence condition.

Implementation of proposed licence condition

The ACCC recognises that there may be further matters to consider in relation to the precise drafting and implementation of the proposed licence condition. These matters may be more appropriately considered during the Department's development and consultation processes.

In broad terms though, the ACCC supports the implementation of the proposed licence condition prior to the rollout of the MTM NBN gaining momentum. We recognise that NBN Co will require time to bed down arrangements to meet the requirements of the proposed licence condition, but we note that many of the proposals outlined above seek to build on existing NBN Co reporting arrangements and systems. It therefore may not be onerous for NBN Co to move quickly to implement the necessary arrangements.

The ACCC also recognises that it would be appropriate to review the operation of the licence condition at an appropriate juncture. As noted, it is important for the licence condition to ensure that information disclosed is relevant and current. Over time, certain information may become less relevant to interested parties, and in those circumstances it may no longer be necessary to oblige NBN Co to make those disclosures (for instance, as overall construction nears completion, earlier design documents may be less critical).

Consequently, it may be appropriate to review the need for the reporting obligations to continue three years following the carrier licence condition coming into effect.

Costs and benefits of the proposed licence condition

In the Discussion Paper the ACCC asked for views on the likely costs and benefits of the proposed licence condition.

A number of stakeholders acknowledged that there would be costs involved with the licence condition, particularly to NBN Co. These included costs associated with implementing systems and process to provide the required information, and to continue to monitor compliance with the condition over time. iiNet noted though that as NBN Co will provide the information to Telstra in any case, and that NBN Co already provides certain information to RSPs generally, the costs associated with the proposed licence condition may not be onerous. In developing a framework for the proposed licence condition the ACCC has been conscious to not impose unnecessary additional costs on NBN Co beyond what is needed for the effective operation of the condition. To this extent, the ACCC has closely analysed NBN Co's existing systems and processes around information delivery and relied on these where practical.

The clear view among stakeholders was however that the benefits of the proposed licence condition would outweigh the costs. The benefits would include cost savings to other RSPs who could better target their own resources as the rollout progressed, and could avoid unnecessary costs incurred because of incomplete or uncertain information about the rollout. Stakeholders also suggested that the proposed licence condition would contribute to ensuring that no service provider obtained an unfair advantage (particularly Telstra), and therefore supported competition.

Submissions also highlighted benefits to consumers, particularly of facilitating a smooth and efficient transition to the NBN for end-users, and a positive customer experience.

The ACCC agrees with the general view from submissions that while there are likely to be costs involved in the proposed licence condition, these are clearly outweighed by the likely benefits. Costs will include the additional compliance and enforcement costs that will fall on NBN Co to meet the requirements of the proposed condition. However, in a number of instances NBN Co will be able to augment existing information flow and reporting arrangements in order to meet the requirements of the proposed condition, and will not have to incur costs from scratch.

These costs are however very likely to be outweighed by the benefits created by the proposed licence condition. The proposed condition will seek to ensure a competitive playing field by protecting against any one party obtaining an advantage from the information NBN Co makes available. A related benefit is the promotion of a positive customer experience during the migration to the NBN. These outcomes are also consistent with the broader benefits sought to be realised by the structural reform of the telecommunications sector.