



Australian
Competition &
Consumer
Commission

Proposed variation to the migration plan: cease sale

Discussion Paper

June 2013

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www.accc.gov.au

1 Purpose

The Australian Competition and Consumer Commission (ACCC) is seeking feedback from interested parties on a variation to the migration plan that Telstra has proposed (the proposed variation). The proposed variation is about the circumstances in which new orders for copper services, and requested changes to existing copper services, in NBN fibre areas that are 'ready for service' can be fulfilled. This is referred to as the 'cease sale obligation' in this document and is contained in clause 17 of the migration plan. The intended effect of the proposed variation is to limit the circumstances in which consumers, who through no fault of their own do not yet have the option of taking up an NBN service at their premise, would not be able to obtain new fixed line services over the copper network. The purpose of this document is to provide:

- Information on the scope of the ACCC's consideration of Telstra's proposed variation to the migration plan (Part 2.1).
- An outline of the existing terms of the cease sale obligation and the role of cease sale obligations in network migrations generally (Part 3).
- An outline of Telstra's proposed variation and industry concerns about the existing cease sale obligation (Parts 4 and 5).
- A preliminary discussion of whether the migration plan (as varied) would comply with the migration plan principles (Part 6).
- Questions to guide interested parties' submissions in relation to the proposed variation (Part 7).
- Information on how interested parties can make a submission (Part 8).

After considering any submissions received, the ACCC will decide whether to accept or reject Telstra's proposed variation and publish its decision on the ACCC website.

2 Introduction

On 27 February 2012, the ACCC accepted Telstra's Structural Separation Undertaking (SSU) and approved the draft migration plan. The SSU and migration plan commenced on 6 and 7 March 2012, respectively.

The migration plan sets out certain actions that Telstra will take, and those processes which it will apply to:

- cease to supply fixed line carriage services (other than exempt services) using the copper network and HFC Network; and

- commence to supply fixed line carriage services using the NBN Co Fibre Network.

Further details on Telstra's migration plan can be found on the [ACCC website](#).¹

2.1 ACCC consideration of proposed variations to the migration plan

The ACCC's consideration of any proposed variation to the migration plan is limited to whether or not the migration plan, as varied, complies with the *Telecommunications (Migration Plan Principles) Determination 2011* (the migration plan principles).² If the ACCC is satisfied that the migration plan as varied complies with the migration plan principles, it must approve the variation.

The ACCC can only refuse a variation requested by Telstra if it is not satisfied that the migration plan as varied complies with the migration plan principles.

An ACCC decision to accept or reject a variation requested by Telstra is limited to an assessment of the variation proposed as understood in the context of the whole migration plan as varied and assessed for compliance with the migration plan principles. It is not a reconsideration of all aspects of the migration plan (for example, provisions of the migration plan unaffected by the proposed variation) against the migration plan principles. An ACCC decision to reject a variation requested by Telstra would leave the existing migration plan on foot.

The migration plan principles include principles that require the migration plan to provide for:

1. disconnection of fixed-line carriage services supplied to premises in a fibre rollout region to occur in a way that:
 - ensures the efficient and timely disconnection of wholesale carriage services and retail fixed-line carriage services from a separating network;
 - to the extent that it is in Telstra's control, minimises disruption to the supply of fixed-line carriage services; and
2. equivalent treatment of wholesale customers and retail business units in the implementation of the processes for disconnecting carriage services from a separating network at premises in each fibre rollout region.

¹ <http://transition.accc.gov.au/content/index.phtml/itemId/1043715>.

² Section 577BF of the *Telecommunications Act 1997*

The migration plan principles are available on the [Department of Broadband, Communications and the Digital Economy website](#).³

For any proposed variation to the migration plan that is not ‘of a minor nature’, the ACCC must publish the proposed variation and an invitation for people to make submissions within 28 days.

3 Existing terms of the cease sale obligation

Under the existing terms of clause 17 of the migration plan, Telstra must not supply any new copper service (in the relevant circumstances) to a premise that is:

- NBN Serviceable; or
- Not NBN serviceable but would require the installation of new copper or other infrastructure (except to fulfil its Universal Service Obligations).

The Universal Service Obligations require Telstra, among other things, to ensure that standard telephone services are reasonably accessible to all Australians on an equitable basis.⁴ Under this requirement, Telstra is only required to provide a telephone service fit for the purpose of voice telephony, not internet services.⁵ Telstra may use a range of technologies, including wireless, to fulfil its Universal Service Obligations.

