

NBN Co submission to the ACCC – Proposed NBN Co carrier licence condition about information disclosure

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Public version

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1 Executive Summary

On 24 March 2015, the ACCC released a discussion paper “Input into a proposed NBN Co carrier licence condition about information disclosure” (**Discussion Paper**) inviting stakeholders to provide their views on the information that NBN Co should be required to provide to retail service providers (**RSPs**) under a proposed carrier licence condition (**CLC**). The Government has stated that the objective of the proposed CLC is to:

ensure symmetry between Telstra and all other retail service providers in respect of relevant NBN-rollout and related information. This will ensure that Telstra does not have any actual or perceived information advantage by virtue of its role as the owner of the copper and HFC networks being acquired by NBN Co.¹

NBN Co supports the stated objective of the proposed CLC, as it has strong incentives to encourage competition in the market for retail broadband services, and it sees this as critical to achieving its commercial objectives. While it is necessary for NBN Co to share certain information with Telstra to ensure an efficient and smooth transition to a multi-technology mix (**MTM**) NBN, NBN Co acknowledges that it is not desirable for Telstra to be in, or perceived to be in, a more advantageous position in the retail market as a result of it receiving this information. NBN Co is committed to working with the ACCC, the Government and RSPs to address this issue.

NBN Co considers that the focus should be on ensuring that all RSPs have access to equivalent information that is relevant to their retail market decisions, and that all RSPs receive that information in a timely manner. The key considerations, as identified in the ACCC’s Discussion Paper, are: what is the relevant information that should be provided to RSPs, in what form and when?

NBN Co does not consider that all of the information it provides to Telstra is needed by RSPs to effectively compete with Telstra in the market for retail broadband services. Most of the information shared with Telstra is not reflective of NBN Co’s final rollout plans and is typically of a highly technical nature related to network and infrastructure planning.

As NBN Co is yet to finalise the planning and operational aspects of the MTM deployment, it believes that it would be premature to attempt to lock-in an approach to providing information in a CLC at this time. However, as NBN Co is committed to supporting the Government’s objective of ensuring a level playing field in the market for retail broadband services, it proposes the following approach:

- Providing 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);
- Continuing to provide monthly updates on RFS dates once construction has commenced in each area;
- After having the opportunity to understand the submissions received by the ACCC on the proposed CLC, NBN Co will conduct further consultation with RSPs on the type of information they require regarding the technology to be used in each serving area. NBN Co will continue to develop its MTM deployment plans in parallel with this consultation process, and proposes to update the Wholesale Broadband Agreement to reflect the new approach to providing technology information once it has been settled with RSPs.

NBN Co believes this approach is the most appropriate way to address the stated objective of the proposed CLC at this time. In addition to further outlining NBN Co’s proposed approach to providing information (see section 2.2), this submission responds to the key issues for discussion set out in the ACCC’s Discussion Paper and provides commentary on each item in the ‘Information flows under the Definitive Agreements’ table of the ACCC’s paper (see sections 3 and 4). NBN Co also makes submissions in relation to the appropriate context and framework for assessing and developing any CLC (see section 2).

¹ Department of Communications, Variation of Telstra’s migration plan – regulatory instruments: exposure drafts, December 2014, p. 10.

2 Background

2.1 Introduction

NBN Co understands that as a result of Telstra's FTTP ring-fencing restrictions not being extended to the FTTN, FTTB and HFC networks, there is a need to consider how to address any potential competition concerns that arise as a result of NBN Co providing necessary information to Telstra about the rollout of these networks. In accepting the need to consider these competition concerns, NBN Co submits that the ACCC should consider carefully what is actually required in order to ensure appropriate competition outcomes are achieved, rather than just seek to provide equivalent information to all RSPs.

It is also necessary to accurately describe the current environment in which NBN Co and RSPs operate and the implications this has for competition outcomes. It is important to recognise NBN Co's incentives to supply rollout information to all RSPs, as well as the underlying reasons for providing this information to RSPs.

NBN Co also notes that while this submission (and the ACCC's Discussion Paper) refers to RSPs and the "retail market" extensively, similar arguments apply to the wholesale service market that is created by access seekers who acquire NBN services and wholesale them to other organisations. For the purposes of this submission, references to RSPs and retail markets also encompass wholesalers of NBN services.

2.2 Key principles

NBN Co agrees with the ACCC that:

Information about the rollout can be used by retail service providers to inform decisions about marketing and product development.²

Indeed, NBN Co believes that this is the central issue in assessing whether there is a need for a CLC to be imposed, and if so, what the nature of that CLC should be. If the information provided by NBN Co to Telstra cannot be used by RSPs at that time to inform these decisions, then there is no relevant competition implication, and the information should not form part of any CLC. Information that NBN Co provides at a later time, or in a different format, may in fact be more relevant to the actual decisions made by RSPs.

One of NBN Co's guiding principles for determining what MTM information should be disclosed by NBN Co to RSPs is that *RSPs should receive network information for MTM that is equivalent in functionality to that provided in relation to FTTP*. However, to the extent that RSPs indicate a need for additional planning information, and such information would be made available to Telstra under the MTM arrangements, NBN Co recognises the need to ensure RSPs are not placed in a position of perceived or actual disadvantage.

In NBN Co's view, the appropriate framework for considering whether any rollout information should be included in the proposed CLC is how that information would be used in any of the decisions made by RSPs. In considering whether specific rollout-related information should be included in the proposed CLC, NBN Co submits that the relevant test for the ACCC is whether RSPs 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.

To assist in the ACCC's and industry's understanding of NBN Co's approach, we outline below:

- (a) NBN Co's understanding, based on experience to date, as to how RSPs use NBN network rollout information to inform decisions they make in selling NBN services;
- (b) Information supplied by NBN Co to RSPs in relation to FTTP;
- (c) NBN Co's proposed approach to providing MTM rollout information to RSPs.

² ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p. 4.

2.2.1 How RSPs use network rollout information to inform decisions

Consistent with the Department's stated objective in relation to the CLC, the ACCC has expressed the view that the proposed CLC:

*...seeks to support competition in retail markets by ensuring that all RSPs have the same opportunity to compete at the same time.*³

The ACCC then states that the rollout information can be used by RSPs to inform decisions about marketing and product development.

NBN Co agrees with the ACCC that it is the use of NBN rollout information to inform decisions made by RSPs that is a key issue in assessing whether any competitive advantage is able to be obtained by Telstra. However, it is important to understand the nature of these decisions, and when rollout information can meaningfully be used by RSPs to inform those decisions. If rollout information is not used to inform particular decisions made by RSPs about how and when they enter markets, then there is little utility in providing it for the purposes of "symmetry" alone. Indeed, provision of information that does not inform these decisions will only result in increased costs on the part of NBN Co (in the preparation and dissemination of the information) and RSPs (as they seek to manage the information).

Based on NBN Co's ongoing engagement with its customers and its understanding of their needs, in NBN Co's view there are three major decision points faced by an RSP as they decide whether and how to enter a market utilising NBN products:

- 1) What retail products will I take to market?
- 2) What geographies will I be in, and when?
- 3) What marketing and sales approach will I invest in, and when?

Each of these decisions requires different information, and requires different lead times to implement. The first question relates more to NBN Co's approach to product development and the associated work the RSP needs to do in developing retail products, systems, processes and workforce. The second and third questions relate to network rollout information.

In the case of the first question, the essential input from NBN Co is information about its current and future product offerings. This information is already provided to RSPs by NBN Co through the operation of its Product Development Forum (PDF).⁴ This provides a transparent and consultative approach to the development and introduction of new products by NBN Co, with all RSPs having the same opportunity to take part in the product consultation process. NBN Co provides regular updates to its integrated product roadmap,⁵ which includes NBN Co's planned dates for introduction of new products, IT specifications and onboarding and testing activities. This provides RSPs with a long-term view of NBN Co's planned introduction of new products, which, when coupled with ongoing customer consultation, affords RSPs significant lead time in relation to their own product development activity. NBN Co also notes that its core products are layer 2 Ethernet bitstream products with similar product constructs, which should simplify the development activities required by RSPs.

The second and third questions are business case decisions where the size of the target market for the RSP needs to be considered along with the cost of serving that market with respect to infrastructure costs, and marketing/sales costs.

NBN Co understands that RSPs' priorities in relation to the network planning information they currently require for FTTP are as follows.

³ ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p. 4.

⁴ The PDF is subject to the provisions of NBN Co's Special Access Undertaking (SAU) accepted by the ACCC on 13 December 2013. <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network/nbn-co-special-access-undertaking-2013/final-decision>.

⁵ Most recently updated in April 2015. See <http://www.nbnco.com.au/content/dam/nbnco/documents/Integrated-Product-Roadmap.pdf>

Firstly, RSPs want information that enables them to plan for product deployment and to market their products in rollout regions sufficiently in advance of the RFS date for those regions (the **'lead time concern'**). Specifically, if an RSP knows two to three years prior to RFS which technology will be deployed by NBN Co in a particular suburb or town, and the estimated number of serviceable premises, NBN Co understands that this would enable the RSP to commence negotiating backhaul arrangements, plan additional infrastructure requirements and commence marketing to end users to enable a successful transition at RFS. Currently, this need for information is addressed for FTTP and Fixed Wireless by the 18 month rollout plan and monthly RFS rollout plan. As NBN Co transitions to a MTM approach, this information requirement will be addressed via NBN Co's nine quarter rollout plans (see next section for further information on this).

Secondly, RSPs have also expressed a need for stability of the rollout data provided by NBN Co (the **'data stability concern'**). NBN Co understands that stability of RFS forecast dates assists RSPs in planning the 'go-live' of their products in a specific rollout region, and in co-ordinating their marketing and sales activities to communicate with end users. NBN Co notes a tension between achieving data stability and addressing the 'lead time concern', as the more detail supplied by NBN Co to RSPs during the early stages of design and construction, the more susceptible this information is to change and misinterpretation. The ACCC should give appropriate consideration to this tension in considering what information might be relevant for RSP needs.

