

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by NBN Co Limited ACN 136 533 741.

1. Person(s) giving the Undertaking

- 1.1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by NBN Co Limited ACN 136 533 741 (**NBN Co**), for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**).

2. Background

- 2.1. The National Broadband Network (**NBN**) is a wholesale broadband access network. The NBN is being built, and is owned and operated, by NBN Co. NBN Co is building the NBN in stages. The areas where the NBN has been built and is operating is classified by NBN Co as 'Ready for Service' (**RFS**). Once an area is classified as RFS, consumers can purchase telephone and internet services from Retail Service Providers (**RSPs**) that are provided using the NBN.
- 2.2. NBN Co advises consumers of their region's RFS date by direct mail and thereafter sends additional correspondence regarding the opportunity to migrate to the NBN. For most consumers, if they do not move their existing fixed line voice and internet services to the NBN within 18 months from RFS their existing services will be disconnected. Some RSPs might have shorter timeframes in which consumers must move their services to the NBN.
- 2.3. NBN Co is obliged to conduct community and stakeholder activities prior to, during, and after rollout in each area, in line with the Government requirement to provide Public Information on Migration.
- 2.4. While most consumers will need to migrate to the NBN should they wish to maintain a fixed line voice and/or internet service, in certain areas there are alternative broadband networks that will continue operating in competition with the NBN (**Alternative Networks**). Consumers who are serviced by Alternative Networks are not required to move to the NBN.
- 2.5. In the Australian Capital Territory (**ACT**) TransACT Capital Communications Pty Ltd operates an Alternative Network, being the **TransACT VDSL2 Network**.

3. Admissions

- 3.1. Between at least January 2019 and 11 July 2019, NBN Co, in trade or commerce, in connection with the supply, possible supply and/or promotion of the supply of its NBN Services, sent communications by direct mail to persons in the ACT, often addressed to the recipients by name, in which it described the coming availability of NBN services and the potential disconnection of certain pre-existing services (**Disconnection Communications**).
- 3.2. NBN Co generally sent Disconnection Communications in various 'Waves' with Wave 1 being furthest from the date on which affected services would be disconnected (**Disconnection Date**) and Wave 5 being closest to Disconnection Date. It was common for consumers to receive multiple waves of Disconnection Communications from NBN Co. In certain of those Disconnection Communications, NBN Co wrote:

Campaign stage	Statements
Wave 1:	<i>"The countdown to disconnection has begun"</i> <i>"If you don't connect to the nbn™ access network, you could be left without phone, internet and other important services, including medical, fire and security alarms."</i>
Wave 2:	<i>"Act now: get connected before existing services are switched off"</i> <i>"The nbn™ broadband access network is now available at [address] and most households and businesses need to connect to an nbn™ powered plan."</i>

	<p>...</p> <p><i>You could be left without phone, internet and other important services, including medical, fire and security alarms."</i></p>
Wave 3:	<p><i>"Connect to an nbn™ powered plan before disconnection"</i></p> <p><i>"Don't wait until affected services are about to be disconnected."</i></p> <p>...</p> <p><i>You could be left without phone, internet and other important services, including medical, fire and security alarms."</i></p>
Wave 4:	<p><i>"Don't wait for a disconnection notice – get connected"</i></p> <p><i>"This is an important reminder that most existing landline phone and internet services in [suburb] will be disconnected in [6/8] months' time."</i></p> <p>...</p> <p><i>You could be left without phone, internet and other important services, including medical, fire and security alarms."</i></p> <p><i>"Don't risk being left without affected services"</i></p>
Wave 5:	<p><i>"URGENT: action required to keep your phone and internet services active"</i></p> <p><i>"Order an nbn™ powered plan before affected phone and internet services are disconnected from [date]"</i></p> <p><i>"IMPORTANT NOTICE"</i></p> <p><i>"Most existing phone and internet services in [suburb] are being switched off from [date]"</i></p>

3.3. NBN Co admits that:

3.3.1 by sending Disconnection Communications to consumers who were receiving phone and internet services via the TransACT VDSL2 Network in the ACT, NBN Co represented that:

3.3.1.1 their existing phone and internet services would likely be disconnected; and

3.3.1.2 they were likely to need to acquire NBN services if they wanted to continue to have phone and internet services,

when, in fact, those consumers would not be disconnected and could continue to receive phone and internet services via the TransACT VDSL2 Network without acquiring NBN services (**Disconnection Representations**); and

3.3.2 the Disconnection Representations were likely to have been false or misleading, and, as a result, were likely to have contravened sections 18, 29(1)(l) and 34 of the Australian Consumer Law (**ACL**) contained in Schedule 2 to the CCA.