The Universal Service Obligations are set out in the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and the Australian Communications and Media Authority (ACMA) monitors Telstra’s performance of the requirements. Further information on the Universal Service Obligations is available on the [ACMA website](#).

3.1 The role of ceasing to supply services in network migrations

The decommissioning of telecommunications networks commonly happens in three stages:

- The service provider stops offering new customers services on the network it is decommissioning and offers new customers services on the new network instead.

³http://www.dbcde.gov.au/__data/assets/pdf_file/0006/136473/Telecommunications_Migration_Plan_Principles_Determination_2011.pdf

⁴ Section 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

⁵ Section 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

- For a period of time, existing customers on the network the service provider is decommissioning are encouraged to switch to the new network. During this period, the service provider will typically institute policies designed to switch existing customers to the new network gradually. For example, customers wishing to make changes to their services or accounts may be required to switch to the new network to effect those changes.
- At some point, the service provider will switch off the old network. The service provider continues to provide services to its customers on the new network.

Using a staged approach helps service providers gradually scale down the number of customers using the network that is being switched off. The fewer customers using the network when it is switched off, the fewer customers who may experience service disruption. It is also generally easier for service providers to ensure that turning off a network does not disrupt customers' services if they do not have to process large volumes of orders towards the end of the switch over period.

4 Telstra's proposed variation to the cease sale obligation

On 14 June 2013 Telstra wrote to the ACCC seeking approval of a variation to the cease sale obligation contained in clause 17 of the migration plan. Telstra's request, including a mark-up of the proposed variation, is available on the [ACCC website](#).⁶

Telstra states that the effect of the proposed variation is to exclude premises from the cease sale obligation that are not capable of being connected to the NBN.

To this end, under the varied terms of the migration plan, Telstra would not provide new copper services (in the relevant circumstances) to premises that are:

- NBN serviceable; or
- a Frustrated Premise.

NBN Co has provided a submission providing information about the types of premises which it expects will be classified as 'Frustrated Premises,' which is available on the [ACCC website](#).⁷

As the definition of 'Frustrated Premise' is still being settled between NBN Co and the Department of Broadband, Communications and the Digital economy, Telstra's

⁶ <http://transition.accc.gov.au/content/index.phtml?itemId=1082236>.

⁷ <http://transition.accc.gov.au/content/index.phtml?itemId=1082236>.

proposed variation provides for a delay to the application of cease sale to Frustrated Premises, until NBN Co commences to identify Frustrated Premises in its service qualification system.

Telstra states that it understands the number of premises likely to be identified as 'Frustrated Premises' will be a much smaller category than non-serviceable premises. NBN Co has not yet identified any premises as 'Frustrated'.

Telstra states that it believes that making the proposed changes to clause 17 of the migration plan will:

- ensure a better end-user experience in migrating to the NBN fibre, and
- provide greater certainty about when cease sale will and will not apply.

Telstra proposes to implement the proposed variation to the migration plan from 1 July 2013 (prior to an ACCC decision in relation to the proposed variation). Telstra provided information to its wholesale customers on its proposed implementation of cease sale in June 2013.

Telstra states that this change will allow the continued processing of orders for new copper based services according to business as usual processes in NBN fibre rollout regions until the order stability period⁸ for premises that are not frustrated nor NBN serviceable.

5 Concerns about the existing terms of the cease sale obligation

A number of Telstra's wholesale customers raised concerns about Telstra's intended implementation of the existing cease sale obligation. These concerns included:

- risks relating to end-user continuity of service, specifically for premises that would be 'passed' by NBN fibre but are not yet 'NBN Serviceable'
- uncertainty around the meaning of 'new copper or other infrastructure' and whether it would apply in cases of newly constructed buildings or where transposition of a cable is required

⁸ Immediately prior to the disconnection date for a rollout region, Telstra may apply an order stability period of 20 business days, where it will not process any orders for copper or HFC services (other than disconnection orders). The order stability period is designed to facilitate migration in an orderly and robust manner and to allow Telstra to clear pending orders before commencing the managed disconnection process (migration plan, clause 13.1).

- lack of measures to ensure that Telstra provides access to any new copper installed pursuant to its discretion under its Universal Service Obligations in an equivalent manner.

Telstra states it is requesting the proposed variation in response to industry concerns, and its own concerns, about the potentially poor end-user experience that could arise from the application of the existing terms of the cease sale obligation.