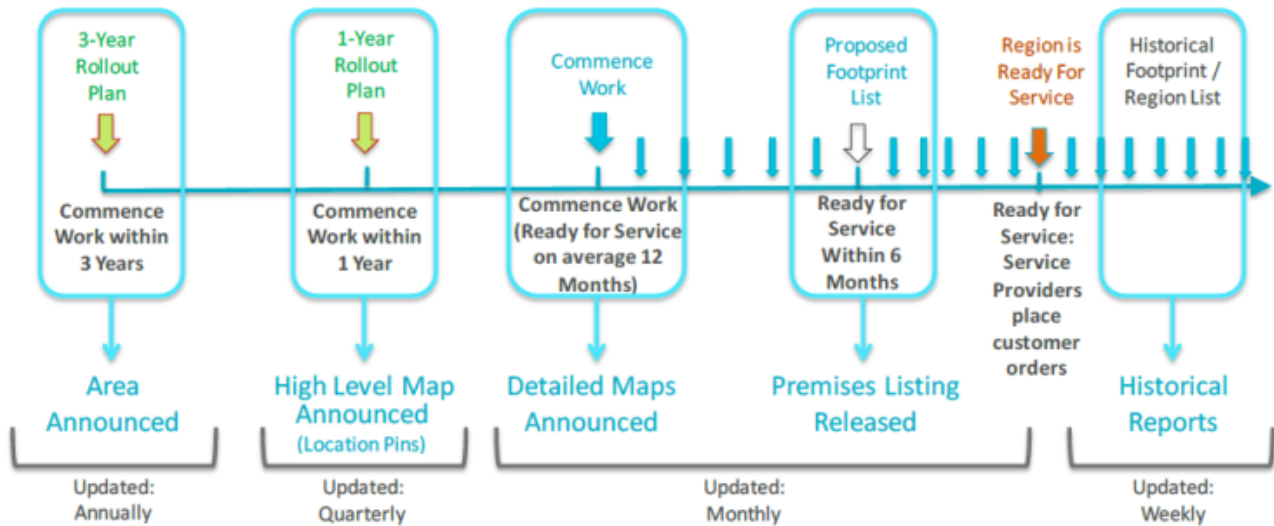
2.2.2 FTTP network planning information provided to RSPs

The key pieces of information that NBN Co has disclosed to RSPs in relation to FTTP planning, design, construction and migration are:

- **Two mid-to-long term documents.** These are the *Three-Year Construction Rollout Plan* and the *One-Year Construction Rollout Plan* which were designed to enable RSPs to develop business cases and set mid to long term business plans. As a consequence of the move to an MTM network, NBN Co advised the ACCC and RSPs in April-May 2014 that there was not a sufficiently robust basis on which NBN Co could currently prepare these construction plans. NBN Co committed to use its best endeavours to complete and provide these plans as soon as possible. On 1 December 2014, NBN Co provided an 18-month plan to RSPs. This showed all areas where the build of the MTM network would commence up to and including 30 June 2016 (HFC rollout information was not included in this publication). The indicative RFS dates for these areas were also provided, enabling Access Seekers to develop business cases and set mid to long term business plans.
- **Two short-term documents.** These are the *Monthly Ready For Service Rollout Plan*, which provides RSPs with a regular monthly update on the expected RFS date for Rollout Regions where build has commenced; and the *Proposed Footprint List*, which provides a list of the premises that are within the boundaries of the rollout regions which are close to being declared RFS; and
- **Points of Interconnect (POI) Rollout Plan.** This document provides RSPs with the expected dates that NBN POIs will be available for interconnection.

Further detail of the above information was provided to RSPs in May 2014 in the communications pack: *NBN Co Network Rollout Plan – Communications & Data Formats*.

Information on the rollout information flows is also included in the Operations Manual to NBN Co's WBA, showing the sequencing of the various activities and reports provided to RSPs, a diagrammatic summary of which is shown below (which is by way of example only).



NBN Co notes that the level and form of information that NBN Co provides to RSPs has been developed as a consequence of NBN Co’s work with industry (over the course of several years) to identify what data is of most use to RSPs and how this should be delivered by NBN Co.

In addition to the rollout related information, NBN Co has provided RSPs with numerous product consultation and product construct papers as part of its consultation on FTTB, FTTN and HFC products, and sought their views on how these products could be developed to best meet their needs.

The existing arrangements are consistent with, and a manifestation of, NBN Co’s incentives (which are further described throughout this submission) and provide the foundation upon which NBN Co can build, in moving to the MTM approach, to ensure all RSPs have access to rollout information that enable them to effectively compete in the market for supplying NBN services.

2.2.3 Proposed MTM rollout information

NBN Co is yet to finalise the planning and operational aspects of the MTM deployment. There are still arrangements that need to be finalised with external parties (e.g. network providers, design and construction partners), and in NBN Co’s view it would be premature to attempt to lock in the approach to providing information to RSPs in a CLC at this time.

That said, NBN Co considers that it is possible to address potential concerns that arise from its provision of rollout-related information to Telstra through a more targeted suite of information flows to RSPs. This section describes these information flows in some detail, and how they are intended to be provided to RSPs.

Nine quarter rollout information

NBN Co has recently developed a nine quarter (9Q) rollout plan which will be updated on a rolling basis each quarter, and which will replace the previous Three-year Construction Rollout Plan and the One-year Construction Rollout Plan. This will be provided to access seekers who have signed up to appropriate confidentiality arrangements (i.e. the access seeker need not have executed an Access Agreement with NBN Co). The first iteration of the 9Q rollout was provided to RSPs on 1 April 2015. However, as a number of the planning and operational aspects of the MTM deployment are still being finalised, at that time NBN Co was only able to provide an 18 month forecast, and was not yet able to provide information on HFC deployment. As NBN Co achieves greater certainty about deployment schedules, the information provided to RSPs will be provided over longer timeframes, ultimately over a full 9 quarters. This is consistent with the incentives that NBN Co has to provide reliable information in a timely manner, as further described in section 2.3.1. The information provided in the 18 month forecast on 1 April 2015 is in the same form as will be provided in the 9Q rollout plans.

The 9Q plan will contain the information in the following table, which provides a view of the serving areas that are completed, in-build, or in plan. The estimated date for commencement of build in the fibre serving areas is shown along with the estimated RFS dates. The Connectivity Serving Area (CSA) is also shown for each area and the relevant POI that each CSA will connect to, along with a premises count, to enable a view of the volume expected in each area. Information is provided at the level of the Fixed-line Serving Area (FSA).

| Header | Description |
|---|--|
| Service Type | High level descriptor of the type of technology used, e.g. Brownfields fixed-line, Greenfields fixed-line, or Wireless. |
| FSA Identifier | The NBN Co unique identifier for a Fixed-line Serving Area. |
| FSA Name | The expanded name of the Fixed-line Serving Area. |
| Locality Name | The towns or suburbs that are all or partially covered by the Fixed-line Serving Area, and hence are under consideration for deployment within the timeframe of this plan. |
| FSA State | The State that the Fixed-line Serving Area is located in. |
| FSA Designation | "metropolitan" or "non-metropolitan". |
| CSA Identifier | The NBN Co unique identifier for a Connectivity Serving Area. |
| CSA Name | The expanded name of the Connectivity Serving Area, to which this FSA is allocated. |
| POI Identifier | The NBN Co unique identifier of the Point Of Interconnect. |
| POI Name | The expanded name of the Point of Interconnect, to which this FSA is allocated. |
| Approximate number of premises within the planning period for the FSA | The premises count of completed, in build and in plan projects within the planning period. |
| Number of Serving Area Modules (SAMs) for the FSA | The expected final number of SAMs in this FSA at the completion of build of the FSA. |
| Number of premises "completed" | The total premises count from the SAMs in this FSA that are completed |
| Number of SAMs "completed" | The expected number of SAMs in this FSA that are completed |
| Approx premises "in build" | The total premises count from the SAMs in this FSA that are being built (i.e. are covered) within this plan. |
| Number of SAMs "in build" | The expected number of SAMs in this FSA that are being built (i.e. are covered) within this plan. |
| Approx premises "in plan" | The total premises count from the SAMs in this FSA that will be built (i.e. are covered) within this plan. |
| Number of SAMs "in plan" | The expected number of SAMs in this FSA that will be built (i.e. are covered) within this plan. |
| Actual or Expected date(s) of Build Commence of "in build" and "in plan" SAMs | The dates that NBN Co has or expects to issue the relevant contract instructions. Build Commenced means that NBN Co has issued contract instructions to construction partners so they can commence build work in this area consistent with the completed Detailed Design Document. |
| Expected date(s) of RFS of "in build" and "in plan" SAMs | The date that NBN Co expects to be ready to connect end users from Access Seekers within this Rollout Region. |
| Technology | "Fibre to the Premises" or "Multi-Technology Mix" |

Similar information is provided to RSPs in relation to greenfield and fixed wireless rollout areas, but this does not relate to areas where NBN Co is acquiring fixed line infrastructure from Telstra, and hence is not related to the purpose of the proposed CLC.

The information contained in the 9Q forecasts provides RSPs with sufficiently detailed and timely rollout information to make product and marketing decisions that are required to effectively compete in the market for NBN services. As NBN Co develops its ability to provide accurate forecasts for the MTM deployment, RSPs will, via the 9Q plan, have access to the dates that construction is planned to commence and dates that services will be able to be provided over a 27 month timeframe. Coupled with the other information in the

9Q plan about market size, POI location, and deployment progress, NBN Co considers that the 9Q plan provides RSPs with the relevant information required to effectively compete with Telstra in NBN fixed-line areas. It should also be noted that the currently proposed 9Q forecasts only reflect the requirements of the Definitive Agreements between NBN Co and Telstra, leaving NBN Co with the option to provide longer term forecasts (e.g. three years) once it is in a position to do so. As discussed further in section 2.3.1, NBN Co has incentives to provide RSPs with a long-term view of its expected deployment when it is in a position to do so.

Technology selection information

In the move to the MTM deployment, in addition to the 9Q forecast information, an additional set of information that RSPs may require as they develop their approach to entering markets is the mix of technologies that NBN Co expects to deploy. However, how this is best provided is difficult to define at this stage of NBN Co's development of its MTM approach. As noted in the discussion in section 3.2, much of the information provided to Telstra is at an early stage of the planning process, when the actual technology choice has not been finalised. The high level design information is provided to Telstra at this stage in its role as owner and operator of network infrastructure, so that it can manage and identify any issues with potential live network activities that might be performed by NBN Co. Providing any of these indicative views of the possible technology mix at too early a stage is likely to be counter-productive, as it will consume resources of both NBN Co and RSPs without necessarily resulting in information that is relevant to the decisions that RSPs need to make.

It is only once the network planning has reached the Detailed Design Documents (**DDDs**) stage and work is ready to be issued to construction partners that the technology mix is stabilised to the extent that RSPs would be able to use that information in their planning. However, as the DDDs are technical documents, reflecting the construction works to be performed, and other information about the infrastructure in a SAM, this may not be a useful set of information for RSPs (see also section 2.3.6). After the DDDs are finalised, there are still additional steps required in relation to address matching, which means that it is not possible at that stage to provide a definitive list of technology type for each individual premises. There are also likely to be issues as to how RSPs could manage this information (from an IT and resource perspective), due to the detailed nature of the information that is provided.

