

Response to ACCC's Request for Submissions from Interested Parties on NBN Co's Proposed SAU variation 27 May 2016

This submission responds to questions 17 and 22 raised in the ACCC's SAU variation consultation paper¹:

17. Do the rollout information commitments contained in the SAU represent appropriate commitments (in terms of the nature and scope of information to be provided, the level of detail at which it will be provided, and its timing and frequency of information)?

22. Do you consider NBN Co's commitment of making the information available on the online platform to be a useful and appropriate way of receiving rollout information?

This submission argues that some of the restrictions in currently publicly available information proposed in NBN Co's variation to its SAU are not justified by reasons of commercial confidentiality, and relevant and regularly updated rollout information should continue to be made publicly available in order to meet the needs of end-users.

Commercial Sensitivity and Access Restrictions

NBN Co states the following²:

- *Information contained in nbn's rollout plans is commercially sensitive to nbn; therefore, there must be appropriate restrictions in relation to the entities to which the information is provided, and how it is used by those entities*³.
- *Certain information contained in the rollout plans and reports nbn provides to access seekers is derived from data nbn receives from third parties*⁴ and
- *The ACCC has acknowledged the appropriateness of imposing conditions regarding access to nbn's rollout information.*

It is worth pointing out that the ACCC, in the same document referred to by NBN Co above, goes on to say:

*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.*⁵

NBN Co published its "three-year construction plan"⁶ for general public access on its web site in October 2015 and this remains on its web site. The web page states:

It [the three-year construction plan] will be updated as information becomes available to reflect ongoing variations arising from the planning process. (When originally published in October 2015, the web page stated that the three-year construction plan⁷ would be "updated each quarter."

Recently NBN Co removed these words and replaced them with the current version. No reason was given for this change and no updates to the plan have been published as yet.)

However, if the ACCC accepts NBN Co's proposed variation to the SAU with its proposed restrictions on access to future rollout information, NBN Co would not have to make any updates to

¹ ACCC, *Variation to NBN Co Special Access Undertaking Consultation Paper*, p32

² NBN Co, *Supporting submission*, 2016, p. 27

³ NBN Co, *Supporting submission*, 2016, p. 27

⁴ NBN Co, *Supporting submission*, 2016, p. 28

⁵ ACCC, *Report to Department of Communications: ACCC consultation on proposed information disclosure carrier licence condition*, May 2015, p20

⁶ <http://www.nbnco.com.au/learn-about-the-nbn/three-year-construction-plan.html>

⁷ Referred to by NBN Co in the SAU and SAU Variation as "3-year construction rollout plan"

its published rollout plan available to the public. This is because NBN Co's proposed variation to the SAU restricts access to the annual 3-year rollout plan updates to access seekers⁸.

As the material contained in the 3-year rollout plan was, and remains, published on NBN Co's public web site, together with a promise of regular updates, this information and promised updates cannot be claimed to be commercially sensitive to NBN Co. Hence NBN cannot justify its restriction of future releases of the 3-year rollout plan to access seekers based on commercial sensitivity.

As noted by the ACCC, the SAU variation removes altogether the 1-year construction roll-out plan which NBN Co currently has undertaken to update and republish quarterly^{9,10}. The stated reason for removal given by NBN Co, that the information in the 1-year plan is "redundant" because of (unspecified) "changes" to the 3-year plan and the monthly RFS plan, is only correct if the information in the 1-year plan and its updates continues to be publicly available to end-users.

With the restricted access proposed by NBN Co to its updated 3-year rollout plan and the monthly updated RFS plan, and the removal of the 1-year plan with quarterly updates, no updated rollout plan information would be publicly available to end-users until "build preparation commences", at which time an end-user can access NBN Co's online address tool¹¹.

It is submitted that NBN Co's supporting document does not adequately justify the rationale for these changes; in particular it has failed to justify why it will no longer make publicly available updated 3-year NBN rollout plans.

Interests of End-Users in NBN Service Rollout Information

The ACCC notes¹²:

...the provision of rollout information promotes the long-term interests of end-users in the following ways:

- promoting competition — rollout information can reduce barriers to entry into new markets by providing access seekers with information required for developing products, marketing and infrastructure. The provision of this information in a timely fashion enables access seekers to make services available more quickly to end-users.*
- encouraging efficient use of and investment in infrastructure — giving access seekers clarity and certainty as to the progress of the rollout of the network will enable them to efficiently plan for operations and investment in downstream services, networks and facilities. This is likely to increase dynamic efficiency in the use of and investment in infrastructure.*

There are other ways in which "*the provision of rollout information promotes the long-term interests of end-users*". It is not just access seekers who can benefit from having timely information as to the likely arrival date of NBN service in a particular area. End-users who do not currently have access to NBN service can use information as to the likely timing of the availability of NBN service at their premises to help make informed decisions as follows:

