



**Submission by AAPT Limited (27 September 2011)**

**in response to**

**ACCC's discussion paper:**

***Assessment of Telstra's Structural Separation Undertaking and draft  
Migration Plan***



## Introduction

1. AAPT Limited (**AAPT**) welcomes the opportunity to comment on Australian Competition and Consumer Commission (ACCC) discussion paper titled “*Assessment of Telstra’s Structural Separation Undertaking and draft Migration Plan*” (**Discussion Paper**) dated 30 August 2011.
2. AAPT supports and adopts the submission of the Competitive Carrier’s Coalition (**CCC Submission**) dated September 2011 on the sections of the Discussion Paper relating to the ACCC’s assessment of Telstra’s Structural Separation Undertaking (**SSU**).<sup>1</sup>
3. Accordingly, this submission specifically focuses on AAPT’s views in relation to the ACCC’s assessment of Telstra’s draft Migration Plan.

## Executive summary

4. As the ACCC states in the Discussion Paper, before it can approve Telstra’s draft Migration Plan, it must be satisfied that it complies with the general, specific and procedural principles in the Telecommunications (Migration Plan Principles) Determination 2011 (**Determination**), as well as the requirements of the Telecommunications Migration Plan – Specified Matters) Instrument 2011 (**Specified Matters Instrument**).
5. AAPT does not consider that the draft migration plan submitted by Telstra addresses all of the statutory criteria. Accordingly, the ACCC must reject it.
6. It is AAPT’s view that the draft migration plan does not satisfy (among others) the following provisions of the Determination:
  - **general requirement to comply with sections 8 and 21** - the migration plan does not provide sufficient assurances or detail to

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<sup>1</sup> Competitive Carriers' Coalition, *Response – Assessment of Telstra's Structural Separation Undertaking – Discussion Paper*, September 2011 (**CCC Submission**).



enable the ACCC to be satisfied that Telstra's proposed processes, which are aimed at complying with particular provisions of the Determination, will be carried out in accordance with the general principles at sections 8 and 21; and

- **section 33 of the Determination dealing with dispute resolution** - the migration plan fails to provide for an adequate dispute resolution process.

7. AAPT provides further reasons below as to why the draft migration plan should not be approved by the ACCC in its response to the ACCC's specific questions seeking industry's comments on the draft migration plan.

### **The SSU is unacceptable**

8. AAPT does not intend to restate the CCC Submission except to summarise the following key issues regarding the SSU for the ACCC's attention, namely the ACCC must instruct Telstra that an SSU will not be accepted until:
  - the SSU contains absolute obligations on Telstra to achieve the 'equivalence of outcomes' with material consequences for a failure to deliver;
  - the SSU contains effective ring-fencing measures, including to ensure that the Telstra department responsible for determining wholesale pricing is subject to robust ring-fencing measures;
  - the SSU adequately addresses Telstra's incentives;
  - the SSU provides for a 'step change' in the way Telstra deals with wholesale customers and does not merely replicate the current operational separation arrangements of the Standard Access Obligations (SAOs);



- the carve-outs in the SSU relating to Exempt Areas are removed;
  - the initial costs for the Telstra's proposed management accounting system (TEM) are disclosed and open to scrutiny by wholesale customers;
  - the retail-minus retail cost pricing methodology proposed for wholesale ADSL2+ is replaced with a cost-based methodology, consistent with the proposed wholesale prices for all other 'regulated services';
  - it is clear that the role of the ITA is genuinely independent with real powers to investigate and impose orders and penalties on Telstra;
  - the ITA has a general jurisdiction to decide whether any given situation amounts to a failure to achieve the 'equivalence of outcomes';
  - the SSU contains a genuine service level regime which simulates a competitive environment and is comparable to regimes in related industries in which suppliers face genuine competition;
  - the SSU provides for genuine equivalence in relation to regulated 'Telstra Exchange Building Access (TEBA) space'; and
  - the SSU contains robust contingency provisions which provide Telstra to undertake actual structural separation or functional separation if there is a material change in the roll out to the NBN such that mandated migration does not occur substantially in the manner contemplated.<sup>2</sup>
9. AAPT refers the ACCC to the CCC Submission for the reasons supporting the above assertions, which AAPT agrees with and adopts.