One option that may address the needs of RSPs is to provide updated information within the existing monthly RFS rollout plan, which provides additional information on the expected number of premises in an FSAM that would be served by each technology type. This would provide RSPs with information on the expected number of premises on each technology at the start of the construction phase, and therefore a significant lead-time to the RFS date to address issues such as the customer premises equipment (**CPE**) that may be required for those premises.

However, NBN Co acknowledges that there may be other approaches favoured by RSPs on this issue. To ensure that NBN Co is providing relevant information to RSPs, it may be most appropriate for NBN Co to consult with access seekers (for example, via the product development forum) about the type of information on technology mix that is required. NBN Co suggests that this could be done once industry feedback to this current ACCC consultation period has been received, so that this could be factored into any NBN Co consultation with industry.

During consultation with industry on the technology mix information, NBN Co would continue to develop its MTM deployment approach in parallel and this would inform the consultation process. Once a new approach has been developed, in consultation with industry, NBN Co believes that it would be appropriate to include the approach to providing technology mix information to RSPs in the WBA. This would provide RSPs with a level of certainty about the information that they could expect to receive from NBN Co.

2.3 Framing of licence condition analysis

NBN Co has concerns with the ACCC’s characterisation of some of the issues in the “costs and benefits” section of its Discussion Paper. NBN Co does not believe that the ACCC has completely described the current situation in relation to the provision of NBN network rollout information. It is important that analysis of the costs and benefits of the proposed CLC is appropriately framed by the context in which NBN Co is operating. Thus, NBN Co considers that the following should be recognised in considering the nature of any potential CLC:

- 1) NBN Co has incentives to provide RSPs with rollout information in a timely manner;
- 2) NBN Co will not necessarily be the sole provider of fixed line access services in all areas in which it operates, and the operation of any CLC given this commercial competition needs to be considered, to ensure there is a level playing field in relation to the provision of wholesale broadband services;
- 3) It has not always been the case in the past that network owners have provided detailed updates to the market about the rollout of their networks;
- 4) Past reliability of NBN forecasts should not be addressed by imposing information equivalence requirements;
- 5) Costs will not necessarily rise for RSPs if the CLC is not imposed; and
- 6) There are necessary underlying reasons for NBN Co to provide the information that it does to Telstra.

These issues are addressed in the following sections.

2.3.1 NBN Co’s incentives

The ACCC expresses the view that:

...in a competitive market, it would be expected that a supplier would make available to potential customers information concerning the nature and availability of its services⁶,

but then goes on to suggest that NBN Co, by virtue of it being likely to be a sole provider of fixed-line services, and facing other objectives may not operate in the same manner. NBN Co does not accept this position.

While NBN Co does not dispute that there are likely to be areas where it may be the only provider of fixed line access services, the potential for competition and indeed the entry of other providers (e.g. in high value Multi Dwelling Units, greenfields areas, etc.) needs to be acknowledged. As competition is most likely to arise in higher-revenue and/or lower cost geographic areas, this must be given proper consideration as a material constraint on NBN Co. The extensive commitments provided by NBN Co in its Special Access Undertaking (SAU), as well as NBN Co’s non-discrimination obligations, must also be weighed as a constraint on its conduct, particularly when considering equivalent treatment of RSPs.

The ACCC has raised a concern that, in pursuing other objectives, NBN Co might not ensure equivalence amongst RSPs during the network migration and build phase. NBN Co does not accept this to be the case. As previously recognised by the ACCC, NBN Co has incentives to encourage take-up of its services:

The ACCC considers that NBN Co will face a high degree of revenue sufficiency risk for most, if not all, of [the period to June 2023]. This is due to NBN Co’s initial prices and the expected low initial take-up of NBN services. This should provide incentives for NBN Co to invest efficiently.⁷

And:

Initial prices in the SAU are set at levels similar to current prices for copper and hybrid fibre coaxial (HFC) services and ... prices cannot increase by more than CPI minus 1.5 per cent each year. This

⁶ ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p. 3-4.

⁷ ACCC, Final decision: NBN Co Special Access Undertaking — December 2013, pg 96

*means that NBN Co will only be able to increase its revenue by offering new products or increasing demand, meaning NBN Co has an incentive to innovate **and to increase take-up of its services**.*⁸
(emphasis added)

In addition, NBN Co has incentives to bring forward revenue in order to meet the Government's policy objective to constrain public equity funding to no more than \$29.5 billion.⁹ To address both its revenue sufficiency risk, and the policy objective in relation to peak public funding, NBN Co will obviously want to encourage take-up of its services, and have this take-up occur as soon as possible. It is critical that NBN Co starts to generate revenue from its infrastructure as soon as possible after making that infrastructure investment. As such, NBN Co has every incentive to see end-users migrate to NBN services as close as possible to the RFS date, rather than at the end of the 18-month migration period. NBN Co considers that strong competition between RSPs is key to achieving this early end-user migration.

With a greater number of RSPs competing for end-users in the lead up to a RFS date in a given area, better products and/or prices are likely to be offered to end-users. There is also likely to be additional information circulating about when services will be available on the NBN from a variety of service providers. As a result of this competition, NBN Co would expect more end-users to switch to NBN services on or soon after the RFS date than would otherwise be the case.

Consequently, NBN Co has every incentive to ensure all RSPs have equivalent access to information sufficient for each of them to plan for and commence supplying services on the RFS date. From a commercial perspective, RSPs require relevant network planning information to effectively on-board and commence selling NBN Co services once a rollout region is declared RFS. If RSPs were not receiving appropriate information that was otherwise available to Telstra, this would be a substantial concern for NBN Co as the wholesale service provider, as this would undermine the commercial objective of maximising end user migration onto the NBN as soon as possible. As a further example of NBN Co working to ensure that all RSPs have access to information to assist them in moving end-users onto the NBN, a range of marketing materials and tools to support RSPs is offered by NBN Co.¹⁰

NBN Co does not accept that its objective to achieve rollout targets will detract from its overall incentive to see RSPs strongly compete for customers in the build and migration phase, and thus bring forward its revenue. Indeed, NBN Co would highlight that it has shifted from a focus on rollout metrics such as home passed, to the number of premises that are actually serviceable by RSPs.¹¹ This shift has been to ensure that RSPs have greater certainty about when it is commercial for them to invest in their networks and interconnect with the NBN. This shift in metrics is consistent with the incentives described above, as it highlights the importance to NBN Co of RSPs being able to migrate end users on to NBN services.

In addition to these commercial incentives, NBN Co is subject to a non-discrimination obligation that requires it to ensure it does not discriminate when carrying out certain activities related to the supply of services. While this does not mean that a piece of information disclosed to one RSP must by default be disclosed to all RSPs, NBN Co must still assess the purpose and effect of supplying that information in complying with its non-discrimination obligations.

⁸ ACCC, Final Determination: Applications for Authorisation lodged by NBN Co Limited in respect of provisions of the HFC Subscriber Agreement entered into with SingTel Optus Pty Ltd and other Optus entities, 19 July 2012, p.11.

⁹ NBN Co Statement of Expectations, 8 April, 2014.

http://www.communications.gov.au/__data/assets/pdf_file/0014/221162/SOE_Shareholder_Minister_letter.pdf

¹⁰ "NBN Marketing Materials", at <http://www.nbnco.com.au/sell-nbn-services/new-connections-newsletter/nbn-marketing-materials-what-you-need-to-be-successful.html>

¹¹ "NBN Co has traditionally focused on the premises past or covered measure, however what is apparent is that we need to increase our focus on premises serviceable, as this is what is important to our customers, the RSP and ultimately what triggers our revenue streams", NBN Co half-year results, 21 February 2014. Transcript, pg 10. <http://www.nbnco.com.au/content/dam/nbnco/images/media-images/Transcript-Half-Year-Results.pdf>

2.3.2 Level playing field considerations

NBN Co agrees with the ACCC that there should be a level playing field in the market for retailing broadband services. NBN Co argues that there should also be a level playing field in relation to the provision of *wholesale* broadband services, and notes that the Government has made clear its intention to provide competitive neutrality for NBN Co.¹² As noted above, NBN Co will not be the only provider of high-speed broadband infrastructure in high-value MDUs, with competitive deployments already taking place. Information about NBN Co's network rollout and product development is highly commercially sensitive and under normal circumstances would not be disclosed to a competitor at a level of detail that would reveal that sensitive information. It would be inappropriate if a CLC facilitated the access of NBN Co's commercially sensitive rollout and related information by companies in direct competition with it in relation to the deployment and operation of network infrastructure. An appropriate way to address this issue must be considered in developing any CLC. NBN Co further addresses this issue at section 4.6 of this submission.

2.3.3 Previous industry practice

The ACCC states that:

*In the past, network owners have provided detailed updates to the market about the rollout of their networks, such as providing details of DSLAM installations in exchange buildings.*¹³

NBN Co's understanding is that it has not always been the case previously that network owners have provided detailed updates to the market about the rollout of their networks

In any event, NBN Co notes that its commercial incentives as a wholesale-only network operator are vastly different to those faced by vertically-integrated network owners. Under normal circumstances, a network operator with vertically-integrated retail operations would not face incentives to reveal its network expansion plans to retail competitors. Rather, it would make decisions having regard to its retail market share, giving preferential treatment to its retail arm in accessing rollout information in a timely manner. While access regulation may have sought to address these issues and resulted in different outcomes, the past practices of vertically integrated network owners are not a relevant consideration in developing a CLC applying to a wholesale-only network operator in NBN Co's particular circumstances.

2.3.4 Previous NBN forecast information

The ACCC has expressed the view that:

*In the initial NBN rollout regions, many consumers risked losing continuity of service as a result of not migrating to the NBN during the migration period. Retail service providers have stated that an absence of reliable information about the timing and availability of NBN services contributed to these outcomes. Retail service providers have also expressed the view that they incurred additional costs to support consumers during the transition to the NBN, and were discouraged from actively marketing in initial rollout regions due to the lack of reliable information. Consequently, should achieving information symmetry also increase the quality and timeliness of information available to service providers generally, then a better consumer experience during migration to the NBN could be a further benefit arising from the proposed licence condition.*¹⁴

NBN Co is not convinced that information equivalence is the solution to the issues raised by the ACCC here, or how providing any of the specific information flows provided under the Telstra Definitive Agreements (**DAs**) would resolve them.

¹² Australian Government, *Telecommunications Regulatory and Structural Reform*, December 2014.

¹³ ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p. 4.

¹⁴ ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p. 4.

NBN Co's understanding is that any adverse RSP and end-user migration experiences have been as a result of lack of information about network serviceability, and NBN Co's ability to achieve an acceptable level of serviceability, rather than rollout-related information. If the issue is in fact about the *quality* of the serviceability information that is being provided by NBN Co to RSPs, this is a separate issue to *what* information should be provided under any CLC. For instance, disclosing detailed MTM network details (e.g. technical data on the integration of an NBN Co node with a specific pillar on Telstra's copper network) would be unlikely to resolve these concerns.

