



# Telstra Structural Separation Undertaking and Migration Plan

Submission to the Australian Competition and Consumer Commission



September 2011



## **About ACCAN**

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will activate its broad and diverse membership base to campaign to get a better deal for all communications consumers.

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## **Introductory comments: matters to which the ACCC is to have regard (5.5)**

### **The national interest in structural reform of the telecommunications industry**

The 'Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan' Discussion Paper views this in terms of economic objectives, in particular the promotion of economic efficiency. ACCAN believes this interpretation is unbalanced insofar as structural reform of the telecommunications industry can advance the 'overall welfare of the nation' in a range of ways beyond economic objectives. Primarily, the national interest in this reform would be served if it allowed more Australians to have access to affordable telecommunications services which enhance their lives and promote social inclusion.

### **The impact of structural reform on consumers**

The Discussion Paper appears to interpret the impact of this reform on consumers as primarily an indirect impact through its direct impact on competition and economic efficiency which flows on to deliver, over time, new and better products and services to consumers.

ACCAN believes there is also a more proximate impact on consumers to which the ACCC should have regard – the immediate impact on the range of service choices offered to consumers by the telecommunications industry (see interim equivalence section below).

## **Assessing the impact of the SSU**

*Q.1 The ACCC would be interested in any views, together with supporting evidence or rationale, in relation to the likely future with the SSU and the likely future without the SSU as outlined above.*

The Discussion Paper at 8.5.4 suggests that the effect on downstream markets of the customer access network being removed from Telstra ownership will be positive. ACCAN also takes this view because of the many ways in which consumers find themselves powerless and frustrated by the present industry structure.

To illustrate the situation, we deal with consumers who have no telephony or internet choices at the moment except Telstra. Real service choice is largely confined to metropolitan areas, and ACCC figures show that nation-wide Telstra supplies 70 percent of all fixed voice services and around 41 percent of fixed broadband services.<sup>1</sup>

We also deal with many consumers who would like to switch providers but are prevented or discouraged from doing so by obstacles such as Telstra's "temporary connection charge". Temporary connection charges are applied if a home line is connected for three months or less. Such charges begin at \$159 and can be as high as \$399<sup>2</sup> and act as a barrier to consumers switching providers in some circumstances where the current industry arrangements force a customer of service provider A to take a phone service with Telstra before being allowed to churn to service provider B; or where a consumer wishes to take up

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<sup>1</sup> ACCC telecommunications reports 2009-10, p.10-11

<sup>2</sup> <http://www.telstra.com.au/home-phone/plans-rates-connections/index.htm?red=/connections/>

a naked DSL service with a non-Telstra provider but is required to have an active copper line first.<sup>3</sup>

Consumers in both suburban and regional areas are often informed that they cannot obtain a DSL service because there are no ports available in the local exchange and Telstra is not planning any upgrade in the near future, or because the customer premises are on a RIM. Frustration at the complex procedures, waiting lists, and inconsistent explanations from Telstra, particularly where consumers are not Telstra retail customers, is widespread. One of the longest threads on the Whirlpool forum web site records a continuous stream of battle stories as people attempt to get a DSL service.<sup>4</sup>

(There are further examples of consumer detriment experienced as a result of Telstra's vertical integration provided in the section below on interim equivalence.)

On the whole, an appropriately modified<sup>5</sup> SSU coming into force is one way of achieving the goal of addressing in a decisive manner Telstra's vertical integration, and in our view the outcome would be more favourable for consumers in comparison to what exists now and in comparison to the alternative functional separation scenario. As the Discussion Paper notes, functional separation would not be as effective in removing the incentives for Telstra to favour its own retail business arm, nor would an alternative structural separation path be likely to eventuate.<sup>6</sup>

The likely future with the SSU would see an end to the current anti-competitive, anti-consumer situation, whereas there is very little clear indication that it will be adequately resolved without the SSU.