3.4. Between at least May 2018 and about 23 October 2019, NBN Co, in trade or commerce, in connection with the supply, possible supply and/or promotion of the supply of its NBN Services, maintained a web page at www.nbn.com.au/switchoff (**Web Page**). During at least some of that period, that Web Page contained the following statement:

Services that will not be switched off...

Other fibre providers or private networks

If your phone or internet is already provided over another fibre network, such as a network provided by your building owner, private enterprise network, health or education network, or a cable network that's not owned by Telstra or Optus (such as TransACT – excluding ACT customers being migrated to the nbn™ access network, OptiComm, Pivit, etc.), they should continue operating unless your provider advises otherwise.

3.5. NBN Co admits that:

3.5.1 by maintaining the Web Page, containing the statement at paragraph 3.4, NBN Co represented that all customers connected to the TransACT network in the ACT were being migrated to the nbn access network when in fact that was not the case (**Web Page Representation**); and

3.5.2 the Web Page Representation was likely to have been false or misleading, and, as a result,

is likely to have contravened sections 18, 29(1)(l) and 34 of the ACL.

4. Australian Consumer Law

- 4.1. The ACL is contained at Schedule 2 to the CCA and provides consumers with protection in respect of the goods and services they purchase from suppliers within Australia.
- 4.2. Section 18 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.
- 4.3. Section 29(1)(l) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation concerning the need for any goods or services.
- 4.4. Section 34 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

5. NBN Co's response

- 5.1. NBN Co has cooperated with the ACCC from the commencement of its investigation, including by:
 - 5.1.1 providing the ACCC with information about its conduct;
 - 5.1.2 removing the Web Page Representation from the Web Page on 23 October 2019;
 - 5.1.3 ceasing to send the Disconnection Communications from 11 July 2019;
 - 5.1.4 modifying the content of its Disconnection Communications in consultation with the ACCC; and
 - 5.1.5 offering this Undertaking to the ACCC.

6. Commencement of this Undertaking

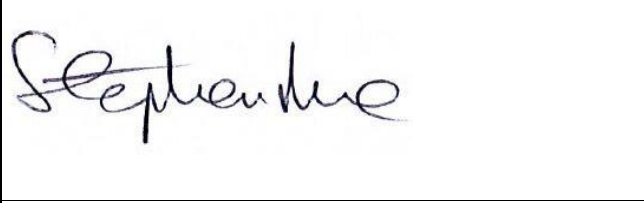
- 6.1. This Undertaking comes into effect when:
 - 6.1.1 it is executed by NBN Co; and
 - 6.1.2 the Undertaking so executed is accepted by the ACCC (the **Commencement Date**).
- 6.2. The Undertaking has effect for three years after the Commencement Date (the **Term**).
- 6.3. NBN Co undertakes to assume the obligations set out in Attachment A for the Term.

7. Acknowledgments

- 7.1. NBN Co acknowledges that:
 - 7.1.1 the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website;
 - 7.1.2 the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications;
 - 7.1.3 this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct; and
 - 7.1.4 a public version of a summary of the ACCC Compliance Program review reports referred to in Attachment D of this Undertaking may be held with this Undertaking in the public register.

Executed as an Undertaking

NBN Co Limited ACN 136 533 741 by its authorised representatives:

	
Signature of authorised representative	Signature of authorised representative
Stephen Rue	Will Irving
Name of authorised representative	Name of authorised representative
This 1st day of June 2020	This 1st day of June 2020

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

2 June 2020

Date

and signed on behalf of the Commission:



Chair

Rodney Graham Sims

Date

2 June 2020

Attachment A

Undertaking

Cease and refrain from further false or misleading representations

1. NBN Co undertakes that it will not, in trade or commerce, send communications to persons, or publish communications for persons, which communications represent to those persons that their existing phone and/or internet services will be disconnected when this is not the case.

