

7 January 2015

Assistant Secretary
Infrastructure Deployment
Department of Communications

By email to: migration@communications.gov.au

Dear Sir or Madam

This submission is provided by iiNet Limited (**iiNet**) in response to the consultation paper entitled: *Variation of Telstra's migration plan – regulatory instruments: exposure drafts (the Consultation Paper)*.

The Consultation Paper requests feedback on exposure drafts of the following:

- the Telecommunications (Migration Plan – Specified Matters) Instrument 2015 (**the 2015 Specified Matters**); and
- the Telecommunications (Migration Plan Principles) Determination 2015 (**the 2015 Migration Plan Principles**),

(referred to collectively as **the 2015 Instruments**).

The 2015 Instruments are required in order to permit Telstra to make changes to its current Migration Plan which is based on:

- the Telecommunications (Migration Plan – Specified Matters) Instrument 2011 (**the 2011 Specified Matters**); and
- the Telecommunications (Migration Plan Principles) Determination 2011 (**the 2011 Migration Plan Principles**),

(referred to collectively as **the 2011 Instruments**).

iiNet acknowledges that:

- changes to Telstra's Migration Plan are necessary:
 - as a result of the move to the multi-technology mix (**MTM**) approach to the rollout of the NBN;

- in order to allow interaction with the Migration Assurance Policy Statement (**MAPS**); and
- to make improvements based on learnings gained from experience of migration in the first 32 FSAMs; and
- most of the changes to the Specified Matters and Migration Plan Principles are for these purposes.

However, iiNet has the following concerns:

- the 2015 Specified Matters appears to reduce the scope of regulatory recourse;
- Telstra should not be the final arbiter of whether the Migration Plan is consistent with the MAPS; and
- iiNet does not agree that it is appropriate to relax the information security provisions in the 2015 Migration Plan Principles as compared to the 2011 Migration Plan Principles.

Each of these concerns will be considered in turn.

The 2015 Specified Matters appears to reduce the scope of regulatory recourse

Item 28 of the 2011 Specified Matters provides that the Migration Plan may deal with:

A process for the ACCC or the independent telecommunications adjudicator to require Telstra to amend an existing process, or develop specific disconnection measures

Item 29 of the 2011 Specified Matters provides that the Migration Plan may deal with:

A process for wholesale customers to propose modifications to an existing process or to a disconnection measure

Items 28 and 29 of the 2011 Specified Matters are included in the 2015 Specified Matters. However, they contain additional wording as follows:

Item 28 of the 2015 Specified Matters states (emphasis added):

*A process for the ACCC or the independent telecommunications adjudicator to require Telstra to amend an existing process, or develop specific disconnection measures **in relation to special services***

Item 29 of the 2015 Specified Matters States (emphasis added):

*A process for wholesale customers to propose modifications to an existing process or to a disconnection measure **in relation to special services***

In iiNet's view, the jurisdiction of the ACCC or Independent Telecommunications Adjudicator (**ITA**) to propose modifications to an existing process or to a disconnection measure should not be restricted to processes or measures that relate to special services. The Consultation Paper does not explain

why the additional wording to these items has been included. If the intention is merely to ensure that there is no doubt that the jurisdiction of the ACCC and ITA will extend to processes relating to special services, then iiNet submits that this would be better achieved by including the word 'including' after the word 'measure'.

Telstra should not be the final arbiter of whether the Migration Plan is consistent with the MAPS

Section 11 of the 2015 Migration Plan Principles includes a new process that gives Telstra a discretion to identify any inconsistencies between the Migration Plan and the MAPS and to provide a draft variation to the ACCC in order to make the Migration Plan Consistent with the MAPS. In iiNet's view, this process lacks vigour because it is open to Telstra to refuse to identify any variation to the Migration Plan, even if there is a manifest inconsistency between the MAPS and the Migration Plan. Therefore, it is likely that Telstra will not deal with any inconsistencies between the MAPS and the Migration Plan unless it is in Telstra's interests to do so. iiNet believes that given the important role that the MAPS plays, the process described in section 11 of the 2015 Migration Plan Principles should be varied so that the ACCC, and not Telstra, so that the decision on whether or not the Migration Plan is consistent with the MAPS should rest with the ACCC and not Telstra.

iiNet does not agree that it is appropriate to relax the information security provisions in the 2015 Migration Plan Principles as compared to the 2011 Migration Plan Principles

The 2011 Migration Plan Principles require the following obligations to be placed on Telstra as relevant to information security:¹

- Telstra must ensure that it has effective measures to ensure that information it receives from NBN Co for the purposes of commencing the supply of fibre services or the disconnection of services in a fibre rollout region cannot be used by Telstra to gain an unfair competitive advantage (for ease of expression referred to as **the NBN Information Obligation**).
- Telstra must ensure that it has effective measures to ensure that information it receives from NBN Co for the purposes of commencing the supply of fibre services or the disconnection of services in a fibre rollout region cannot be used by Telstra to gain an unfair competitive advantage (for ease of expression referred to as **the Wholesale Customer Information Obligation**).

