

**ACCC Discussion Paper:**

**Input into a proposed NBN Co carrier licence condition about information disclosure**

**Response by iiNet – April 2015**

## 1. Introduction

The Australian Competition and Consumer Commission (**ACCC**) has released a discussion paper entitled: *Input into a proposed NBN Co carrier licence condition about information disclosure (the Discussion Paper)*. The purpose of the Discussion Paper is to seek input from stakeholders to identify suitable information that NBN Co should be required to provide to retail service providers (**RSPs**) under a proposed new carrier licence condition (**the CLC**).

The stated purpose of the CLC is to ensure symmetry between Telstra and all other RSPs in respect of information provided by NBN Co to Telstra (**NBN Information**). It is intended that this, in turn, will ensure that Telstra does not have any actual or perceived information advantage by virtue of its role as the owner of copper and hybrid-fibre coaxial networks being acquired by NBN Co. iiNet welcomes the opportunity to respond to the Discussion Paper. iiNet's response is set out below.

## 2. Structure of this submission

This submission provides iiNet's initial feedback in response to the following issues:

- The need for the CLC and its objective.
- The process for determining the content of the CLC.
- Guiding principles for the CLC.
- Information to be disclosed.
- Manner and form of disclosure.
- Recipients of the information and enforcement.

## 3. The need for the CLC and its objective

iiNet acknowledges that the rollout of the NBN requires NBN Co to provide NBN Information to Telstra and that the Definitive Agreements between Telstra and NBN Co make provision for this. As Telstra is an RSP that is in competition with other RSPs, Telstra being in receipt of NBN Information in circumstances where other RSPs do not receive that information (or they receive it later than Telstra does) (referred to in this submission as **Restricted NBN Information**) has the potential to allow Telstra to gain an unfair competitive advantage.

iiNet notes that Restricted NBN Information was originally subject to rules in Telstra's Migration Plan that prevent Telstra from using Restricted NBN Information to gain a competitive advantage (referred to in this submission as the **FTTP Information Obligations**).<sup>1</sup> However, the revision to the Migration Plan Principles arising from the move to the MTM NBN, does not require the FTTP Information Obligations to apply to Restricted NBN Information as it relates to the FTTB, FTTN and HFC rollout (**the Additional MTM Networks**). The Government's intention is that the problem of Telstra gaining an unfair competitive advantage from Restricted NBN Information as it relates to the Additional MTM Networks should be dealt with by means of:<sup>2</sup>

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<sup>1</sup> Telstra Migration Plan (as currently in force), section 24.

<sup>2</sup> Discussion Paper, at p.3.

- existing mechanisms (including the Competition and Consumer Act 2010 (CCA), Telstra's structural separation undertaking (SSU) and relevant provisions of the Definitive Agreements between Telstra and NBN Co); and
- the CLC.

Note that for ease of expression Restricted NBN Information as it relates to the Additional MTM Networks will be referred to as **Relevant NBN Information**.

In iiNet's view, the existing mechanisms do not adequately deal with the issue of Telstra gaining an unfair advantage from Relevant NBN Information because:

- Although there are equivalence and transparency obligations in Telstra's SSU, other than the FTTN Information Obligation (which will not apply to Relevant NBN Information), those obligations only apply in respect of Telstra's supply of regulated services. They do not apply to the roll out of the NBN or any conduct of Telstra's as it relates to Telstra services supplied over the NBN. Therefore, the extent to which those obligations would have any effect on Telstra's use of Relevant NBN Information is debatable.
- Although NBN Co is subject to non discrimination obligations under Part XIC of the CCA, it is debatable whether those obligations would apply to the Relevant NBN Information given that the Relevant Information is supplied to Telstra in its capacity as a network owner and not in its capacity as an RSP.
- Although Telstra using Relevant NBN Information to gain a competitive advantage will harm competition, it may be difficult to establish the required thresholds for any action to be taken under Part XIB of the CCA.
- As regards the Definitive Agreements, iiNet does not have visibility as to what restrictions NBN Co places on Telstra as regards the Relevant NBN Information. In any event, the Definitive Agreements are private agreements between Telstra and NBN Co and any enforcement of their terms is a matter for the discretion of the parties. iiNet submits that leaving regulatory protection to the discretion of a private party is not good regulatory practice.

iiNet submits that given that:

- there is an obvious risk that Telstra could use the Relevant NBN Information to gain a competitive advantage;
- the FTTN Information Obligations will not apply to Relevant NBN Information; and
- the existing mechanism are inadequate to deal with the issues arising from Telstra having the Relevant NBN Information,

there is a clear need for the CLC. Since NBN Co is required to prepare and release Relevant Information to Telstra and NBN Co also has obligations to RSPs that require information flows between NBN Co and RSPs, any additional burden put on NBN Co by the CLC is unlikely to be too onerous and, in any event, will be outweighed by the obvious benefit in ensuring

that an already dominant incumbent does not gain an unfair competitive advantage over its competitors. Furthermore, greater transparency and clarity from NBN Co regarding the NBN rollout will aid efficiency and avoid unnecessary costs arising from there being uncertainty about the detail of the rollout of the NBN that arises from a lack of information.