8 NBN Co, *First Variation to NBN Co Special Access Undertaking*, 2016, p186 (marked up version)

9 NBN Co, *Special Access Undertaking*, 2013, 1H.2.2, p151

10 There do not appear to have been any 1 year plans published by NBN Co.

11 <http://www.nbnco.com.au/content/nbnco.html>

12 ACCC, *Variation to NBN Co Special Access Undertaking Consultation Paper*, p26

1. Lock-In Contract Some RSPs offer pre-NBN internet access contracts which require continuation of the contract with the RSP after the availability of the NBN at the end-user's premises (referred to in this submission as "lock-in contracts"). Knowing the likely date for the availability of the NBN at their premises would allow an end-user to make a more informed decision as to the suitability of a lock-in contract. For example, if NBN service is likely to be available before the end of the offered contract, an end-user may consider that a contract without a lock-in is preferable to a lock-in contract, as this would allow the end-user to change their RSP if other RSP's offered more suitable post-NBN plans.
2. Length of Contract The length of contract with an RSP for the provision of pre-NBN internet access is a choice which may be available for an end-user; this would more important if the RSP preferred by the end-user only offered lock-in contracts. Knowing when NBN service is likely to be available at an end-user's premises would allow an end-user to make a more informed decision as to the length of contract with their RSP.
3. Purchase of a pre-NBN Service Modem Some RSPs offer a "free" ADSL2+ modem as part of their network access contract with the end-user. If the end-user decides to change their RSP after the availability of NBN service at their premises, part or all of the cost of the supplied modem may have to be paid to their RSP if their contract with their RSP is still in force at the time NBN service becomes available. An end-user could thus make a more informed decision as to whether to buy their own ADSL2+ modem or accept the one offered by their RSP by knowing when NBN service is likely to be available at their premises.
4. Purchase of Network Equipment following Network Equipment Failure Prior to NBN service availability, if an end-user's own network equipment (e.g. modem, router etc.) fails, the end-user needs to decide whether to repair or replace the faulty equipment, and if to replace, the quality of the replacement. Knowing the likely interval before availability of NBN service would help an end-user to make an appropriate decision. A short interval before NBN service availability might indicate to an end-user that a cheaper or repaired modem might be more cost-effective.
5. Choice of RSP Knowing the likely date of NBN service at an end-user's premises would allow the end-user to undertake timely research into the RSP market to choose the most suitable RSP plan when NBN service becomes available.

Options for Providing Suitable Information to End-users

The above points justify why NBN rollout information should continue to be made available to end-users in a timely, up-to-date and specific way.

NBN Co claims in its supporting document that it already provides sufficient publicly available information¹³:

101. Consistent with its commercial incentives, nbn makes extensive rollout-related information available on its public website, including:

(a) an online address tool where interested parties can check nbnTM network availability at a particular address;

(b) an interactive rollout map showing locations in Australia where nbnTM network services are available and where build has commenced;

(c) a list of areas where nbnTM network services are available and where build has commenced; and

(d) a list of areas where build work is scheduled/in plan (the most recent version of this list was published on 16 October 2015¹⁴ and provides a three-year view).

¹³ NBN Co, *Supporting submission*, 2016, p. 25

¹⁴ It is not only "the most recent version", it is the only version to have been published.

The only item listed by NBN Co which provides a suitable time horizon for end-users, based on the items listed in this submission's points 1-4 above, is (d), the published 3-year construction plan¹⁵. As noted by the ACCC, NBN Co intends to remove public access to future annual updates to this plan¹⁶. So there will be no regularly updated long-term rollout planning information available to end-users if this part of NBN Co's SAU Variation is approved.

It is submitted that NBN Co's proposed changes to the SAU in Clause 1H.2.1 and the removal of Clause 1H.2.2 unnecessarily and unfairly restrict the availability of suitable NBN rollout information to end-users. To continue to make useful and timely information available to end-users, NBN Co could instead adopt either of the two options described below, which are provided to demonstrate that the provision of useful information for end-users would be straightforward and would not require end-users to have access to information which could reasonably be considered as "commercially sensitive".

A three year time horizon for rollout information is appropriate as the maximum length of most RSP contracts for internet access services is two years and would not require NBN Co to produce any additional rollout information, given that it plans to continue to produce 3-year rollout plans. A requirement for quarterly updates is one which NBN Co has previously promised for both its 3-year plan and its 1-year plan.

Hence neither option described below requires any additional information to what NBN Co currently provides, states that it will provide, or has previously provided. It would simply be available in one place and updated regularly. NBN Co would continue to have no liability if it was incorrect in its estimation of timing, choice of technology etc., as is now the case with the published 3-year construction plan¹⁷.