The 2015 Migration Plan Principles relax the information security provisions because:²

- The NBN Information Obligation only applies as regards information that relates to the FTTP rollout. As regards information that relates to FTTB, FTTN or HFC, the definition of NBN Information in Schedule 4 of the 2015 Migration Plan Principles, effectively allows Telstra to have complete discretion over whether, or the extent to which, any information relating to the FTTB, FTTN or HFC rollout is covered by the NBN Information Obligation.
- The Wholesale Customer Information Obligation is not included in the 2015 Migration Plan Principles.

¹ Section 29, 2011 Migration Plan Principles.

² Section 34, 2015 Migration Plan Principles.

iiNet notes that the Consultation Paper acknowledges that the handling of information is a critical issue in ensuring that the competition objectives of the Government's NBN reforms are realised.³ However, notwithstanding this, it is nevertheless proposed to allow the scope of the NBN Information Obligation to be restricted so that it does not apply in respect of information related to FTTB, FTTN and HFC. The justification given for this appears to be that the need to deal with information security in respect of information provided by NBN Co to Telstra in respect of FTTB, FTTN and HFC can be dealt with by:⁴

- a new carrier licence condition applicable to NBN Co (**the New Licence Condition**); and
- existing processes under Part IV and XIB of the Competition and Consumer Act 2010 (**CCA**); and
- the fact that the definitive agreements between Telstra and NBN Co allow NBN Co to enforce Telstra's obligations not to use any NBN Co information to gain an unfair advantage.

iiNet accepts that if the effect of the New Licence Condition is that all RSPs receive exactly the same information as Telstra at exactly the same time, in respect of FTTB, FTTN and HFC, there would be no need for the NBN Information Obligation to apply to information about FTTB, FTTN and HFC. However, anything short of this does not justify not imposing the NBN Information Obligation in respect of information relating to FTTB, FTTN and HFC.

As regards Parts IV and XIB of the CCA, the protections that they provide are not well suited to deal with this issue because they have high evidentiary thresholds that will be extremely difficult, if not impossible, to satisfy in the absence of a positive obligation on Telstra to ensure that adequate measures are in place to prevent any abuses, along with an obligation to report on compliance with those measures. Furthermore, the substantive protections relating to 'gaining an unfair advantage' (which is applicable test under the NBN Information Obligation) and the protections relating to 'substantially lessening competition' (which apply to many of the relevant provisions under the CCA) are not the same.

As regards the definitive agreements, there are practical problems and also issues of principle as to why Telstra's obligations under the definitive agreements do not justify the non applicability of the NBN Information Obligation to FTTB, FTTN and HFC information. Practical problems arise from the fact that, as with Parts IV and XIB of the CCA, without a positive obligation on Telstra to comply and demonstrate compliance, it may be extremely difficult, if not impossible, for NBN Co to identify any non-compliance. As regards the issues of principle, iiNet does not believe that an issue that has been identified as 'critical in ensuring competition' should be left to the discretion of NBN Co to enforce. iiNet believes that, just as with NBN Co information that relates to the FTTP roll out, NBN Co information that relates to FTTB, FTTN and HFC should be protected from misuse by Telstra by imposing a positive obligation on Telstra that can be enforced by the ACCC.

As regards the Wholesale Customer Information Obligation, iiNet notes that the following justifications have been given for not including it in the 2015 Migration Plan Principles:

³ Consultation Paper, at p.10.

⁴ *ibid.*

- the existence of Parts IV and XIB of the CCA;
- the wholesale customer's agreement with Telstra will address information security; and
- information security is addressed in Telstra's Structural Separation Undertaking (SSU).

In iiNet's view, none of these are sufficient to justify not including the Wholesale Customer Information Obligation in the 2015 Migration Plan Principles. The problems of relying on Parts IV and XIB of the CCA have already been discussed. As regards wholesale contracts, although these may prevent the disclosure of confidential information, they are unlikely to specifically restrict Telstra from using a wholesale customer's migration information to 'gain an commercial advantage'.

As regards the SSU, the scope of the SSU obligations relating to information security, while relevant, are limited to 'regulated services'.⁵ This means they have no application to services that are not 'regulated services'.⁶ The Wholesale Customer Information Obligation included in the 2011 Migration Plan Principles is broader and applies to information received from a wholesale customer 'under or in connection with the disconnection processes from a separating network'.⁷ Therefore, the Wholesale Customer Obligation applies to information relating to the disconnection of all relevant wholesale services and not just to the disconnection of 'regulated services'. Therefore, reliance on the SSU would give rise to a gap in protection.

In light of the above, iiNet submits that the 2015 Migration Plan Principles should:

- ensure that the NBN Information Obligation applies to information relating to FTTB, FTTN and HFC; and
- include the Wholesale Customer Information Obligation as it is included in the 2011 Migration Plan Principles.

Yours faithfully

Stephen Dalby
Chief Regulatory Officer

⁵ SSU clause 10.

⁶ The definition of 'regulated services' is contained in clause 71 of Schedule 1 of the Telecommunications Act 1997.

⁷ Section 29(2) of the 2011 Migration Plan Principles.