As discussed above, NBN Co has strong incentives to ensure that all RSPs have access to reliable rollout information in a timely manner, and continues to invest in improving the quality of its rollout information. NBN Co has continually improved the accuracy of its RFS forecast dates for FTTP, and will adopt similar approaches in relation to the forecasts developed for MTM services. In section 2.2.1, NBN Co explained the tension between lead-time and data stability. NBN Co reiterates its concern that supplying technical network information at an early stage which does not provide clarity around key rollout information or timing may lead to RSPs making incorrect interpretations or assumptions.

NBN Co acknowledges that the shift to an MTM approach to network deployment has introduced challenges for forecasting while necessary arrangements are being put in place to facilitate the delivery of the MTM approach. This has resulted in a transition period in which longer-term forecasts of network deployment have not been possible, as the information was not available to NBN Co. As NBN Co has incentives to provide information to RSPs that is reliable, it has adopted the approach of only providing detailed MTM forecasts when it has sufficient certainty to do so. This is unrelated to the issue of information equivalence with Telstra.

2.3.5 Potential RSP costs if licence condition is not imposed

NBN Co does not agree with the ACCC's suggestion that costs will rise for industry participants as a result of a CLC not being introduced:

*If NBN Co did not disclose adequate information, it is highly likely that industry participants would seek to establish information about the NBN rollout from other sources that may be less reliable.*¹⁵

This notion presupposes that NBN Co is withholding relevant rollout information from RSPs. NBN Co has strong incentives to ensure RSPs have rollout information sufficient to compete in supplying retail services to end-users during the transition to the NBN. It does not have an incentive to provide incomplete or unreliable rollout forecasts. While RSPs and other industry participants may engage in further 'speculative' type research, which is common in many industries, it is incorrect to assume costs of this type can or should be addressed by a CLC.

2.3.6 Rationale for providing information to Telstra

NBN Co also considers that there needs to be appropriate recognition of the underlying rationale behind NBN Co providing detailed rollout information to Telstra in the first place, and the use to which it can be put.

Much of the MTM information is provided by NBN Co to Telstra in its role as infrastructure owner and operator. As discussed below, one purpose of the MTM information to be supplied to Telstra is to ensure the integrity of the Telstra network is maintained and interruptions to that network are minimised. The complex and commercially sensitive data sets that Telstra will receive are not designed to provide it with an advantage over other RSPs to plan or market its supply of NBN services – as RSPs will receive, in effect, a 'translation' of this information consisting of NBN roll out timeframes and progress, focussed on the addressable market (i.e. serviceable premises) and other information likely to be of use for preparatory activities such as backhaul planning and marketing.

As will be described in greater detail in section 3.2, NBN Co's view is that information flows that arise as a consequence of the MTM arrangements are, to a large extent, either:

¹⁵ ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p. 4-5.

- (A) irrelevant to the lead time concern or data stability concern; or
- (B) so specific to network architecture that, even if they are relevant to the lead time or data stability concern, are not likely to be useful or relevant for RSPs.

An example of what is referred to in (A) above is the *Copper path transition details* (Information flow 21 in the Schedule to the Discussion Paper). This information flow is a notification by NBN Co to Telstra that an RSP has fully migrated to the NBN - and no longer requires services supplied by Telstra over the copper sub loop/HFC. This information flow will not provide Telstra with additional knowledge in relation to rollout timing. As such, it is difficult to identify what aspect of this information could or should be shared with RSPs.

Examples of what is referred to in (B) above are the design and as-built documentation that NBN Co will provide to Telstra. These information flows will provide Telstra with:

- an initial high level network design identifying boundary points and the downstream assets that NBN Co will be taking over from Telstra (and the technology that NBN Co could be using at the street level - but at such an early stage in the overall planning cycle that it will not necessarily reflect the ultimate network solution selected by NBN Co) (Information flow 5);
- confirmation of the constructible design that may include the rearrangement, addition or removal of plant (Information flow 7); and
- as built information confirming where NBN Co has placed devices/equipment and any logical rearrangement of services (Information flow 6).

This information is necessary to be provided to Telstra so that:

- NBN Co's construction activities do not interfere with Telstra's supply of services on the legacy network prior to a region being declared RFS; and
- Telstra has knowledge of what network and facilities are integrated with the network that Telstra maintains and/or operates after a region is declared RFS.

2.4 Costs of imposing a licence condition

As a general principle, NBN Co agrees with the ACCC that the costs and benefits of imposing the proposed CLC should be assessed as part of the decision as to whether to impose a licence condition, and the form of any such licence condition. However, in practice, this may be difficult to accurately quantify in advance of implementing any particular form of CLC.

As acknowledged by the ACCC, the imposition of a CLC on NBN Co will result in costs to both NBN Co and RSPs. While the quantum of costs is difficult to estimate, at this stage, it is likely that RSPs will face increased costs for IT systems required to process the design documents and additional staff time to analyse the information.

Consequently, a core principle in analysing whether to introduce a CLC (and the form of any such condition) is to establish what benefits arise from specific items of information being provided by NBN Co. If no benefit to competition in the retail market can be identified, the information flow should not form part of any CLC. These benefits should be considered by reference to the rollout information that NBN Co has already committed to make available to RSPs.

2.5 Telstra's migration plan

NBN Co notes the current FTTP Migration Plan Principles include a requirement that Telstra put in place effective measures to ensure that any information Telstra receives from NBN Co for the purpose of the commencement of supply of fibre services or the disconnection of copper services or HFC services at premises in the Fibre Footprint, cannot be used by Telstra to gain an unfair commercial advantage over its Wholesale Customers. These provisions of the Migration Plan will continue to apply to information provided to Telstra in relation to FTTP services.

3 Information flows under the Definitive Agreements

3.1 Introduction

As previously discussed, any assessment of the relevance to RSPs of the information flows provided under the DAs should be undertaken by reference to the use to which RSPs would put that information in coming to decisions about how they would compete in the retail market.

NBN Co has analysed and provided comments on each of the information flows described in the Schedule to the ACCC's Discussion Paper. With the exception of information flows 1 and 7, NBN Co does not consider that the information flows described in the Schedule are relevant to the decisions that RSPs will need to make in relation to their product and marketing approach, and therefore should not be included in any CLC.

3.2 Analysis of Information flows

| Info. Flow Ref | Information Type | Description | NBN Co Comments |
|----------------|---|---|---|
| 1. | Nine quarter forecast | <p>NBN Co provides Telstra with a rolling nine quarter forecast. This forecast to include:</p> <ul style="list-style-type: none"> - the number and approximate geographic boundaries of the Serving Area Module (SAM); - expected number of premises in the Fixed Line Footprint; - expected design commencement and construction completion dates. | <p>See detailed comments in relation to nine quarter forecasts in section 2.2.3 of this submission.</p> <p>The 9Q forecast contains information of relevance to RSP decision making such as the expected number of premises that will be served in a SAM, indicative construction commencement date and RFS dates.</p> <p>[c-i-c]</p> <p>NBN Co intends to provide RSPs with 9Q forecasts, as described in section 2.2.3 .</p> |
| 2. | Address Listing (Initial notification of proposed fixed line footprint list) | <p>NBN Co provides Telstra with the proposed Fixed Line Footprint list for each Rollout Region once NBN Co has completed its detailed design process for that Rollout Region. This will show which Premises are in the proposed Fixed Line Footprint in a Rollout Region, subject to an address-matching process with Telstra.</p> <p>This is required for disconnection activities - this address sharing and matching is to support this activity only.</p> | <p>A version of this list is published to access seekers on the access seeker portal (the “Historical Footprint List” or “HFL”). The HFL is developed using the Fixed Line Footprint List (FFL) as its basis. At RFS, the two lists should contain the same (or at least, substantially the same) data. The HFL is provided weekly to RSPs with serviceability and technology selection information on a per premises basis.</p> <p>As such, the Fixed Line Footprint List does not provide any additional rollout information that could be used by RSPs to make decisions in relation to their competitive position or activities in an area, and may be confusing to industry.</p> <p>Additionally, NBN Co is also working to enable Telstra to use the FFL to inform end users and its wholesale customers of Premises which in the lead up to Disconnection Date still have active services, in order to assist with migration to the NBN of those services.</p> <p>NBN Co therefore submits that this information flow should not be included in any CLC.</p> |
| 3. | Address Listing (Query and Resolution of issues) | <p>To complete the address matching process, NBN Co and Telstra exchange a series of enquiries and responses in relation to the data provided under Info Flow Ref #2.</p> <p>If Telstra raises a query about a Premises listed by NBN Co under Info Flow Ref #1, NBN Co responds to resolve any issues raised with the address listing data, for the</p> | <p>As for item 2.</p> |

| Info. Flow Ref | Information Type | Description | NBN Co Comments |
|----------------|---|---|--|
| | | <p>purpose of improving data quality.</p> <p>This is required for disconnection activities - this address sharing and matching is to support this activity only.</p> | |
| 4. | Address Listing (Change to existing footprint) | NBN Co notifies Telstra of a change to a Rollout Region in the Fixed Line Footprint. | As for item 2. |
| 5. | High Level Design documents for service area for local network and associated passive infrastructure | <p>NBN Co provides High Level Design (HLD) (including any ad hoc variations or supplements to such documents, from time to time) to Telstra.</p> <p>The HLD contains the indicative boundary points and downstream assets that NBN Co will be taking over from Telstra. It will also indicate the technology that NBN Co could be using at the street level, including the location of nodes.</p> | <p>The HLD includes the indicative technology allocation within the SAM, SAM boundaries, the proposed activities that NBN Co will be performing on Telstra’s live network and the proposed list of network assets and infrastructure that NBN Co will acquire and use respectively in the SAM.</p> <p>As the HLD is provided at an early stage in the design process, all information is indicative and likely to change during NBN Co’s planning and design process. Hence there is marginal utility in providing RSPs with this information, as it will not necessarily reflect the ultimate network solution developed by NBN Co in that area.</p> <p>The designs are produced in accordance with NBN Co design rules, and are only provided to Telstra as an owner and operator of network infrastructure in order to manage their live network and raise any concerns with potential live network activities by NBN Co. Telstra does not have any commercial competitive advantage over other RSPs, as the HLD is a technical document.</p> <p>The HLD is submitted to Telstra in GML format, which would require RSPs to have IT systems suitable to read these design documents. Due to the nature of these documents (i.e. they are provided in a format which expresses the geographical features of the SAM), it is not appropriate to consider any alternative ‘management style’ report.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |
| 6. | Field inspection of local network and associated passive infrastructure | <p>NBN Co provides Field Inspection Reports (FIR) to Telstra.</p> <p>Refers to the Field Inspection, a field walk out and review of the condition of the infrastructure for design</p> | <p>Field inspection reports are a voluntary DA activity to assess the capacity of Telstra’s duct network.</p> <p>The field inspection activity is required to assess whether the desktop network design is supported by field evidence (that is, by assessing whether a given duct is either blocked or at capacity). NBN Co flushes Telstra ducts, and rod and ropes the duct to assess capacity and physical condition. NBN Co also inspects Telstra</p> |