Direct Communication to ACT premises in TransACT VDSL2 Network areas and reimbursing early contract termination costs in relation to NBN services

2. NBN Co undertakes that it will, within two months of the Commencement Date, at its own expense, develop a system that allows persons to upload information that confirms that they:
 - 2.1. moved from the TransACT VDSL2 Network to the NBN no later than 30 days from 11 July 2019, being the date NBN sent the final Disconnection Communication, and then back to the TransACT VDSL2 Network; and
 - 2.2. paid amounts to an RSP associated with cancelling a NBN retail service so that they could return to a service provided by the TransACT VDSL2 Network in the ACT, including any non-refundable customer premises equipment costs associated with cancelling their NBN based service, or incurred other related costs such as postage (**Early Termination Cost**).
3. NBN Co undertakes that it will, within one week of the system referred to in paragraph 2 being established, and at its own expense, send a copy of the letter at Attachment B to each premises in the ACT within a suburb where the TransACT VDSL2 Network is present, as determined by the suburb list published at <https://www.iinet.net.au/business/transact-wis/> and to which NBN Co sent a Disconnection Communication.
4. NBN Co undertakes that it will, within 45 days of receipt of the information referred to in paragraph 2, if that information is received within five months from the Commencement Date, reimburse each person who so provided that information in complete form, the sum of their claimed Early Termination Cost by way of direct credit or via the RSP the person moved back to referred to in paragraph 2.1, at the election of the person and (as required) with the agreement of the person and that RSP.
5. NBN Co undertakes that it will, within 30 days of receipt of incomplete information in response to Attachment B or provided via the system developed in accordance with paragraph 2, contact each person who provided incomplete information and advise what they need to provide to qualify for reimbursement of their Early Termination Costs.

Corrective Notices

6. NBN Co undertakes that it will, within one week of the system referred to in paragraph 2 being established, and at its own expense:
 - 6.1. publish, or cause to be published a notice in the form of Attachment C in the Canberra Times in its print and digital newspapers which is:
 - 6.1.1. in size 12 and 10 point Times New Roman font in the form of Attachment C;
 - 6.1.2. 260mm high and three columns wide;
 - 6.1.3. published in the first available Saturday edition;
 - 6.1.4. placed in the print newspaper according to the following system:
 - 6.1.4.1. on pages 1, 3, 5 or 7, or if this is not possible due to advertising space availability;
 - 6.1.4.2. on pages 2, 4, 6 or 8, or if this is not possible due to advertising space availability;
 - 6.1.4.3. on the first available page following page 8.
 - 6.2. publish the corrective notice set out in Attachment C on NBN Co's website and ensure that it

- remains published there for five months (**NBN Website Corrective Advertisement**); and
- 6.3. publish, or cause to be published, a paid advertisement on Facebook that appears from time to time over a three month period and reaches 60,000 consumers in the ACT whose interests or behavior indicate an interest in telecommunications services, which states 'NBN Co has published a corrective advertisement after misleading consumers in the ACT about their need to move to the NBN' which contains a link to the NBN Website Corrective Advertisement.