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<sup>2</sup> CCC Submission, section 1.3.



## **Assessment of the draft migration plan**

### **Compliance with sections 8 and 21 of the Determination**

10. Subsection 8(1) of the Determination requires the migration plan to provide for the disconnection of fixed-line carriage services supplied to premises in a fibre rollout region in a way that:
  - ensures the efficient and timely disconnection of Telstra’s wholesale and retail services;
  - minimises disruption to end-user services;
  - gives wholesale customers autonomy in relation to the timing of disconnection of end-users; and
  - provides for disconnection in an equivalent manner between Telstra and its wholesale customers.<sup>3</sup>
11. Subsections 8(2) and (3) require Telstra to have in place reasonable policies and business practices to ensure that disconnection occurs in the manner prescribed by subsection 8(1). The policies and business practices must provide for Telstra to facilitate the migration of its wholesale customers in a way that minimises service outage and the time taken to port local telephone numbers to the NBN or undertake any ancillary procedures, to the extent it is in Telstra’s control to do so.<sup>4</sup>
12. Section 21 of the Determination requires the migration plan to provide for the equivalent treatment of Telstra’s wholesale customers to its own retail business

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<sup>3</sup> Explanatory Statement, Telecommunications (Migration Plan Principles) Determination 2011, p. 4.

<sup>4</sup> Explanatory Statement, Telecommunications (Migration Plan Principles) Determination 2011, p.5.



units in the implementation of the processes for disconnecting services.<sup>5</sup>

13. AAPT notes that Telstra has included the substance of sections 8 and 21 of the Determination in clause 2 of the draft migration plan in the form of objectives. AAPT considers that couching the requirements under sections 8 and 21 of the Determination as merely aspirational objectives falls short of a commitment to ensure those provisions will be satisfied by the draft migration plan.
14. Moreover, AAPT notes there a number of provisions in the Determination which explicitly require (as an additional and separate requirement) that compliance with each of those provisions be carried out in a manner that is “*in accordance with the general principles at sections 8 and 21*”. The relevant provisions of the Determination include:
  - **Section 9 - Specific principle (disconnection of carriage services using copper networks)** – which provides that the processes for disconnection of copper networks in fibre rollout region set out in the migration plan must be set out in sufficient detail to enable the ACCC to be satisfied that the processes are in accordance with the general principles at sections 8 and 21.
  - **Section 12 - Specific principle (restrictions on the supply of carriage services prior to and after the disconnection date)** – which provides that any restrictions proposed in the migration plan regarding the processing of customer transactions must be in accordance with the general principles at sections 8 and 21 (and imposed for the shortest period reasonably required);
  - **Section 20 - Specific principle (provision of information regarding disconnection)** – which provides that the minimum requirements for Telstra to notify its retail customers and wholesale customers of the

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<sup>5</sup> This principle is intended to prevent Telstra from using its role in disconnecting services to gain unfair commercial advantage as fixed-line carriage services transition to the NBN Co fibre network. Ibid, p. 10.

disconnection dates for fibre rollout regions set out in the migration plan must be in accordance with the general principles at sections 8 and 21.

- **Section 23 - General principle (use of adequate processes)** – which provides that:
  1. the migration plan must require Telstra to work in good faith with other industry participants to ensure that the processes for disconnecting fixed-line carriage services and local number portability processes facilitate the migration of retail customers and wholesale customers in a way that is consistent with the general principles at sections 8 and 21; and
  2. the migration plan must provide that, where the ACCC or the ITA determines that that an existing process is not consistent with sections 8 and 21 and needs to be changed, Telstra must change that existing process and develop disconnections to ensure the process for managing disconnection is consistent with the general principles at sections 8 and 21.
- **Section 25 - Specific principle (development of disconnection measures)** – which provides that where disconnection measures must be developed by Telstra in accordance with section 23 of the Determination, the migration plan must require such disconnection measures to be consistent with the general principles at sections 8 and 21 and be approved by the ACCC or the ITA.
- **Section 27 - General principle (using standard Telstra operating systems, interfaces and processes)** – which provides that, where the ACCC or the ITA determines that the use of an operating system, interface or process is not consistent with sections 8 and 21 and needs to be changed, the migration plan must provide that Telstra must



change the operating system, interface or process in order to ensure it is consistent with the general principles at sections 8 and 21.