As regards the objective of the CLC, iiNet agrees that the objective of ensuring 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 is appropriate.

#### **4. The process for determining the content of the CLC**

As stated above, iiNet welcomes having the opportunity to respond to the Discussion Paper. However, iiNet believes that a single Discussion Paper cannot reasonably get from a position where the content of the CLC is a blank sheet of paper to a position where the content of the CLC has been finalised in a manner that ensures it is fit for purpose. In order to ensure that the CLC is fit for purpose, consultation with stakeholders on the CLC should be iterative and stakeholders should be given further opportunities to comment on the content of the CLC as it is progressed. In particular, given what the CLC is intended to achieve, and the fact that it does not just affect NBN Co's interests, iiNet would encourage the ACCC to recommend to the Government that any consultation about the CLC with NBN Co pursuant to section 64 of the Telecommunications Act 1997 be broadened to include consultation with RSPs and other stakeholders.

#### **5. Guiding principles for the proposed licence condition**

The Discussion Paper identifies the following principles which could be included in the CLC.<sup>3</sup>

- any information about the NBN rollout that NBN Co makes available to one service provider should be made available to all service providers;
- Telstra will not obtain a competitive advantage by reason of its receipt of information from NBN Co;
- all relevant parties are to receive information from NBN Co about the NBN to place them in an equivalent position to plan for, and commence supplying, equivalent services over the NBN fixed line network generally, and in individual NBN service areas that comprise a part of the NBN fixed line network;
- information disclosed should be accurate and timely, such that information for each individual service area should be provided with sufficient notice so that each relevant person is in practical terms equally well placed to make use of that information;
- information disclosed should be in an appropriate format so that it is readily able to be interpreted by each relevant person; and
- there should be no unnecessary restrictions on each relevant person gaining access to the information.

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<sup>3</sup> Discussion Paper, at p.13.

Subject to iiNet's view on the treatment of information that is commercially sensitive to an RSP (discussed in section 6 below), iiNet supports the inclusion of these principles in the CLC. In particular, iiNet welcomes that these principles deal with 'equivalence of outputs'. By 'equivalence of outputs' iiNet means that the interpretation of information provided by NBN Co to an RSP should not be dependent on other information that the RSP does not have but which Telstra has. For example, if NBN Co simply provides information about the NBN network footprint without specifying what particular technology will be used, it is likely that Telstra will be in a position to know what technology will be used at any particular premises but other RSPs will not.

## 6. Information to be disclosed

The Discussion Paper asks the following question:

*What information about the NBN rollout do service providers require? What is the rationale for making this information available?*

Given the stated objective of the CLC, iiNet submits that the high level answer to this question is 'all information that NBN Co provides to Telstra'. That said, iiNet acknowledges that it is useful to distinguish between:

- information that the RSP will use; and
- information that the RSP may not actually use but which it should nevertheless be entitled to access (if it wishes) in order to avoid any actual or perceived information advantage that Telstra may gain from having access to the information.

It is also necessary to consider how information that is commercially sensitive to a particular RSP should be dealt with.

### Information RSPs will use

As regards information that the RSP will use, iiNet agrees that information about the following is required:

- construction and other ready for service information (**RFS Information**);
- technology choice information;
- service-related information;
- forecast and actual line quality information; and
- points of interconnect related information.

As regards RFS Information, iiNet notes that due to uncertainty arising from the move to the MTM NBN, NBN Co has not been complying with its obligations under its Special Access Undertaking (**SAU**) as regards its obligation to publish specified RFS Information but NBN Co has endeavoured to do so as soon as reasonably practicable. iiNet is hopeful that the focus on NBN Information requirements that arises from consultation over the CLC will assist NBN Co to be able to meet its SAU commitments as regards information disclosure. However,

iiNet notes that the RFS Information obligations in the SAU are largely limited to information about the fibre network. iiNet believes that the CLC could usefully dovetail with NBN Co's SAU obligations by making those obligations applicable to the Additional MTM Networks.