| Info. Flow Ref | Information Type | Description | NBN Co Comments |
|----------------|--|---|---|
| | | <p>assistance and remediation purposes.</p> <p>FIR only includes information in relation to ducts and associated duct infrastructure. FIR can be provided separately, or along with the Detailed Design Documents.</p> | <p>pits to assess whether they may be physically compromised or have insufficient capacity due to existing equipment in the pits. All information submitted by NBN Co in the FIR flows through to the subsequent DDD (see information flow 7 below).</p> <p>From the perspective of the associated passive infrastructure (API), the FIR assesses whether a pole is unsafe, the pole location (longitude/ latitude), pole owner identity, what assets are on the pole (to assist Telstra’s assessment as to whether to transfer or licence the pole to NBN Co).</p> <p>Again, the API FIR data flows through to the subsequent DDD.</p> <p>Thus, the FIR information provided by NBN Co will only confirm the current state of Telstra’s existing network infrastructure. NBN Co does not consider that there is any linkage between the FIR data and RSP competitive behaviour or opportunity. However, the provision of such data would give a ‘free ride’ to any infrastructure based competitor considering installing equipment into ducts (i.e. it could allow them to assess duct quality and capacity without having to go into the field). NBN Co views this as an unacceptable commercial outcome, having entered into an agreement with Telstra to access these ducts under the commercial terms of the DAs.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |
| 7. | <p>Detailed Design Documents for service area for local network and associated passive infrastructure</p> | <p>NBN Co provides Detailed Design Documents (DDD) (including any ad hoc variations or supplements to such documents, from time to time) to Telstra.</p> <p>The DDDs are the fully constructible design of a Service Area Module (SAM); that is, a full representation of design in NBN Co’s system including identifying Pre Asset Transfer Activities NBN Co will perform on the live network. The DDDs include the SAM boundary and distribution of access technology within the SAM, including proposed node locations.</p> | <p>The DDDs confirm the technology type within the SAM, SAM boundary, the proposed activities NBN Co will be doing on Telstra’s live network, the proposed list of network assets and infrastructure that NBN Co will acquire and use respectively in the SAM, and any remediation work required.</p> <p>The DDDs are submitted to Telstra in GML and LODE data format, which would require RSPs to have IT systems suitable to read the design documents (i.e. they are provided in a format which expresses the geographical features of the SAM). Due to the nature of these documents, it is not appropriate to consider any alternative ‘management style’ report.</p> <p>The designs are produced in accordance with NBN Co design rules, and are only provided to Telstra as an owner and operator of network infrastructure to review in order for them to manage their live network (orders, faults, etc.) and raise any concerns with potential live network activities by NBN Co. Telstra does not have any commercial competitive advantage over other RSPs, as the DDD is a technical document.</p> <p>In NBN Co’s view, the only information in the DDDs that is not contained in other information provided to</p> |

| Info. Flow Ref | Information Type | Description | NBN Co Comments |
|----------------|---|--|---|
| | | | <p>RSPs that is relevant to their commercial decisions is the technology type that is intended to be used in each SAM.</p> <p>NBN Co submits that this information flow should not be included in any CLC, other than an indication of the technology type that is intended to be used.</p> |
| 8. | Progressive Records Update | <p>NBN Co will provide Telstra with regular Progressive Record Updates in regards to agreed live network Construction Activities completed in the SAM.</p> <p>This process will help Telstra facilitate management of related customer impacts and coordination between parties in relation to working on the live network.</p> | <p>This information is provided to allow Telstra to continue to manage services it provides over network assets that are affected by activities performed by NBN Co pre-asset transfer. It ensures that Telstra has accurate network information after NBN construction activities commence, to allow it manage its network effectively.</p> <p>The fact that NBN Co has commenced network rollout in that area will have been made known to RSPs via the 9Q forecast that will be provided to them. The monthly ready for service rollout plan process will also provide Access Seekers with visibility of the build commencement activity as per the quarterly 9Q forecast.</p> <p>As such, the Progressive Record Update does not provide any additional information that could be used by RSPs to make decisions in relation to their competitive position or activities in an area.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |
| 9. | NBN 'As-Built' for local network and associated passive infrastructure | <p>At the end of the construction phase within a SAM, NBN Co provides Telstra with the As-Built Drawings. The As-Built Drawings show NBN Co's construction activities within a SAM following the completion of construction activities.</p> <p>This is not purely a physical issue because Telstra also requires information on what NBN Co has done with regards to the logical rearrangement of services. Information includes:</p> <ul style="list-style-type: none"> - Distribution of access technologies in the SAM - Location of nodes - Technology type per premises. | <p>This information is provided to allow Telstra to continue to manage services it provides over network assets that are affected by activities performed NBN Co. It ensure that Telstra has accurate network information after NBN construction activities commence, to allow it manage its network effectively.</p> <p>The fact that NBN Co has commenced network rollout in that area will have been made known to RSPs via the 9Q forecast that will be provided to them. The monthly ready for service rollout plan process will also provide Access Seekers with visibility of the RFS dates communicated via the same monthly process.</p> <p>The only relevant information for RSPs in the as-built drawings is the technology allocation type, which NBN Co believes could be provided to RSPs after following the proposed approach suggested in section 2.2.3.</p> <p>As such, the As-Built Drawings does not provide any additional rollout information that could be used by</p> |

| Info. Flow Ref | Information Type | Description | NBN Co Comments |
|----------------|---|--|---|
| | | <p>Telstra needs to be aware of what is in its network as it affects shared infrastructure.</p> <p>Telstra requires the As-Built Drawings because it not only affects Telstra's operations on its own network, but also, because it is shared infrastructure and it is available to third parties.</p> | <p>RSPs to make decisions in relation to their competitive position or activities in an area.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |
| 10. | Query LIC pull through capability | <p>If NBN Co intends to undertake pull-through activities in relation to a Lead-in Conduit (LIC), NBN Co must provide Telstra with NBN Location ID for that premises for the purpose of ascertaining from Telstra if any Cable in that LIC is a non-removable existing cable.</p> | <p>This information is concerned entirely with activities related to LICs (i.e. at the individual premises level), which is at such a granular level in the network that there is no meaningful rollout information provided that could be used by RSPs to make decisions in relation to their competitive position or activities in an area.</p> <p>In practice, this information will be conveyed by a telephone call from an NBN field technician to Telstra in order to confirm that the work is able to be performed. To date, NBN Co has not performed pull-through activities.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |
| 11. | Raise Network Assurance Ticket on infrastructure licenced from Telstra | <p>NBN Co submits a fault ticket on licensed ducts, racks or dark fibre and Telstra notifies status of the restoration.</p> | <p>This information is concerned entirely with faults and remediation on Telstra ducts, exchanges, or dark fibre which NBN Co uses, to allow Telstra to remediate as required.</p> <p>As such, it does not provide any rollout information that could be used by RSPs to make decisions in relation to their competitive position or activities in an area.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |
| 12. | Notify In-Train Orders | <p>NBN Co at the Disconnection Date for a Rollout Region notifies Telstra of any Premises where NBN Co has accepted an order before the Disconnection Date (in-train order), which do not need to be disconnected by the Disconnection Date.</p> | <p>This information is provided on the Disconnection Date for a Rollout Region (i.e. at the end of the migration period), to ensure that Telstra is able to continue to provide services while in-train orders for NBN Services are being completed.</p> <p>As such, it does not provide any rollout information that could be used by RSPs to make decisions in relation to their competitive position or activities in an area.</p> |

| Info. Flow Ref | Information Type | Description | NBN Co Comments |
|----------------|--|---|--|
| | | | NBN Co submits that this information flow should not be included in any CLC. |
| 13. | Polygon Boundary Notice | NBN Co requests Regional Planning Information by providing a Polygon Boundary Notice which is indicative boundaries of the planned SAM (which must not be for an area exceeding 4,000 Premises unless Telstra otherwise agrees). | <p>This is a request from NBN Co to Telstra based on the 9Q forecast, and is the data that enables NBN Co to utilise additional design partners. An 18 month version of the 9Q forecast information has already been provided to RSPs.</p> <p>This information is the first step in the design process for a SAM, and provides NBN Co with the information to start its design process and licence to do some field inspections.</p> <p>The notice provided to Telstra is only a GML data file consisting of indicative SAM boundaries where NBN Co plans to commence design activities.</p> <p>Hence, it does not convey information about the RFS date for a SAM, or the technology to be used, as this is not determined until later in the overall design process.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |
| 14. | Notify NBN Rollout (fixed line rollout) and Forecasts | <p>Notifications of Overall Rollout Plan and updates thereto.</p> <p>Notifications of Acquired Network Rollout Regions, forecasted Disconnection Commencement Dates for Acquired Network Rollout Regions, updates to forecasted Disconnection Commencement Dates for Acquired Network Rollout Regions and notification of actual Disconnection Commencement Dates for Acquired Network Rollout Regions.</p> <p>Notifications of forecasted Region Ready For Service Dates for Rollout Regions, and updates thereto.</p> | <p>RFS dates and forecasted RFS dates are already published by Telstra under the Migration Plan as part of its Disconnection Schedule.</p> <p>Disconnection Commencement Dates of Acquired Network Rollout Regions (and Initial Release Rollout Regions) are only relevant for PSAA purposes.</p> <p>As such, disclosure of this information does not provide any additional rollout information that could be used by RSPs to make decisions in relation to their competitive position or activities in an area.</p> <p>NBN Co therefore submits that this information flow should not be included in any CLC.</p> |
| 15. | Regional Operating Baseline (ROB) | NBN Co to provide Telstra with a forecast of Rollout Regions in which NBN Co nominates Telstra to remediate duct sections. | <p>The ROB is a list of the SAMs that Telstra will remediate (as opposed to SAMs where NBN Co will undertake remediation).</p> <p>As such, it does not provide any rollout information that could be used by RSPs to make decisions in relation to their competitive position or activities in an area. NBN Co also assumes that RSPs are indifferent as to who conducts duct remediation.</p> |

