

17 November 2014

The Hon Malcom Turnbull MP
Minister for Communications
287-289 New South Head Road
Edgecliff NSW 2027

By email: infrastructureandaccess@communications.gov.au

Dear Minister,

Submission regarding draft Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014

We refer to your letter dated 14 October 2014 inviting NBN Co to make a submission on the proposed draft Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014 (the proposed declaration). NBN Co provides the following submissions with respect to the proposed declaration and the underlying issues that the proposed declaration seeks to address.

NBN Co's concerns with the 'loopholes' in Parts 7 and 8 of the Telecommunications Act 1997 (Cth) (Act) are well known. As the Regulatory Impact Statement for Early Assessment (RIS) makes clear, the roll out by a carrier of vectored VDSL2 re-opens the competition concerns that the NBN and the structural separation of Telstra were intended to address. In addition, the loopholes have the potential to undermine NBN Co's roll out plans and business case – which are premised on NBN Co's competitors competing on a level playing field with NBN Co. Given these concerns, NBN Co's preferred position is that Parts 7 and 8 of the Act be amended to remove the loopholes relating to extensions of existing superfast networks. NBN Co considers that this is the optimal solution for addressing the competition concerns arising from vertically integrated operators seeking to avail themselves of the loopholes in Parts 7 and 8 of the Act. NBN Co appreciates that this may be difficult to achieve in the short term, and so considers a carrier licence condition, which mandates that operators of superfast networks separate their wholesale and retail operations, to be the next best option.

The proposed declaration is intended to expire after two years (i.e., by 2017). NBN Co is concerned that a 'two year transitional period' may not provide the desired level of certainty for the industry. NBN Co submits that the sunseting of the carrier licence condition should be linked to the achievement of appropriate market conditions or other steps having been achieved (such as appropriate legislative amendments), in case these conditions or steps have not been achieved within the initial two year period.

This submission sets out NBN Co's comments on the proposed declaration.

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The proposed carrier licence condition declaration

NBN Co agrees with the RIS that the crux of the issue is what action needs to be taken to ensure that vertically integrated carriers who were not previously supplying a large number of superfast carriage services to residential and small business customers, but who are now proposing to do so, and who are not subject to Parts 7 and 8 of the Act, supply wholesale services over their networks in a manner that does not adversely impact competition in downstream markets.

NBN Co's position is that, to achieve this objective, the declaration should put in place a robust and transparent regime for operators of superfast networks to functionally separate their wholesale and retail operators. Having regard to this overriding objective, NBN Co makes the following specific comments on the proposed carrier licence condition declaration:

1. The declaration should cover networks supplying superfast carriage services to residential and small business customers

The intention of the proposed licence condition is to close the gaps in Parts 7 and 8 that have been identified by TPG's actions and the ACCC's decisions while the Government considers longer term options. For this to be successfully achieved, the proposed licence condition must apply to all carriage services that would otherwise be captured by Part 7 and 8 of the Act.

Parts 7 and 8 of the Act currently apply to superfast carriage service supplied *wholly or principally to residential or small business customers, or prospective residential or small business customers, in Australia*. By contrast, as set out in section 5 of the draft declaration, the proposed licence condition would only apply to superfast carriage services supplied to residential customers. No rationale has been provided for limiting the proposed licence condition in this way. NBN Co strongly recommends that the declaration be amended to include superfast carriage services supplied to *residential or small business customers*.

2. More robust separation obligations required

At a minimum, subsection 6(2) of the declaration should:

- include a reporting obligation which would require a specified carrier to provide a report (e.g., to the ACCC) on a regular basis, detailing the steps that the carrier had taken to comply with the carrier licence conditions and whether there have been any breaches. This reporting obligation could be similar to the reporting requirements in Telstra's structural separation undertaking.
- specify with precision the obligation on the specified carrier to provide services at wholesale, including interconnection of its facilities to enable a carrier or carriage service provider to acquire services from the specified carrier. The declaration currently requires a specified carrier to supply a Layer 2 Wholesale Service at all times during which a Layer 2 Wholesale Service is not a declared service. However, this obligation requires less than the Standard Access Obligations (SAOs) set out in Part XIC of the Competition and Consumer Act 2010 (Cth), which would operate upon declaration. For example, the SAOs require an access provider to provide interconnection and to ensure that the technical and operational quality of the service is equivalent to that which it provides itself. By comparison, the only relevant obligation in the carrier licence condition is that the wholesale company not discriminate in favour of the retail company 'in relation to the supply of an eligible service'. Accordingly, this aspect of the proposed carrier licence condition does not go far enough to achieve its intended purpose. There is no reason why arrangements in place pending declaration should not be

consistent with those that would apply from declaration.¹ NBN Co considers that the carrier licence condition should make clear that:

- the obligation not to discriminate 'in relation to the supply of an eligible service' extends to both the terms and conditions on which the service is supplied as well as the quality and timing of the service; and
- the wholesale company should be obliged to provide interconnection of its facilities where doing so is necessary for a carrier or carriage service provider to acquire a service from the wholesale company (such as a Layer 2 wholesale service).
- include a non-discrimination rule which is functionally the same as that which applies to NBN Co. NBN Co's position is that, if it is to face infrastructure based competition, NBN Co should compete on a level playing field with other infrastructure owners. This is the position which currently applies to carriers or carriage service providers which supply a layer 2 bitstream service using a designated superfast telecommunications network: ss152ARA and 152ARB. Therefore, to the extent NBN Co is obliged to comply with a non-discrimination rule, the same rule should also apply to specified carriers which are required to comply with the proposed carrier licence conditions. In this respect, it is unclear to NBN Co why the non-discrimination rule in clause 6(2)(i)(i)(B) differs from that which applies to NBN Co and suppliers of a layer 2 bitstream service using a designated superfast telecommunications network. For example, the carrier licence condition does not include an obligation not to discriminate when developing a new eligible service or extending or enhancing the capability of a facility by means of which a service is supplied.