## **Network consolidation: impact on competition in downstream markets**

*Q. 4. What do you think will be the likely impact of the SSU coming into force on competition in:...(c) downstream (wholesale or retail) fixed voice and broadband markets.*

ACCAN supports the approach taken in the Discussion Paper's assessment (section 8.5) of both the natural monopoly features of telecommunications, and the pros and cons associated with network consolidation (i.e. fewer fixed-line access networks) and the concomitant reduction of potential for full facilities-based competition.

As noted, the nature of service provisioning in telecommunications, where there is both upstream and downstream components, makes assessing impacts on consumers of network consolidation a complex calculation.<sup>7</sup>

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<sup>3</sup> For example, see TPG Naked ADSL2+ with VoIP Frequently Asked Questions at 3.9 <http://www.tpg.com.au/ull/faq/faq.php#3.9>

<sup>4</sup> <http://forums.whirlpool.net.au/forum-replies.cfm?t=1270797&p=42>

<sup>5</sup> See in particular comments relating to 'interim equivalence and transparency' below.

<sup>6</sup> p.34

<sup>7</sup> Discussion paper. p.46-7

A combination of the historical experience since deregulation in 1997 and real-world commercial conditions in Australia in the foreseeable future, do not offer most Australian consumers realistic hopes for the emergence of competing fixed-line networks.

As the Discussion Paper observes, the potential for investment in other fixed-line access networks is likely to be similar with or without the SSU, that is “*such investment would be unlikely in established areas, with some potential in greenfield estates.*”<sup>8</sup>

The discontinuation of broadband services over HFC networks is unlikely in our view to produce real world detriment to the consumers who currently use these services. There is not likely to be a diminution of service choices for these consumers given that early indications of service provider offers using the NBN are comparable to or exceed available service offerings over HFC in terms of value for money and speeds.<sup>9</sup> HFC-based services are also likely to become less attractive over time given the capabilities of the NBN fibre network.<sup>10</sup>

Therefore, on the whole, when contrasted with the existing vertically integrated, incumbent access network, the relative improvement for consumers, particularly those outside the urban cores, to be derived from the SSU is likely to be significant. We assume the existence of a nation-wide wholesale, open-access network (such as the NBN). The network consolidation would enable multiple retailers to compete fairly across far wider geographic areas of the country and differentiate on the basis of service offerings and customer service.

## Impact on consumers (8.6)

*Q.13. Are there any other benefits or detriments to consumers (or particular types of consumers) that are likely to arise as a result of the SSU coming into force?*

*Q.14. Do you consider that the coming into force of the SSU will result in an overall benefit to consumers of telecommunication services?*

As the Discussion Paper correctly notes, the likely impact of the SSU coming into force on consumers involves the forecasting and weighing of multiple factors. As we have dealt with the effects on consumers of addressing Telstra’s vertical integration in other sections of this submission, the focus here will be on service-specific factors.

There are significant service benefits to consumers of a more timely rollout of the NBN. This will be particularly felt in areas where service choices are currently limited or non-existent; for consumers who have by current standards, a slow DSL connection because they live more than three or four kilometres from their local telephone exchange; and for consumers who are on RIMs and therefore cannot access a fixed-line internet service.

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<sup>8</sup> p.37, italics added.

<sup>9</sup> For example, iiNet’s published offers: <http://www.iinet.net.au/nbn/>

<sup>10</sup> See Optus Submission to ACCC in support of the application of the HFC Subscriber Agreement at 2.18-2.22.  
<http://www.accc.gov.au/content/trimFile.phtml?trimFileTitle=D11+2301965.pdf&trimFileFromVersionId=1009387&trimFileName=D11+2301965.pdf>



The extent of local government lobbying for early connection to the NBN<sup>11</sup> indicates that dissatisfaction with the present service situation is widespread as is demand in the community for the changes that the SSU would help to bring about more speedily.

The Discussion Paper notes that if the SSU comes into force, some consumers could potentially lose access to particular service features that they value. In this regard, ACCAN is concerned to ensure that low-income consumers can continue to be supplied with a subsidised phone-only service (which currently takes the form of Telstra's *HomeLine Budget* for a line rental price of \$22.95 a month). Our expectation is that if the SSU came into force, government would meet its community service obligations and have measures in place for low-income consumers who want only a standard phone service.<sup>12</sup>

On balance, there is an overall benefit to consumers from a service perspective of the SSU coming into force. As we have indicated, the number of consumers who stand to benefit relative to their existing situation is significant.