| Info. Flow Ref | Information Type | Description | NBN Co Comments |
|----------------|--|---|---|
| | | | NBN Co submits that this information flow should not be included in any CLC. |
| 16. | TSAM Duct Remediation (including Remediation and Installation Works Plan) | NBN Co to provide Telstra with a plan for duct remediation and installation works in SAMS other than those in which Telstra will conduct remediation works. | <p>These are notices that relate to the schedule of remediation and installation works which will be undertaken in a SAM prior to the applicable RFS date.</p> <p>The reporting that is provided relates to two notices – one where NBN Co is doing the remediation in a SAM, and one where Telstra is doing remediation in a SAM. These notices are purely construction related, and do not have any direct impact on when RFS will occur in respect of a SAM.</p> <p>As such, disclosure of this information does not provide any additional rollout information that could be used by RSPs to make decisions in relation to their competitive position or activities in an area.</p> <p>NBN Co therefore submits that this information flow should not be included in any CLC.</p> |
| 17. | Query HFC lead-in Infrastructure at NBN location | <p>This information is applicable to HFC only.</p> <p>Before RFS, where Telstra receives an order for a Pay-TV or Broadband service, Telstra may query NBN Co systems to check for any NBN Co built lead-in within the existing Telstra HFC Footprint (NBL). Telstra has the option to acquire that lead-in from NBN Co to provide the requested service pre-RFS.</p> | <p>This information relates to areas in which NBN Co has commenced HFC network infill. The fact that NBN Co has commenced HFC rollout in that area will have been made known to RSPs via the 9Q forecast that is provided to them. Thus, RSPs already have access to the information they require to formulate decisions about their competitive approach in those areas.</p> <p>NBN Co considers that as a result of these arrangements, Telstra will be in the same competitive position or activities as it would have been in the absence of NBN Co commencing HFC construction work in that area.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |
| 18. | MAC Migration request | <p>This information flow relates solely to HFC.</p> <p>Where NBN Co receives a NEBS (NBN Ethernet Broadband Service) order from anyone requesting a NEBS HFC service, that order will have a MAC address associated with it. The MAC address is the unique identifier that appears on a device (e.g. modem) and is used to authenticate a modem onto the HFC network. The MAC address of itself only identifies the device, and provides no information on service type, location</p> | <p>NBN Co will not be proceeding with a blacklist/whitelisting approach with Telstra in regards to the co-existence of Cable Modems over the network.</p> <p>[c-i-c]</p> <p>This approach negates the need for any data exchange between Telstra and NBN Co regarding Cable Modem MAC addresses.</p> <p>NBN Co therefore submits that this information flow should not be included in any CLC.</p> |

| Info. Flow Ref | Information Type | Description | NBN Co Comments |
|----------------|---|---|--|
| | | <p>or customer.</p> <p>As the HFC network is shared spectrum and both Telstra and NBN Co cable modem termination systems (CMTSs) will be connected in parallel, a modem will attempt to connect to both the NBN Co and the Telstra CMTS. To avoid an NBN NEBS service (modem) incorrectly connecting to the Telstra CMTS it must be positively rejected. This will be achieved by creating and managing a “blacklist” of MAC addresses that NBN Co provides to Telstra.</p> | |
| 19. | <p>Planned change impacting licensed copper/HFC infrastructure</p> | <p>NBN Co will provide information on planned changes where those changes will impact components of the transferred network on which Telstra continues to operate exchange based services under transitional or exempted agreements. For example, if NBN Co moves a pillar, Telstra will need to know this as it will impact customer services that utilise the impacted components of the network.</p> | <p>This information is provided after the RFS date, to allow Telstra to continue to manage services it provides over network assets that are transferred to NBN Co.</p> <p>As such, it does not provide any information that could be used by RSPs to make decisions in relation to their competitive position or activities in an area.</p> <p>NBN Co considers that it is not appropriate to provide information to RSPs that identifies licences NBN Co provides to Telstra to support ongoing continuity of existing services.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |
| 20. | <p>Notify Licensed Infrastructure Incident</p> | <p>This relates to incidents that occur on the parts of the transferred network on which Telstra continues to provide services. The requirement to notify exists until all services within a SAM are migrated.</p> <p>When NBN Co is informed or becomes aware of an infrastructure incident (such as a cable cut), it will provide this information to Telstra so that Telstra has a record to support assurance, billing and customer relationship functions. This information exchange will include a description of fault, expected restoration</p> | <p>This information is provided after the RFS date, to allow Telstra to continue to manage services it provides over network assets that are transferred to NBN Co.</p> <p>As such, it does not provide any information that could be used by RSPs to make decisions in relation to their competitive position or activities in an area.</p> <p>NBN Co considers that it is not appropriate to provide information to RSPs that identifies licences NBN Co provides to Telstra to support ongoing continuity of existing services.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |

| Info. Flow Ref | Information Type | Description | NBN Co Comments |
|----------------|---------------------------------------|--|--|
| | | <p>date and time. It is anticipated that NBN Co would also provide similar information to its RSPs with respect to NBN services.</p> | |
| 21. | Copper path transition details | <p>This information flow relates to a daily feed from NBN Co to Telstra in relation to the copper sub loop licences.</p> <p>Where Telstra has a licence to use the copper sub loops, and NBN Co receives an order from another RSP to say it has fully migrated and no longer requires any copper services, this allows Telstra to update its records (e.g. discontinue services and billing arrangements for Telstra Wholesale Customers).</p> <p>Without this transaction Telstra would not be aware of the change of status (migration) of this customer and would continue to bill the Wholesale Customer as records would indicate an active service.</p> <p>The post-migration information flow that happens is ongoing and reflects the transfer of the copper sub-loop from Telstra as a licenced user to NBN Co as the provider of the NBN Service.</p> | <p>This information is provided after the RFS date, and after migration events have occurred, to allow Telstra to continue to manage services it provides over network assets that are transferred to NBN Co. The provision of gaining RSP information to Telstra is discussed further in section 4.3.4 of this submission.</p> <p>As such, it does not provide any information that could be used by RSPs to make decisions in relation to their competitive position or activities in an area.</p> <p>NBN Co considers that it is not appropriate to provide information to RSPs that identifies licences NBN Co provides to Telstra to support ongoing continuity of existing services.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |
| 22. | Ready for Service Delay Event | <p>In the event of a 'Region Ready for Service Delay Event', NBN Co must promptly notify Telstra in writing no later than 1 Business Day prior to the forecasted Region Ready for Service Date.</p> <p>At the same time, NBN Co must submit a rectification plan setting out a proposed solution to the Event.</p> | <p>The monthly rollout plan process provides an update to Access Seekers of any revised RFS date.</p> <p>NBN Co submits that this information flow should not be included in any CLC.</p> |

4 Response to ACCC issues for discussion

In this section NBN Co provides its response to each of the “issues for discussion” raised by the ACCC in its Discussion Paper. This is not necessarily a direct response to each question posed by the ACCC, but rather addresses the key themes and issues raised by the ACCC. While NBN Co believes that it is premature to impose a CLC at this time, if this is the consequence of the current ACCC process, the following responses should be addressed in the formulation of that CLC.

4.1 Objective of the proposed licence condition

NBN Co supports the overarching objective of the proposed licence condition. As described in section 2.3.1, NBN Co’s incentives are to have early migration of end-users to its network, which in part is achieved by having all RSPs in an equivalent position to be able to provide services over the NBN at RFS, and compete for end-users in the lead up to RFS. However, it does not follow that this objective is best achieved by simply providing the same information to RSPs as is provided to Telstra.

Instead, the focus should be on what information is actually required by RSPs to make decisions that place them in a position to effectively compete with Telstra in providing retail broadband services to end-users. Achieving the objective may not even require the imposition of a licence condition on NBN Co, provided that relevant rollout-related information is provided by NBN Co under other appropriate arrangements.

4.2 Guiding principles for the proposed licence condition

NBN Co agrees that developing principles could help to ensure that the objective of the proposed licence condition is achieved, whether this is done by introducing a CLC or via an alternative approach. Specifically, in relation to the proposed CLC, NBN Co considers that well-developed principles should guide the drafting of any licence condition, rather than be incorporated into the actual drafting of the licence condition.

Including principles in the drafting could result in any CLC being in a state of constant evolution and potentially expanding in application and operation. While there may be some attraction to increasing the level of flexibility of a CLC, this is likely to lead to increased uncertainty for NBN Co as to what it is required to do and likely higher and uncertain compliance costs. While NBN Co is not opposed to the concept of a CLC evolving if circumstances change, subject to an appropriate review process, it does not consider including principles in the drafting of the licence condition is necessary to achieve this. Furthermore, NBN Co believes RSPs’ primary concern will be with the specific information provided, and that they will find little utility in the inclusion of guiding principles in any CLC drafting.

NBN Co does not agree that the proposed CLC objective of ‘ensuring symmetry’ suggests a presumption that information made available to one RSP should be made available to all RSPs. NBN Co notes that such a presumption fails to recognise that the information symmetry the proposed CLC seeks to address is “*in respect of relevant NBN-rollout and related information.*”¹⁶

As NBN Co has argued earlier (section 2.2.1), the information is only ‘relevant’ if it enables RSPs to make decisions allowing them to compete effectively with each other in supplying NBN services to end-users. In this respect, NBN Co agrees with the ACCC that:

*The information NBN Co should disclose would be relevant information if it is likely to have a material bearing on retail service providers planning operations over the NBN, either generally, in a particular service area module, or to a particular premise.*¹⁷

¹⁶ Department of Communications, Variation of Telstra’s migration plan – regulatory instruments: exposure drafts, December 2014, p. 10.

¹⁷ ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p. 12.

It follows that information NBN Co may provide to RSPs under any CLC (or by any other means) may not include all of the information provided to Telstra. If information cannot be used by an RSP to make a decision related to the supply of NBN services, including planning its supply of these services, then it does not need to be provided.

In addition, the relevant timing of the information provision is critical in considering the content of the proposed CLC. While it is possible that NBN Co could provide information to Telstra that could later be relevant to RSPs decisions, it is important to consider whether the information will have a material bearing on retail service planning *at the time* it is provided to Telstra, particularly if the information is indicative and does not reflect final rollout plans. NBN Co addresses specific information flows in more detail in the table in section 3.2 of this submission.