Identifying, publishing and disclosing the location of Alternative Networks

7. NBN Co undertakes that it will, within two weeks of the Commencement Date, diligently and in good faith prepare and provide to the ACCC a list of networks reasonably estimated by NBN Co to have 1,000 services in operation or more and update that list quarterly during the Term.
8. NBN Co undertakes that it will:
- 8.1. within two weeks of the Commencement Date, publish and maintain on its website at nbn.com.au/switchoff, for a period of two years from Commencement Date, the following statements in font no smaller than size 18 point:
- 'NBN Co maintains a list of networks that NBN Co reasonably understands will continue to operate after the nbn™ rollout has been completed.**
- NBN Co invites owners/operators of networks that will continue to operate after the nbn network roll out has been completed to contact NBN Co and provide details of the locations (by postcode) of that network.**
- Consumers serviced by these networks do not need to migrate to the NBN.**
- NBN Co will add further details to this page as they are provided by network owners/operators';**
- 8.2. within two months of the Commencement Date, implement a process to ensure that any communication about possible disconnection of services sent to any location where an Alternative Network that is included on the list referred to in paragraph 7 or of which NBN Co receives details in response to the statement set out in paragraph 8.1 (**New Disconnection Communications**), states the existence of any such networks and includes in font no smaller than size 10 point:
- 'If you are currently receiving broadband services using the [insert name of network] your broadband services will not be disconnected and you do not need to move to the NBN if you do not want to. Contact your retail service provider for more information';**
- 8.3. within one month of the Commencement Date, contact operators of the Alternative Networks set out in the list referred to in paragraph 7 or of which NBN Co receives details in response to the statement set out in paragraph 8.1 to advise that should they request it, NBN will publish on its website information about the existence, location (by postcode) of the Alternative Networks, and/or the name/s of any plans for broadband services they provide. If an Alternative Network does not provide the details of the locations (by postcode) of its network NBN Co will not include that information about that Alternative Network on its website and paragraph 8.2 will not apply; and
- 8.4. within two months of the Commencement Date publish on its website at nbn.com.au/switchoff,
- 8.4.1. at the request of Alternative Networks, information about one or more of the existence, location (by postcode) of their networks and/or the name/s of any plans for broadband services they provided; and
- 8.4.2. at the request of RSPs that provide services using Alternative Networks, the names of any plans they offer that are specific to identified Alternative Networks.

Compensating Alternative Networks for their corrective communications costs

9. NBN Co undertakes that it will, in respect of Alternative Network owners/operators who had, as at Commencement Date, incurred costs associated with correcting communications sent by NBN Co to customers of those Alternative Networks which may have conveyed the impression that those customers were likely to need to migrate to the NBN (**Alternative Network Corrective Communications**):
- 9.1. within one month of the Commencement Date, pay to the TPG Group (upon receipt of evidence that TPG Group had prior to the date of this Undertaking incurred costs in sending Alternative

Network Corrective Communications associated with the Disconnection Communications sent by NBN Co during the period 1 January 2019 to 11 July 2019) the reasonable costs incurred by TPG Group in sending such Alternative Network Corrective Communications, that amount being no less than \$20,000;

- 9.2. within one month of receiving evidence from owners/operators of Alternative Networks that they incurred Alternative Network Corrective Communications costs prior to the date of this Undertaking, reimburse those reasonable costs to owners/operators of Alternate Networks.
10. NBN Co undertakes that it will not unreasonably withhold payments to operators of Alternative Networks arising from the operation of paragraph 9.2.
11. NBN Co undertakes that it will, within two months of the Commencement Date, contact owners/operators of Alternative Networks set out in the list referred to at paragraph 7 to advise of the undertaking in paragraph 9.2.

Compliance Program

12. NBN Co undertakes that it will, within three months of the Commencement Date:
 - 12.1. establish and implement a Competition and Consumer Compliance Program (**Compliance Program**) in accordance with the requirements set out in "Attachment D", being a program designed to minimise NBN Co's risk of future contraventions of sections 18, 29 and 34 of the ACL and to ensure its awareness of the responsibilities and obligations in relation to the requirements of sections 18, 29 and 34 of the ACL within three months of the date of this Undertaking coming into effect;
 - 12.2. maintain and continue to implement the Compliance Program for a period of three years from the date of this Undertaking coming into effect; and
 - 12.3. provide, at its own expense, a copy of any documents required by the ACCC in accordance with Attachment D.