### **Commercially sensitive information**

In general terms, iiNet's view is that the commercially sensitive information of one RSP should not be disclosed to another RSP.

iiNet notes that the Discussion Paper seeks views on the following particular issues:

- NBN Co notifying RSPs of which of its customers have lodged an NBN order.
- The losing service provider being notified of the identity of the gaining service provider.

As regards notification of customers that have lodged NBN orders, iiNet's view is that this information should not be made available to any RSP (including Telstra) as it could facilitate aggressive 'win back' activities. That said, iiNet is concerned that Telstra will, as part of the migration process, obtain information from NBN Co that will allow Telstra to be in a position to know which of its customers have placed an NBN order pre-churn. The obvious solution to this problem is to impose obligations on Telstra (including appropriate ring fencing arrangements) that prevent Telstra from using this information for any purpose other than effecting the migration. However, it is not clear to iiNet whether the CLC can achieve this solution effectively because it can only impose obligations on NBN Co (i.e. the most the CLC can do is to require NBN Co to impose this condition on Telstra) and, if the Definitive Agreements already allow for the disclosure of this information to Telstra without this obligation, it is difficult to see how NBN Co could reasonably be expected to comply with the relevant CLC obligation. Furthermore, as discussed in section 3 above, iiNet does not believe that leaving enforcement to NBN Co is good regulatory practice. A potential solution to this problem is to impose the restriction directly on Telstra through the imposition of an additional condition on Telstra's carrier licence.

As regards the losing service provider being notified of the identity of the gaining service provider, iiNet agrees that this information is commercially sensitive and should not be made available. Furthermore, in iiNet's view, there is no clear reason why Telstra would need this information. However, as with NBN ordering information, iiNet is concerned that notwithstanding that Telstra may not require this information for the purposes of the migration to the NBN, Telstra will, nevertheless receive information from NBN Co that will allow Telstra to be in a position to know who the gaining RSP is. Indeed NBN Co has signalled to RSPs that it intends to provide such information to Telstra.<sup>4</sup> The same issues as discussed above in relation to NBN order information applies here, meaning that a potential solution to the problem may be to impose the restriction on the use of this information directly on Telstra through the imposition of an additional condition on Telstra's carrier licence.

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<sup>4</sup> NBN Co, Customer Discussion Paper: Fibre-to-the-Node Offer (9 February 2015), p. 6.

## **7. Manner and form of disclosure**

There are already existing information flows in place as regards information between NBN Co and RSPs, including by means of the NBN Portal. In order to aid efficiency, iiNet suggests that, where feasible, existing forms and formats of disclosure be used.

As regards the timing and level of detail of RFS Information, iiNet suggests the following is the minimum that an RSP should have available to it (in Excel format). Therefore, to the extent that NBN Co's existing obligations do not require NBN Co to provide this information, the CLC should impose an obligation on NBN Co to provide it:<sup>5</sup>

- 3 year construction plan updated annually – high level by area boundary & technology type (FTTP, FTTB, FTTN, HFC, FW) & indication of RFS even if at a high level – publically available via interactive map.
- 1 year construction plan – as above with greater accuracy of RFS – publically available via interactive map with extra detail for RSP in terms of high level number of premises available.
- Monthly RFS Rollout plan – as per existing FTTP - available monthly with a 12 month view – provided at a rollout region level.
- Historical Rollout Region List – as per existing FTTP - available weekly at rollout regional level.
- Proposed Footprint List (PFL) – as per existing FTTP -rolling 6 months (or greater) by address level with RFS & DCD details – as per existing FTTP (RSP available only) and updated monthly.
- Historical Footprint List (HFL) – as per existing FTTP – updated weekly by address level (RSP available only)
- Disconnection details included in HFL.

## **8. Recipients of the information and enforcement**

As discussed in section 6 above, iiNet's view is that the commercially sensitive information of one RSP should not be disclosed to another RSP (and obviously not made publically available). However, if such information must be provided to Telstra in order to effect the migration to the NBN, then Telstra should be subject to appropriate obligations (including appropriate ring fencing requirements) that prevent Telstra from using that information to gain a competitive advantage. As discussed in section 6 above, the CLC may not be the best vehicle to achieve this and imposing conditions directly in Telstra's carrier licence would be more appropriate.

**iiNet Limited**  
**24 April 2015**

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<sup>5</sup> Please note this suggestion is made without iiNet knowing precisely what RFS Information Telstra receives.