4.2.1 Possible principles

The ACCC has articulated proposed principles for inclusion in the CLC on page 13 of the Discussion Paper. NBN Co does not agree with all of the principles outlined by the ACCC. In relation to the specific principles described by the ACCC, NBN Co makes the following comments:

- (1) *Any rollout information made available to one RSP should be made available to all.*
As described below in section 4.3.1, NBN Co does not accept that this is a necessary principle to be adopted when considering the form of any CLC. The focus of any CLC should be on how the information could actually be used by RSPs in practice to ensure effective retail competition for NBN services. Adopting this principle would extend the scope of any CLC far beyond its objective.
- (2) *Telstra will not obtain a competitive advantage by reason of its receipt of information from NBN Co.*
NBN Co accepts that this is likely to be a key principle of any CLC introduced. However, as described in section 2.3.1, NBN Co has every incentive to ensure that that this occurs in the absence of the proposed CLC. As described in section 2.2.1, the way this principle should be considered is in light of the practical use to which RSPs could put information that has been provided to Telstra.
- (3) *Parties to receive information to place them in an equivalent position to plan for and commence supplying equivalent services over the NBN.*
NBN Co accepts this is a key principle, and refers to its comments for the previous principle.
- (4) *Information disclosed should be accurate and timely, so that each RSP is in practical terms equally placed to make use of that information.*
While NBN Co accepts this as a valid principle, this should only be applied to the extent the information has an impact on decision making by RSPs. If there is no decision-making that is impacted by providing the information to Telstra at an earlier time, NBN Co does not believe that the objectives of the proposed CLC are undermined. As discussed in section 2.3.4, NBN Co has strong incentives to ensure that all RSPs have access to reliable rollout information. However, by their very nature, forecasts of future construction events may not be realised in practice. Accordingly, while NBN Co is continuing to improve its forecast accuracy, it would not be reasonable or appropriate for any CLC to include mandated accuracy requirements that did not properly take account of the inherent nature of forecast information.
- (5) *Information disclosed should be in an appropriate format so that it is readily able to be interpreted by each relevant person.*
As discussed below in section 4.4, NBN Co does not accept that it should have to tailor information to suit the needs of individual organisations, as this could place an unreasonable burden (time and cost) on NBN Co. However, consistent with its incentives, NBN Co has continued to refine how it presents information to RSPs to ensure that it is relevant to their needs, and has been responsive to

RSP feedback in this regard. Rather than tailoring information to the needs of individual RSPs, NBN Co continues to engage with all RSPs to ensure the information it provides continues to be relevant.

(6) *There should be no unnecessary restrictions on parties gaining access to information.*

NBN Co accepts this as a principle, but as discussed in section 4.6, any CLC must allow NBN Co to put in place appropriate confidentiality arrangements with the recipients of the information, and ensure that the information is only able to be used for purposes relevant to the expressed objectives of the proposed CLC.

4.3 Information to be disclosed

The central issue to be addressed in considering the information that should be disclosed is how and when that information could actually be used by RSPs in practice to ensure effective competitive outcomes are achieved in the retail broadband market. The details of what information should be disclosed and the way in which this is best achieved should reflect this key principle.

4.3.1 Verbatim style reports

NBN Co does not agree that ‘ensuring symmetry’ suggests that all RSPs should receive the exact same data sets as supplied to Telstra. Instead, as discussed in section 2.2.1, the focus must be on how the information could be used by RSPs in practice to ensure competitive outcomes are achieved. As detailed in section 3.2, as a result of NBN Co’s analysis of the information flows in the Schedule to the ACCC’s Discussion Paper, NBN Co considers that the majority of the information flows provided by NBN Co to Telstra under the DAs simply do not provide RSPs with information that could inform the decisions they will need to make when competing in the market for NBN services. Only a limited sub-set of the total information provided by NBN Co to Telstra facilitates this decision making, as outlined in NBN Co’s proposed approach in section 2.2.3.

4.3.2 Management and operation style reports

As discussed in section 2.2.2, NBN Co already provides detailed rollout-related information to RSPs that gives a long-term view of the expected dates for commencement of construction and when areas will be ready-for-service and, in NBN Co’s view, “*appear capable of militating against Telstra gaining preferential insight into NBN Co construction progress*”¹⁸.

4.3.3 Information to disclose in management or operational style reports

Construction and other ready for service information

Consistent with the general principles articulated by NBN Co in section 2.2.1, the issue of when RSPs need to receive information on the likely construction and RFS dates in an area should be considered in light of the decisions they will need to make to market and supply services. NBN Co considers that the information provided in the 9Q rollout plan will address these RSP needs.

Technology choice information

Consistent with the general principles articulated by NBN Co in section 2.2.1, the issue of when RSPs need to receive information on the likely technology mix in an area should be considered in light of the decisions they will need to make to market and supply services. As NBN Co intends to provide equivalent bitstream product sets on its fixed line networks, the critical decision to be made by RSPs that is influenced by technology mix is in relation to any CPE it may need to provide to an end-user which is technology-dependent. As discussed in section 2.2.3, NBN Co proposes to further consult with RSPs on the most appropriate way forward to provide relevant technology-related information to RSPs.

¹⁸ ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p. 14.

Service-related information

In response to the ACCC's comments on NBN Co's disclosure of service-related information to Telstra (e.g. gaining RSP identity), NBN Co refers to comments below in section 4.3.4. In summary, NBN Co believes that significant additional issues would be created by providing such information to all RSPs, while "solving" the issue by preventing NBN Co disclosing this information to Telstra would have significant adverse implications for the overall migration of services to the NBN. NBN Co considers that the protections that have been put into place via the WBA terms strikes an appropriate balance of the interests of the various parties.

Forecast and actual line quality

NBN Co notes that the provision of forecast and actual line quality is not part of the information flows provided to Telstra, and hence goes beyond the scope of the proposed CLC. Further, NBN Co does not consider that anything done by NBN Co will provide Telstra with an advantage in forecasting line quality on NBN services.

First, Telstra will not be able to reliably forecast speeds over NBN services. The introduction of VDSL2 technology for the first time in Australia to underpin NBN Co's FTTN/B product significantly reduces the usefulness of any historical information that Telstra may hold.¹⁹ In the case of FTTB, there are no relevant Telstra copper records because the cabling within a multi-dwelling unit is mostly owned by the building owner.

Secondly, NBN Co will make an FTTN/B service qualification (**SQ**) tool available to RSPs that provides an estimate of the likely speed of each NBN FTTN/B connection. As set out in NBN Co's *FTTN/B Consultation Outcomes & Final Product Construct*²⁰, this tool will allow RSPs to obtain estimates of the expected service speed prior to ordering a service and then upon activation a report of the actual operating speed of the service. RSPs will have access to this SQ tool prior to completing the activation of an individual FTTN/B service, enabling them to discuss the most appropriate speed tier with an end-user during the ordering process. If RSPs find the actual operating speed of a new service is significantly lower than the initial SQ tool estimate, they will be able to change to a more appropriate speed tier for that end-user at no charge from NBN Co. This tool is already available in relation to FTTB services launched in 2015.

In time, NBN Co will implement a model where speed estimates provided by the SQ tool will be based on actual historical data from each operating NBN FTTN/B service. NBN Co expects this to be within 12-24 months of the FTTN product launch. As previously discussed, NBN Co has incentives to ensure that this type of information is able to be provided to all RSPs as quickly as possible and in as useful and accurate a manner as possible, as it will enhance their ability to market and sell NBN services. However, in its initial stages, the SQ tool will provide estimates of FTTN service speeds using information about copper line length and information known to NBN Co regarding the performance of its VDSL2 technology. FTTB service speed estimates will initially be provided with a general comment informing RSPs that speeds are likely to be towards the upper range of those possible, because copper runs within an MDU are typically very short.

Throughout the operating life of an FTTN/B service, NBN Co will make available a test and diagnostics tool that RSPs can use at any time to see the real-world speed of an active service on NBN Co's network on an ongoing basis. In addition, NBN Co will also issue weekly summary reports to RSPs showing the speed of each service throughout the reporting period, as well as a number of other metrics such as line noise.

¹⁹ Because VDSL2 uses significantly more spectrum than ADSL-based services, its speed-over-distance performance is will be entirely unique - as will its susceptibility to interference, environmental factors and copper quality issues. Having never implemented VDSL2 technology over their copper network, Telstra is unlikely to have a clear view of how its historical copper records translate into NBN FTTN/B service performance.

²⁰ Provided to the ACCC and RSPs in confidence in August 2014

Points of interconnect (POI) related information

NBN Co does not agree with the ACCC's suggestion in relation to the provision of additional POI information as part of the proposed CLC. This is not part of the information flows provided to Telstra under the DAs, and therefore does not give rise to any information asymmetries or competition issues.

[c-i-c]

4.3.4 Limiting information flows

The ACCC has raised the issue as to whether certain information should not be provided to *any* service provider if it is not necessary or appropriate to make it available to *all* service providers. The particular example provided by the ACCC is the disclosure by NBN Co to Telstra of a daily feed of NBN activations in FTTN/B areas that includes the identity of the gaining service provider (i.e. the access seeker who will be supplying the NBN service). The ACCC suggests that information symmetry could be achieved by providing this information to all RSPs, but identifies that this approach could be problematic given the commercial sensitivity of the information, and may disclose personal data of the end-user beyond what is reasonably necessary. NBN Co agrees that there would be significant issues raised by such an approach and that it is not appropriate to provide this information to all RSPs.

The ACCC has suggested that the proposed CLC could instead contain a provision that prevents the supply of the gaining service provider information to Telstra in its role as the losing network access provider. [c-i-c]

NBN Co considers that there is a clear rationale for this information being provided to Telstra, and that preventing disclosure of this information to Telstra would create a number of problems for both Telstra and the rest of industry. In addition, there are a number of other considerations that should be taken into account when assessing how this gaining RSP information should be treated under any proposed CLC:

- (1) As noted by the ACCC in the Schedule to the Discussion Paper (at item 21), this information is provided to Telstra in the context of the copper sub-loop licences that will be provided to it to continue to offer services such as ULLS, ADSL and PSTN once asset ownership has transferred to NBN Co. This information allows Telstra to maintain its records as it continues to operate these 'legacy' services in the transition to NBN Co supplying layer 2 bitstream services.
- (2) Under current industry churn practice, for both ULLS and ADSL service transfers, Telstra notifies the losing RSP of the churn and the name of the RSP to whom they have lost it. In order for Telstra to continue managing their churn process under FTTB/N (as end-users move from ULLS and ADSL to NBN-based services), it is necessary that NBN Co provides the name of gaining RSPs to Telstra. A key benefit of this practice is that if it is determined that there has been an incorrect churn, the losing RSP or end user can contact the gaining RSP in order to initiate the reinstatement of their service.

The provision of this information to Telstra simply ensures that Telstra is placed in the same position as it would have been in the absence of NBN Co taking ownership of Telstra's copper network, and allows service continuity to continue in as uninterrupted a manner as possible in the circumstances.

- (3) If NBN Co was not able to provide this information to Telstra as a result of a condition contained in a CLC, NBN Co, Telstra and third parties would not be able to effect the disconnection of services (and, potentially, the reinstatement of voiceband continuity where it has inadvertently not been ordered by the gaining service provider). If services cannot be disconnected, NBN Co cannot migrate PSTN and ADSL services to the NBN. In addition, as Telstra would not know which services to disconnect in their systems, this would lead to potential double billing of their wholesale customers (i.e., being billed by NBN Co and Telstra).