Reporting and responding to the ACCC

13. NBN Co undertakes that it will:
 - 13.1. within three months of the Commencement Date, provide a report to the ACCC stating all measures taken in compliance with the items in paragraphs 1, 2, 6, 7, 11 and 12 of this undertaking;
 - 13.2. within six months of Commencement Date, provide a report to the ACCC stating all measures taken in compliance with the items in paragraph 3, 4 and 5 of this undertaking and stating:
 - 13.2.1. the number of persons NBN contacted in accordance with paragraph 3 of this undertaking, and the number of those persons who were subsequently provided with a reimbursement of their Early Termination Costs;
 - 13.2.2. the number of Early Termination Cost reimbursements that NBN Co has paid in accordance with paragraph 4 of this undertaking, and the total quantum of those Early Termination Costs;
 - 13.2.3. the number of persons who applied for reimbursement of Early Termination Costs in accordance with paragraph 5 of this undertaking and who were not paid Early Termination Costs, each reason why Early Terminations Costs were not paid, and the number of instances in which each reason applied;
 - 13.3. within three months of Commencement Date, provide a report to the ACCC stating all measures taken in compliance with paragraph 8 of this undertaking and state the name of each Alternative Network NBN Co contacted in accordance with paragraph 8.3. of this undertaking and the date on which NBN contacted each Alternative Network;
 - 13.4. within six months of Commencement Date, and every six months thereafter during the Term of this undertaking, provide a report to the ACCC stating:
 - 13.4.1. the name of each Alternative Network and RSP that requested NBN Co publish information on NBN Co's website in respect of an Alternative Network in accordance with paragraph 8.4. of this undertaking, and the date on which the Alternative Network or RSP contacted NBN Co for that purpose;
 - 13.4.2. the date that NBN Co published the information on its website about the Alternative

Network or RSP;

- 13.4.3. If NBN Co did not publish information on its website about the Alternative Network or RSP, the reasons why;
 - 13.4.4. the name of each Alternative Network to which NBN Co made a payment in accordance with paragraph 9.2. of this undertaking, the date on which each payment was made and the amount of each payment;
 - 13.4.5. the name of each Alternative Network that requested a payment from NBN Co in accordance with paragraph 9.2. of this undertaking and to which NBN Co did not make a payment, the date of the request and the amount of the payment requested, and the reason why NBN Co did not make the payment;
- 13.5. within six months of Commencement Date, provide to the ACCC:
- 13.5.1. a report stating all measures taken in compliance with Attachment D to this undertaking including stating all measures implemented by NBN Co in accordance with paragraph 5 of Attachment D to this undertaking; and
 - 13.5.2. a copy of the report prepared for NBN Co in accordance with paragraph 3.2 of Attachment D to this undertaking.
14. NBN Co undertakes that it will report any non-compliance with this Undertaking to the ACCC as soon as practicable.
15. NBN Co undertakes that it will respond within a reasonable period of time to any enquiries made by the ACCC for the purposes of monitoring compliance with this Undertaking.

NBN Co is offering assistance to switch back to your old broadband service if you were on the TransACT network

We previously advised people in the ACT that they were likely to need to switch to the NBN if they wanted to keep a fixed line voice and/or internet service.

It has come to our attention that the advice was wrong for people connected to the TransACT VDSL2 network. This applied mostly to iiNet customers. The TransACT VDSL2 network is widely available in the ACT and will continue to be available as an alternative to the NBN.

If you were on the TransACT VDSL2 network and moved to the NBN prior to 10 August 2019, we will cover the costs to help you return to TransACT if you would like to.

This includes early termination fees you have paid or need to pay to your NBN provider to cancel your contract with them, and non-refundable costs associated with purchasing and/or postage for equipment specific to that NBN service such as modems.

If you would like to return to the TransACT network:

1. Contact a provider that offers services over the TransACT network, such as iiNet, and choose a VDSL2 plan that suits you.
2. Contact us by [date] via [mechanism – e.g. hyperlink, email, phone etc] to claim back early termination fees and costs of specific equipment and postage. Uploading proof of your costs is fast and easy – you can take a picture of receipts, a picture of your bank statement, or attach relevant emails.
3. We will reimburse you within 45 days of receiving a valid application.

If you have contacted us under step 2 above, but have not completed the process by [date], we will send you a reminder before the closing date.

We have sent you this letter as part of a court enforceable undertaking that we have provided to the Australian Competition and Consumer Commission following an investigation it conducted. The investigation related to the incorrect advice that we sent to certain people in the ACT about their need to move to the NBN from the TransACT VDSL2 network. More information is available at [ACCC to provide URL link to media release].

Please call us on [insert] should you require further information or to ask questions about the claims process.