15. AAPT considers that in order to comply with each of sections 9, 12, 20, 23, 25 and 27 of the Determination described above, Telstra must, in each clause of the draft migration plan which addresses the relevant subject matters of those Determination provisions, include an *explicit commitment* from Telstra that the relevant draft migration plan clause will be exercised in a way that is consistent with the general principles at sections 8 and 21. This is the only way that the ACCC can be satisfied that there will be compliance with the Determination; particularly in circumstances where there is insufficient detail in the drafting of the draft migration plan to enable the ACCC to properly assess compliance.
16. For example, AAPT considers that in order for clause 8 of the draft migration plan, which deals with the provision of information regarding disconnections (as required under section 20 of the Determination), to comply with the general principles at sections 8 and 21, there should be an explicit statement that Telstra commits to supplying information to Telstra's competitors:
  - on an equivalent basis (i.e. the same information at the same time);  
and
  - in a way that does not allow Telstra to gain an unfair commercial advantage over its wholesale customers.

### **Inadequate dispute resolution process**

17. Section 33 of the Determination requires the migration plan to provide for an adequate dispute resolution process, which must be overseen by the Independent Telecommunications Adjudicator (**ITA**), if established under the SSU. Under the SSU, the ITA will consider disputes which, among





other things, include those disputes referred to the ITA under clause 31 of the draft migration plan.

18. AAPT agrees with an earlier submission of the CCC made to ACCC in August 2011 (**Initial CCC Submission**) in relation to the SSU. In that submission, the CCC stated that the ITA scheme proposed in the SSU “*is flawed both in its fundamental design and in the detail of its operation. Without wholesale changes, the CCC members would not sign on to participate in the ITA scheme*”. AAPT refers the ACCC to both the Initial CCC Submission and the CCC Submission dated September 2011, which sets out in detail the reasons why the ITA scheme is an unacceptable dispute resolution process.

19. As the ACCC sets out in the Discussion Paper:

*“The willingness of wholesale customers to participate in the ITA scheme will be fundamental to the effectiveness of the ITA as a dispute resolution mechanism and whether the ITA is effective in supporting the outcomes of equivalence and transparency.*

*... If the ITA scheme does not provide assurance to industry that it is an effective dispute resolution mechanism – and industry do not participate in the scheme – it is unlikely to achieve equivalence of outcomes.”<sup>6</sup>*

20. Accordingly, the migration plan, which refers to, and relies upon, the ITA scheme proposed in the SSU, does not provide for an adequate dispute resolution process.

21. In responding to the ACCC’s specific questions seeking industry’s comments on the draft migration plan (see below), AAPT provides further reasons as to why the draft migration plan should not be approved by the ACCC.

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<sup>6</sup> Discussion Paper, pp. 117-118.



## **Answers to ACCC's list of questions regarding the draft migration plan<sup>7</sup>**

50 Are the provisions of the draft Plan compliant with the requirements of the Determination?

As detailed above, AAPT does not consider that the draft Plan is compliant with all the requirements of the Determination.

51 Does the level of detail in Schedule 1 give industry certainty that disconnection processes will ensure efficient and timely disconnections and promote equivalence, service continuity, and the autonomy of wholesale customers? If not, what further detail needs to be provided?

AAPT considers that industry will have more certainty that disconnection processes will ensure efficient and timely disconnections and promote equivalence, service continuity, and the autonomy of wholesale customers if, at the very least, the following issues/circumstances are addressed:

- Cancelling of ULLs - where there are multiple ULLs at one address, AAPT would like the option of cancelling all of those ULLs at the same time.
- Telstra must give wholesale customers sufficient time between installing a new NBN service and when the wholesale customer has to cancel the Telstra service.
- If it is necessary (based on the type of service/migration), Telstra should have a process in place to conduct "emergency reversal". (This is a similar concept as per number porting).
- There should be an option to conduct after hours cancellations.

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<sup>7</sup> Numbering of the questions is as per the Discussion Paper.



- Flexibility should be built into the migration plan to allow for 'bulk' or project managed cancellations.

52 Are there any specific disconnection scenarios which are not adequately specified in the draft Plan?

See response to question 51.