*Q.16 Will the SSU coming into effect improve broadband services, in particular outside of metropolitan areas?*

For the reasons given by NBN Co in their submission regarding the uniform, national wholesale price, it is likely on the whole that the SSU coming into force will improve broadband services outside metropolitan areas, both in terms of choices available and quality of service. The likelihood of such improvements have been reinforced by statements from Telstra competitors such as iiNet indicating a commitment to expanding its coverage to regional Australia given reasonable opportunity to do so by the wholesale environment.<sup>13</sup>

## Wireless restrictions

*Q.24. Do you think that the wireless restriction provisions are likely to result in any negative outcomes for competition in relevant telecommunications markets or for consumers?*

The argument advanced by NBN Co that fixed broadband and wireless are complementary may be true of some users today but may not be the case in the future as LTE speeds improve. It is not inconceivable that some consumers will take a wireless service instead of a fixed service over the NBN, similar to some consumers who already choose to access the internet only via a smart phone.

While not all consumers will meet their needs this way, some may be able to, and there should not be restraints on promoting service offerings in this regard. We should allow the market, not regulations and corporate agreements, to guide consumers' views about the substitutability of fixed line and mobile broadband. An agreement by Telstra, the largest mobile provider, not to promote their service as a substitute for a fixed service in this way is likely on the whole to have a negative effect on consumers by dampening the competition that might otherwise occur.

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<sup>11</sup> Mike Quigley, NBN Co CEO speech to ACCAN National Conference, 7 September 2011.

<sup>12</sup> Senate Environment and Communications Committee Estimates Hansard, 22 February 2011, p.187. <http://www.aph.gov.au/hansard/senate/commtee/S13569.pdf>

<sup>13</sup> Josh Taylor, "iiNet predicts 27% cost drop on NBN", 21 September 2011, [ZDnet.com.au](http://www.zdnet.com.au) <http://www.zdnet.com.au/iiNet-predicts-27-cost-drop-on-nbn-339322771.htm>



There are existing laws prohibiting misleading and deceptive conduct and these laws should be sufficient to address any concerns NBN Co may have about marketing claims made by Telstra.

(ACCAN has lodged a parallel submission on similar provisions applying in the Optus HFC agreement.)

## Interim equivalence and transparency

*Q.26. Do the commitments in the SSU provide sufficient assurance that Telstra will provide equivalence of outcome until the designated day?*

ACCAN agrees with the ACCC's preliminary view that the equivalence and transparency measures as presented are not supported by a clear and enforceable commitment to an equivalence of outcomes.

We support the comments of the Competitive Carriers' Coalition's comments along similar lines and we are of the view that their detailed responses should be accorded significant value.

ACCAN would expect the interim equivalence and transparency elements of an approved SSU to decisively resolve the frustrations which are currently suffered by consumers which can be attributed to Telstra's vertical integration and market power. We would emphasise the importance of these elements being tightened in a re-submitted SSU because these equivalence issues are central to many of the problems faced by consumers and affect consumers directly and immediately in the existing marketplace.

**Disparities in time taken to connect services or deal with faults:** Consumer frustration arises in a number of ways. Service activation requests submitted by Telstra's retail competitors to Telstra for certain broadband services and phone/broadband bundles take an unacceptably long *ten to twenty business days* to be completed during which time the consumer is left without a service.<sup>14</sup> In contrast, consumers report that Telstra's retail arm can activate a service for a consumer in a matter of hours. This non-equivalence is and would remain an unacceptable obstacle to a fair and competitive market.

In particular we are concerned at the lack of real equivalence in how Telstra handles fault repairs for customers of its retail competitors compared to its own retail customers.