- (4) The disclosure of the gaining RSP name does not apply to migrations to FTTP or HFC. This disclosure only applies in relation to copper-based NBN service migrations because the same physical copper line is being used for the NBN Ethernet bitstream service as is used for the legacy services that continue to be provided by Telstra.
- (5) Proceeding on the basis that NBN Co is required to provide the gaining RSP identity to Telstra, and Telstra to the losing RSP, gaining service providers would likely prefer that only the necessary information is disclosed – and only to parties that require the information. While a gaining RSP may prefer their identity is not disclosed to Telstra/the losing RSP, if the disclosure is necessary then the gaining RSP's concern is not addressed by disclosing that information to all of industry. A disclosure to all RSPs would increase the opportunity for information to be misused, and increase the difficulty of monitoring how this sensitive information is handled.
- (6) NBN Co would also make the point that an inconsistency with the DAs that is introduced by any CLC has the potential to lead to an uncertain outcome under the revised DAs, which would need to be considered further by all parties.

The ACCC has noted that NBN Co has recently proposed amendments to its WBA to permit it to disclose this information to Telstra. In that context, NBN Co is seeking consent from its customers for:

- (i) NBN Co to disclose certain information to Telstra; and
- (ii) NBN Co and Telstra to disclose certain information to third parties (e.g. field service delivery partners).

NBN Co is only seeking this consent where such disclosures are necessary or useful to effect the disconnection of services. For example, to effect a disconnection, NBN Co, Telstra and/or third parties (e.g. field service delivery partners) would need to have access to a range of information, including the gaining service provider's Eligible Party Identification Code and the date of activation, collectively referred to as 'Transition Advice Information'. Where this information is confidential, NBN Co is seeking consent to make certain disclosures in such circumstances. NBN Co is seeking this consent for the reason identified by the ACCC – the information may be confidential to customers, including by virtue of NBN Co's standard access obligations under Part XIC of the *Competition and Consumer Act 2010*.

NBN Co has consulted with customers as to the breadth of the disclosure rights that are being sought, and as a result of their feedback, has defined the Transition Advice Information with an appropriate degree of specificity about the purposes for which, and the circumstances in which, that information can be disclosed to Telstra and/or third parties. NBN Co considers that the changes introduced in response to customer feedback have struck an appropriate balance of interests.

4.4 Manner and form of disclosure

NBN Co accepts that some information may need to be disclosed in different formats, but does not accept that this should require customised reports or briefings by NBN Co. This could result in significant cost and resource implication, given the number of customers NBN Co has. Provided that the information affords RSPs the same opportunities to make decisions in relation to their product and marketing positions, there should be no requirement on NBN Co to do more than provide standardised information to RSPs. This has been the practice to date with the rollout information provided by NBN Co to access seekers.

In relation to making information publically available, this will need to be assessed on a case-by case basis, depending on the nature of any CLC that is introduced. While the ACCC has expressed a preference for public disclosure of the information, this does not appear to be linked to the objectives of the CLC. As discussed in section 4.6 below, NBN Co has a number of concerns about providing information without the ability to constrain the purposes for which that information is used. Given the objectives of the proposed CLC, it is not clear that parties other than access seekers need to be provided with access to this level of rollout-related information.

4.5 Level of detail

Consistent with the points made in the previous section, NBN Co does not accept that different levels of information should be provided for different RSPs. NBN Co considers that the information described in section 2.2.3 is at an appropriate level of detail to address the objectives of the proposed CLC.

4.6 Recipients of the information

Information about market entry or expansion is generally considered highly commercially sensitive and under normal circumstances would not be disclosed to a competitor. If an infrastructure competitor to NBN Co is able to access detailed advance information regarding NBN Co's rollout plans, while knowing that NBN Co has a broader obligation to roll out a nation-wide network, it is able to work towards 'beating' NBN Co's entry into the most profitable markets. It is inappropriate that any CLC should facilitate this 'cherry picking' in relation to infrastructure investment, and therefore paramount that it provides for appropriate restrictions on whom information is provided to, and how it is used by those parties.

As already noted, NBN Co has strong incentives to provide information to RSPs which will allow them to effectively and efficiently move end-users onto the NBN. However, it is not in NBN Co's commercial interest for sensitive rollout and related information to be accessed by parties in competition with or considering competing with NBN Co in infrastructure deployment, as this information asymmetry will allow infrastructure competitors to exploit this knowledge to the commercial detriment of NBN Co.

In an attempt to create a level playing field for NBN Co, Parts 7 and 8 of the *Telecommunications Act 1997* were introduced to require non-NBN networks used to supply superfast carriage services to residential or small business customers to operate on a wholesale-only, non-discriminatory basis. Exemptions were made for established, pre-existing networks capable of supplying these services, and for limited extensions of those networks.²¹ As the ACCC is aware, some network operators may not be captured by the current requirements. While interim arrangements have been introduced requiring these operators to maintain functional separation between their wholesale and retail operations,²² this does not prevent rollout information *provided* by NBN Co to RSPs being accessed by an RSP's network operating arm.

NBN Co has significant concerns that rollout information provided by NBN Co under any CLC may be used by other network operators in planning business decisions and developing competitive strategies in relation to infrastructure investment, and that NBN Co would not have equivalent access to the rollout plans of these operators. This information asymmetry is not consistent with the Government's intention to deliver competitive neutrality for NBN Co.²³ NBN Co is concerned that this issue has not been mentioned in the ACCC's Discussion Paper.

Accordingly, information provided by NBN Co under any CLC should only be used by RSPs for permitted purposes which relate to the planning of retail market entry activities. This is consistent with the objectives of the proposed CLC.

While NBN Co will need to give further consideration as to exactly what restrictions might be appropriate to place on RSPs' use of the information, it should be generally accepted that this information must only be used for the purpose of retail activities related to NBN services. Any suggestion to the contrary should be dismissed on the basis of what the proposed CLC is seeking to achieve: addressing concerns regarding an

²¹ The Government has recently announced that from 1 January 2017, structural separation will be the default requirement for new high-speed fixed line broadband networks, with the ACCC able to authorise functional separation where it thinks this is in the long-term interests of consumers.

²² Declaration by Minister for Communications under subsection 63(2) of the *Telecommunications Act 1997*: Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration, 12 December 2014.

²³ Australian Government, *Telecommunications Regulatory and Structural Reform*, December 2014.

imbalance in information provided to RSPs that might cause one RSP to have an advantage over another in the retail broadband services market.^{24,25}

While prospective access seekers may have an interest in information provided under any CLC, NBN Co would only want sensitive information to be provided to parties who genuinely intend to provide retail services using NBN Co's infrastructure. Entering into an Access Agreement is one (and perhaps the most appropriate) way a party could demonstrate its genuine interest in retailing NBN services, and also provide reassurance to NBN Co regarding the use and protection of its commercially sensitive information. This logic also applies to the information NBN Co currently provides to RSPs through its online customer portal.

NBN Co also notes that there is already a significant amount of relevant information made available to companies considering supplying NBN services, as has been noted in the ACCC's Discussion Paper:

NBN Co currently makes the following information available on its website:

- *a rollout map showing locations in Australia where services are available, where the build or the preparation has commenced, and where other fibre operators are available;*
- *a list of communities/suburbs where services are available or build has commenced (published weekly);*
- *a multi-technology rollout plan, published on 30 November 2014, which indicates each area's technology (FTTP, MTM or wireless) and what appears to be an indicative number of premises that are scheduled to have had some form of construction work by June 2016.²⁶*

NBN Co considers any CLC must provide for a confidentiality arrangement between NBN Co and recipients of the information. Specifically, it should be provided that NBN Co may decline to provide information to an RSP on the basis that it has not agreed to an appropriate confidentiality arrangement. As the information provided under a CLC, and thus its degree of sensitivity, may change over time, the confidentiality arrangements should be flexible and adaptable. As such, NBN Co does not consider that the specifics of the confidentiality arrangements should be included in any CLC drafting, as they will need to be subject to an appropriately flexible and timely review mechanism.

4.7 Timeliness of disclosure and maintaining currency over time

The ACCC has identified the key point in relation to the timeliness of information provided to RSPs:

...that information is provided to service providers with sufficient notice so that they are in practical terms equally well placed to make use of it.²⁷

This is consistent with NBN Co's previously expressed position that the key principle in considering any CLC should be the use to which RSPs will put any rollout information to make decisions that relate to their competitive position or activities in markets where they intend to supply NBN services.

As described in NBN Co's detailed response to the table of information flows in section 3.2 of this submission, the information provided on an ongoing basis for the purposes of planning its network or allowing Telstra to continue to effectively operate its network is of limited utility to other RSPs in assisting them in making decisions about their product and marketing approaches. Rather, it is the longer-term forecasts of RFS as provided in the 9Q plans that are likely to be of greater relevance to these RSP decisions.

As discussed in section 4.2, NBN Co does not support the ACCC's position to incorporate general principles in any CLC to address the potential for changed circumstances.

²⁴ Refer to: Department of Communications, Variation of Telstra's migration plan – regulatory instruments: exposure drafts, December 2014.

²⁵ See also, ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p.4, "...there is a risk that Telstra will be able to use this information to its advantage when its *competitors in retail markets* cannot." (emphasis added).

²⁶ ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p. 8.

²⁷ ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p. 21

4.8 Compliance monitoring and enforcement

In its Discussion Paper, the ACCC notes the following regarding potential approaches to ensuring NBN Co's compliance with any CLC:

Such requirements could include a reporting obligation on NBN Co to notify any of the parties with power to enforce a licence condition that NBN Co has identified non-compliance, and to notify the steps NBN Co is taking to rectify the situation.²⁸

To the extent that a CLC identifies specific information provision requirements, if NBN Co were to become non-compliant it will be apparent to RSPs. If the information NBN Co provides under a CLC is limited to information that is relevant to RSPs' decisions about retail market activities (as NBN Co submits it should be), RSPs would have incentives to raise NBN Co non-compliance to the relevant enforcement body in any event. However, while it will depend on the content of any CLC, NBN Co is supportive of the ACCC's suggestion that it provide a report to the relevant agency upon identifying any non-compliance, and notification of the steps it is taking to rectify the situation.

NBN Co submits that the ACCC is likely to have the relevant expertise to monitor compliance with any CLC as the ACCC is currently responsible for monitoring compliance with the SAU, which already contains requirements for NBN Co to provide rollout information to RSPs. In addition, the ACCC is currently responsible for monitoring compliance with the existing *Carrier Licence Condition (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014*.

²⁸ ACCC, Discussion Paper – Proposed NBN Co Carrier Licence Condition, March 2015, p. 22