53 Is any additional detail required in Schedule 1 of the draft Plan in relation to processes used to disconnect lines where pull through has been used?

AAPT considers there should be an explicit statement to the effect that Telstra commits, to the extent it is in Telstra's control, to providing disconnection in a way that minimises disruption to the supply of end-user services, especially in situations involving the use of pull through.

54 What key issues should be addressed in the development of any of the Required Measures?

It is difficult to respond to this question in detail until the relevant Required Measures are available for review. However AAPT submits that in reviewing the details of any Required Measure, the ACCC must not approve the Required Measure unless it is satisfied that it is consistent with the general principles set out at sections 8 and section 21 of the Determination and ensures equivalent treatment of Telstra's wholesale customers.

55 Do parties consider that an information security plan that was consistent with Schedule 6 of the draft Plan would be consistent with section 29 of the Determination? Should the plan provide assurance that any other features or attributes will be included in the information security plan?

AAPT does not consider that the interim information security plan as set out in Schedule 6 currently satisfies section 29 of the Determination. In



order to ensure that Telstra’s retail business units cannot obtain an unfair commercial advantage over wholesale customers as a result of its access to this information, the current information security plan requires, at the very least, the following changes:

- the process for picking authorised Personnel or pre-approved roles or groups who can view NBN Co Migration Information on a “need to know” must be explicitly subject to, and applied consistently with, the ring-fencing of employee functions and Telstra business units as set out in an accepted SSU (including any prohibitions of certain employees from viewing NBN Co Migration Information on any basis);
- more detail and assurances are required about the security measures and controls for the handling of both electronic and hard copies of NBN Co Migration Information;
- inclusion of information about how Telstra intends to rectify an unauthorised disclosure (whether inadvertent or otherwise) – for example, Telstra could be required to secure a personal undertaking from an unauthorised Telstra employee to whom the information was mistakenly disclosed not to use the information to gain an unfair commercial advantage over Telstra’s wholesale customers; and
- inclusion of appropriate consequences for unauthorised disclosure to incentivise compliance with the information security plan, including an ability for the ITA to investigate whether the security measures and processes are adequate and make orders accordingly.

56 Would the ITA scheme as outlined in the draft plan in practice be an adequate dispute resolution process? Are the timeframes set out for the ITA Process appropriate for dealing with disputes that arise under the



plan? Is the ITA provided sufficient authority to resolve disputes effectively?

As set out above, the ITA scheme as outlined in the draft plan is wholly inadequate as a dispute resolution process.

57 What are the key elements that will need to be included in an alternate dispute resolution process, if the ITA is not established under the SSU?

The following key elements would be required as a minimum for an effective dispute resolution process – the relevant arbitrator must (whether it be the ITA or otherwise):

- be genuinely independent;
- have the power to conduct investigations and general jurisdiction to decide whether any given situation amounts to a breach of the draft migration plan, in particular whether it is inconsistent with sections 8 and 21 of the Determination; and
- must have teeth, with sufficient power to impose meaningful penalties or orders which act as a deterrent against Telstra's incentive to discriminate against its wholesale customers.

58 Does the draft Plan provide for interim solutions that would enable disconnection to occur in a way that minimises disruption to end-user services?

Given the broad definition afforded to the term “Interim Carriage Service” and possible exclusion of the operation of the SAOs, AAPT considers that Telstra should not be allowed to make an all encompassing statement that it will not be obliged to provide any interim services (other than call diversion), except at its discretion and where it occurs on commercially agreed terms.



Instead there should be flexibility to address the possibility that the provision of an “Interim Carriage Service” may be necessary on a case by case basis.

- 59 What significant issues, if any, are likely to arise from the operation of clause 6.4 of the draft Plan?

See response to question 58 above.

- 60 Are there any other ways in which disruption to services can be minimised that are within Telstra’s control?

See response to question 51 above.

- 61 Are the suggested monetary caps reasonable in the context of variations to Telstra’s existing processes and disconnection measures?

AAPT considers that the suggested monetary caps, which allow Telstra to avoid implementing remedies when the costs are high, effectively means that, the bigger the failure or the more instances of failure identified in a single year, the less likely it is that Telstra will have to implement a remedy. This would further render the proposed dispute resolution process ineffective.