3. Monitoring of difference

The proposed declaration includes a requirement that, where the terms and conditions of an agreement are not the same as the reference offer, a description of the parties to each agreement and the details of the differences between the agreed terms and conditions and the reference offer must be published in a prominent place on the wholesale company's website. NBN Co supports this requirement, and submits that the declaration should also require the monitoring and reporting of the potential differences in quality of wholesale service.

4. Confidentiality

The operation of the Category B SAOs along with the non-discrimination obligations (set out in sections 152 AXC and 152 AXD of the CCA) mean that NBN Co would be unable to discriminate against any access seeker that operates a superfast broadband network that directly competes with the NBN. Accordingly, NBN Co would be required to provide such a competing network provider with confidential and commercially sensitive information about its network rollout and product development, in circumstances where that competitor is not required to provide NBN Co with comparable information about the competitor's network rollout and product development. Such an outcome is akin to Samsung being required to provide Apple with the designs and specifications of its next-generation smart-phones. Such an outcome is not observed in competitive markets and risks stifling innovation and undermining the rollout of the NBN.

The draft declaration provides for the wholesale company of the specified carrier to not disclose 'protected wholesale information' relating to any of its wholesale customers to the retail company. This does not, however, address the concern that the specified carrier would have access to NBN Co's confidential and commercially sensitive information that may provide it with a competitive advantage in the rollout of a superfast broadband network and the subsequent supply of superfast carriage services in competition with the NBN. We believe that this concern should be addressed by the declaration.

¹ Particularly given, as the Regulation Impact Statement for Early Assessment notes (at page 3): 'Declaration by the ACCC of services on the network and comparable networks may address issues of access. However, the declaration process is long and uncertain'.

Where a specified carrier operates a superfast broadband network in competition with NBN Co it should only have access to NBN Co's commercially sensitive information for the specific purpose of providing carriage services to residential and small business customers using the NBN. Accordingly, it is reasonable that the retail company be allowed to contract with NBN Co and be supplied with relevant NBN Co information for the purpose of supplying NBN based services to residential and small business customers. However, the retail company must establish a ring-fencing protocol to restrict the flow of any of NBN Co's commercially sensitive information to its associated wholesale company.

With respect to the wholesale company it is unclear why they would need to contract with NBN Co as an access seeker in respect of carriage services or need to access NBN Co's commercially sensitive network or product information. The wholesale company may however wish to gain access to NBN Co's network facilities such as POIs and ducts. In such instances it would be reasonable for the wholesale company to have access to specific NBN Co information relating only to the provision of relevant NBN Co facilities under appropriate confidentiality arrangements.

NBN Co submits that subsection 6(2) of the declaration should require that:

- the wholesale company of a specified carrier must not seek to contract with NBN Co in respect of the supply of any carriage service. The wholesale company may however seek to contract with NBN Co for the supply of facilities access services; and
- the retail company must establish a ring-fencing protocol to restrict the flow of NBN Co's commercially sensitive information between the retail company and its associated wholesale company.

5. Definition of local access lines

The proposed declaration applies in respect of *designated telecommunications networks*, which are defined to mean fixed-line telecommunications networks which incorporate *local access lines* (or parts of such lines) necessary for the provision of carriage services.

The expression *local access line* is not, however, defined in the declaration itself. While the expression is defined in ss141D and 158 of the Act, those definitions are expressed to apply to Parts 7 and 8 of the Act only, and would therefore not apply to the reference to 'local access line' in the declaration.

To avoid any unnecessary confusion, NBN Co submits that the term *local access line* should therefore be specifically defined in the declaration, and should also ensure that it is clear that it includes both fibre optic lines between exchanges and remote DSLAMs, and 'jumpers' which are copper lines between the carrier side of the MDF and the customer side of the MDF (i.e. to the network boundary point in an MDF)."

6. Definition of network termination device and network termination unit

The definition of Layer 2 Wholesale Service refers to both a *network termination device* and a *network termination unit*. NBN Co submits that the two terms should be harmonised and, in doing so, the expression *network termination device* should not be used. NBN Co submits that the use of the term *network termination device* is likely to lead to confusion because:

- the expression *network termination device* is a defined term in s3.1.67 of the Wiring Rules. It is relevantly defined there to mean: 'a device meeting the carrier's requirements that is provided by the carrier to establish a demarcation point between the carrier's telecommunications network and customer cabling or customer equipment'. In other words, it is used to determine the network boundary point;
- the declaration is principally designed to regulate FTTB services, where the network boundary point will invariably be the MDF in the basement rather than a network termination device; and

- at least in NBN Co's case, the device at the end-user's premises that includes a data port, and possibly an analogue voice port (the modem), will be supplied by the RSP not the carrier.

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NBN Co would be happy to meet to discuss our thinking on any of these points in greater detail.

Yours sincerely

Caroline Lovell

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Chief Regulatory Officer