One illustrative case relating to fault repairs involves a small business in the security monitoring field in south-western Sydney that contacted ACCAN in 2010 because of difficulties they experienced with a faulty ADSL connection. The retail service provider was a non-Telstra ISP using Telstra wholesale line rental. It had been established by the ISP that there was a fault on the copper line in the street near the business premises. It proved impossible over many months to secure Telstra's cooperation in fixing the problem. The business owner lodged a TIO complaint against the service provider despite knowing they had done all within their power to have the issue dealt with. Contacting Telstra, the business

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<sup>14</sup> See for example TPG Naked ADSL2+ with VoIP Frequently Asked Questions at 3.9 <http://www.tpg.com.au/ull/faq/faq.php#3.9>



owner was told that if he became a Telstra customer, the line defect in the street could be repaired promptly.

**Implications for Customer Service Guarantee:** Non-equivalent treatment also has undesirable consequences for the number of services offered by Telstra’s retail competitors which require a consumer to waive their Customer Service Guarantee (CSG) rights as a condition of service. Retail competitors have reported being unable to meet the CSG period for connections as a result of Telstra’s practices and are therefore in a position where they must seek CSG waivers.<sup>15</sup>

Current Telstra practices therefore undermine the CSG – a measure that is supposed to be a core consumer safeguard – and in practice negate the government’s policy intent of providing consumers with a guaranteed minimum timeframe for connections and fault repairs.

**Independent Telecommunications Adjudicator (ITA) rules:** It is concerning to see monetary caps on compliance with directions or orders made by the ITA such that a Telstra failure that is costly to remedy may not be rectified. In addition, the purpose of the ITA should be to assist in overcoming the asymmetries of power and information between Telstra and its wholesale customers/retail competitors. It is therefore not appropriate for Telstra’s wholesale customers to be required to fund the ITA or be subject to orders by the ITA.

## Migration Plan

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

Relevantly for consumers, the Migration Plan aims, among other things, to enable Telstra’s wholesale customers to minimise disruption to the supply of services to end users; and to facilitate, to the extent it is reasonably in Telstra’s control to do so, the management by wholesale customers of the migration of their customers in a way that minimises the period of any service outage.<sup>16</sup>

**ACCC should request ACMA action:** However, on the whole, we are unsure whether the Migration Plan would or would not yield a seamless transition to the NBN for consumers. While we acknowledge the ACCC’s preliminary view that the Migration Plan appears to address all of the statutory criteria, the procedures for optimising the migration process for consumers are not specified at a level of detail which give us confidence that consumer welfare will be protected. Minimising down-time and disruption to services including priority assistance services would be the key factors in this regard. We also note that the Migration Plan in several clauses refers to Telstra following “a Standard Industry Process” if one is in place, defined as “an industry process established under a registered code or other binding industry process or practice”.<sup>17</sup>

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<sup>15</sup> The ACMA has reported that its records show the number of services to which CSG waivers apply has been rising.

<sup>16</sup> Migration Plan Clause 2(c) and (f)(i)

<sup>17</sup> For example, Migration Plan Clause 9.1(a)(v)





We would therefore ask that the ACCC write to the ACMA requesting that the regulator exercise its power to call for an industry operational code to be formulated and registered, or to add provisions to an existing registered industry operational code specifically on migration to the NBN; or failing that, for the ACMA to create an industry standard on migration to the NBN. We believe the ACCC has relevant expertise to assist in this process should it be initiated.

*Q.60. Are there any other ways in which disruption to services can be minimised that are within Telstra's control?*

**Reconnection circumstances:** ACCAN is concerned to ensure that should there be change to the NBN rollout policy or fibre coverage area, Telstra should be able to reconnect copper paths or HFC lines to supply consumers with telecommunications services. We have some concern at the restrictiveness of Clause 18.2 which allows this only where there is a “permanent cessation of operations” in relation to NBN Co. The term is defined in Schedule 9 to mean “termination on a permanent basis of the operation of *the entire NBN Co Fibre Network*”.<sup>18</sup> We would submit this be re-worded to allow for a wider range of circumstances. The definition could be changed to, for example, “termination on a permanent basis of the operation of the NBN Co Fibre Network in the relevant Rollout Region”.

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<sup>18</sup> Italics added.