Corrective Notice

NBN Co misled consumers serviced by the TransACT VDSL2 Network in the ACT. If you were on that network, you did not have to switch to the NBN and can return to TransACT if you would like to.

Between at least January and July 2019 NBN Co sent letters to persons in the Australian Capital Territory advising them that their broadband services were likely to be disconnected as part of the NBN roll-out. This was not true for people whose broadband services were provided by the TransACT VDSL2 Network. That network will continue to operate alongside the NBN and people could have stayed on that network.

The Australian Competition and Consumer Commission (ACCC) investigated this conduct and formed the view that NBN Co's claims involved making false or misleading representations about the need for services under section 29(1)(l) of the Australian Consumer Law.

NBN Co admits its conduct is likely to have mislead consumers and expresses its apologies to any consumers affected by its conduct.

To minimise the risk of NBN Co sending letters like this again, NBN Co has undertaken to assume a number of obligations under a court enforceable undertaking accepted by the ACCC, which can be viewed at www.accc.gov.au.

As part of the undertaking, NBN Co has agreed to refrain from sending similar false and misleading letters in future, issue this corrective notice and reimburse people who received a letter from NBN Co before 11 July 2019 and have incurred or will incur early termination costs as a result of switching from the NBN back to the TransACT VDSL2 Network:

NBN Co will reimburse you for the cost of ending your contract for NBN services early if you wish to switch back to receiving services from the TransACT VDSL2 Network and:

- Live in a suburb where the TransACT VDSL2 Network is;
- Moved from the TransACT VDSL2 Network to the NBN and then return to the TransACT VDSL2 Network; and
- Can confirm that you paid an early termination fee and/or incurred non-refundable customer equipment costs for your contract for NBN services.

To claim your refund, contact NBN Co at [insert].

NBN Co also undertook to provide better information about networks that will continue to operate alongside the NBN, which is available at nbn.com.au/switchoff. In addition, NBN Co agreed to reimburse those network operators the costs associated with sending their own corrective communications prior to the commencement of the undertaking.

If you have any queries about this notice, please contact us through X.

This notice has been placed by NBN Co following an investigation by the ACCC.

COMPETITION AND CONSUMER COMPLIANCE PROGRAM

Level 1

NBN Co Limited (**NBN Co**) will establish a Competition and Consumer Compliance Program (**Compliance Program**) that complies with each of the following requirements:

Training

1. Within three months of this undertaking coming into effect, and thereafter at least once a year for three years, ensure that each employee of NBN Co with responsibility for drafting, reviewing or approving consumer facing material will attend practical training focusing on Part 2-1 and Part 3-1 of the Australian Consumer Law, contained within Schedule 2 of the *Competition and Consumer Act 2010 (CCA)*.
2. NBN Co will ensure that the training referred to in paragraph 1 above is administered by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law (**the Trainer**).

Complaints handling

3. NBN Co will, within one month of the Commencement Date, engage an independent reviewer to, within three months from Commencement Date:
 - 3.1. assess NBN Co's complaints handling system; and
 - 3.2. provide a report on NBN Co's complaints handling system which identifies any deficiencies and makes recommendations to improve that system, including to enable NBN Co's complaints handling system to better identify and respond to likely ACL compliance issues.
4. NBN Co will ensure that the review is conducted by a suitably qualified compliance professional or legal practitioner with expertise in the ACL who is independent from NBN Co in that it:
 - 4.1. did not design or implement NBN Co's complaints handling system;
 - 4.2. is not a present or past staff member or director of NBN Co; and
 - 4.3. has not previously acted for or advised NBN Co in respect of ACL matters.
5. NBN Co undertakes that it will, within four months from Commencement Date, implement any recommendation made by the independent reviewer in accordance with paragraph 4 above.

Provision of Compliance Program documents to the ACCC

6. NBN Co will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than five years.
7. If requested by the ACCC within five years of the Commencement Date of the undertaking NBN Co will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
 - 7.1. a written statement or certificate from the Trainer who conducts the training referred to in paragraph 1, verifying that such training has occurred; and
 - 7.2. an outline of the complaints handling system referred to in paragraph 3.