Option 1

NBN Co is to make publicly available a quarterly updated 3-year construction rollout plan on NBN Co's web site, so giving the estimated date NBN service will be available in a particular area. In conjunction with the existing online address tool, an end-user would be suitably informed as to the progress of the NBN rollout at their premises.

The revised Clause 1H2.1 could then read:

1H.2.1 3-year construction rollout plan

On a quarterly basis during the Initial Regulatory Period until the Rollout Built Date, NBN Co will make available on its public web site a 3-year construction rollout plan that includes the following information:

- a high level description of the geographic area in which NBN Co plans to deploy the NBN Co Fixed Line Network in the 36 months commencing from the month following the publication of each quarterly rollout plan;*
- the dates on which NBN Co expects to commence work on the NBN Co Fixed Line Network in that geographic area, which may be expressed as a quarter or a half in a specified calendar year (e.g. Q3-2016 or H2-2017); and*
- the estimated number of Premises within that geographic area.*

¹⁵ Point 5 is covered by timely use of NBN Co's existing online address tool, although knowing when to start to use the online address tool would be facilitated by access to an up-to-date rollout plan

¹⁶ It would even be within the scope of the proposed SAU Variation to allow NBN Co to remove the published plan from its public web site entirely.

¹⁷ <http://www.nbnco.com.au/learn-about-the-nbn/three-year-construction-plan.html>

Additionally, a method which allows the user to find out the correct area name to use for their address would enhance the usefulness of this information, as the plan currently provides only a broad area¹⁸.

Option 2

Suitably detailed rollout information could be provided by NBN's enhancing its online address tool. As noted by the ACCC:

*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.*¹⁹

Specifically, NBN Co currently provides the following NBN service status information on entering an address on their online tool²⁰:

- *Not currently available*
- *Build preparation*
- *Build commenced*
- *Service available*

The online address tool could be enhanced for end-users as follows, subject to the information being included in the 3-year rollout plan:

1. at any stage of the rollout, include the estimated date for provision of NBN service at this address;
2. at any stage of the rollout, include the likely or definite technology (e.g. HFC) for the provision of NBN service at this address;
3. prior to build preparation commencing, update this information quarterly;
4. after build preparation commenced, update this information when there is any change in the predicted NBN service availability date and/or build status, e.g. *build commenced*.

An end-user, on entering their address in the enhanced online address tool, would receive one of the following rollout status information:

1. *No date currently available* (i.e. outside the three year time frame covered by the rollout plan)
2. *Estimated date of service Hx 20yz or Qx 20yz; technology A*
3. *Build preparation commenced; estimated date of service Qx 20yz or mm/20yz; technology B*
4. *Build commenced; estimated date of service mm/20yz or dd/mm/20yz; technology B*
5. *Service available dd/mm/20yz; technology B*

where x is the year half or quarter number, y and z are the last 2 digits of the year, dd and mm have their usual meanings and A and B are particular network technologies e.g. FTTN, HFC.

For either option, or any other method of supplying end-users with useful and timely rollout information which the ACCC determines is suitable, the ACCC should monitor NBN Co's web site each quarter to ensure updates have been published as set out in the agreed final SAU variation.

¹⁸ The NBN 3-year Construction Plan as published in October 2015 lists by "high-level description of the geographical areas". Some suburbs may be listed under more than one heading.

¹⁹ ACCC, *Report to Department of Communications: ACCC consultation on proposed information disclosure carrier licence condition*, May 2015, p20

²⁰ <http://www.nbnco.com.au/content/nbnco.html>

Conclusions

Given the large amount of NBN rollout information currently publicly available, it is not apparent why any of the published information or updates to the published information have now become “commercially sensitive” to NBN Co, and therefore it is submitted that NBN Co has not justified why regularly updated rollout information cannot continue to be made available to end-users to help plan their future network services efficiently and cost-effectively.

It is requested that the ACCC require NBN Co to alter its SAU variation to oblige NBN Co to provide the following information on its public website, for access by any end-user:

1. the likely timing of the availability of NBN service at an end-user’s premises within the horizon of a quarterly updated 3-year rollout plan;
2. the progress of the supply of NBN service to an end-user’s premises, using for example status categories 1-5 given in Option 2 above, updated quarterly;
3. the technology to be used for delivery of the NBN service at an end-user’s premises, updated quarterly.

It is submitted that only if this is done will NBN Co have provided “*appropriate commitments (in terms of the nature and scope of information to be provided, the level of detail at which it will be provided, and its timing and frequency of information)*” (Q 17) and “*a useful and appropriate way of receiving rollout information*” (Q 22).