6 Discussion of the proposed variation

A preliminary discussion of how the proposed variation may affect the migration plan and its compliance with some of the migration plan principles is provided below.

6.1 Efficient and timely disconnection of wholesale carriage services and retail fixed-line carriage services

The proposed variation would affect how Telstra treats orders for new services and does not appear to affect the disconnection of services directly. The proposed variation would not appear to diminish the effectiveness of the clauses of the migration plan that directly provide for efficient and timely disconnection of services.

The migration plan (as varied) would continue to encourage the progressive migration of services to the NBN fibre network in the lead up to decommissioning of Telstra's copper network. This is because the cease sale obligation would apply in each rollout region wherever the consumer premise is serviceable by the NBN, which is still expected to be the overwhelming majority of premises in a 'ready for service' NBN fibre service area.⁹ That is, the cease sale provisions in the migration plan as varied would continue to provide for the efficient and timely disconnection of services through the scaling down of services on Telstra's copper network in the lead up to decommissioning.

6.2 Minimising disruption to the supply of fixed-line carriage services

The migration plan (as varied) would appear to minimise disruption to fixed line services by reducing the likely number of end-users who would not be able to obtain an NBN or copper fixed line service during the switchover period. The proposed variation to clause 17.1(ii) is likely to remove uncertainty about the class of orders that will be refused during the cease sale period (which, on its broadest reading, is

⁹ NBN Co cannot declare a rollout region 'ready for service' until 90 percent of premises are Passed.

potentially quite large). Consequently, it should be simpler for service providers to know in advance whether they are able to fulfil an order or service change request.

The migration plan (as varied) would appear to minimise disruption to the supply of fixed line services by allowing Telstra to refuse orders for services at premises that are not NBN serviceable only if those premises are identified as ‘Frustrated’ – which is expected to be a much smaller number of premises than those potentially caught by the existing terms of clause 17.1(b). On the one hand, this aspect of the variation could restrict some consumers accessing fixed line services until the NBN can be connected to their premise (i.e. the circumstances leading to the premises being identified as ‘Frustrated’ are resolved). This may mean that some consumers (such as new residents in a multi dwelling unit that has been identified as ‘Frustrated’) will not be able to acquire fixed line copper services, when under the existing terms of the cease sale obligation they would have been able to do so. On the other hand, blocking copper orders to Frustrated Premises could minimise disruption of services over a longer timeframe by prompting affected consumers to take reasonable steps to make their premises NBN serviceable, where they are able to do so (e.g. seeking the body corporate's cooperation for installation of NBN infrastructure). Such efforts may assist the consumer to receive fixed line services beyond the relevant disconnection date for the copper network, given copper services will be switched off on the disconnection date.

There may be some circumstances that lead to a premise being identified as ‘Frustrated’ that a consumer will not be able to resolve without the cooperation of third parties (e.g. where a developer has failed to provide certain infrastructure or permissions in relation to heritage buildings need to be obtained). However, consumers will still be able to order a standard voice telephone service from Telstra at a premises identified as ‘Frustrated’ pursuant to the Universal Service Obligation.

6.3 Equivalent treatment of wholesale customers and retail business units

The proposed variation would appear to provide for the equivalent treatment of wholesale customers and Telstra’s retail business units. In particular, it provides for clarity around the type of orders that Telstra should refuse, based on the status of a premise in NBN Co’s service qualification system. This would appear to resolve uncertainty around whether Telstra would be refusing the same types of orders for wholesale customers and retail business units under the existing terms of the cease sale obligation. The proposed variation also makes clear that Telstra would only be permitted to supply a standard telephone service pursuant to its Universal Service Obligations and not supply any other types of services (such as fixed-line internet services).

7 Questions for consideration

The ACCC considers that the proposed variation is not of a minor nature and so is providing a 28-day period in which interested parties may make submissions. Part 6 of this paper provides information on how to make a submission.

The ACCC seeks feedback from interested parties on whether the migration plan, as varied, would comply with the migration plan principles.

In particular, the ACCC would like feedback on the following questions:

1. Would the migration plan (as varied) provide for the disconnection of fixed-line carriage services supplied to premises in a fibre rollout region to occur in a way that ensures the efficient and timely disconnection of wholesale carriage services and retail fixed-line carriage services?
2. Would the migration plan (as varied) provide for disconnection of fixed-line carriage services supplied to premises in a fibre rollout region to occur in a way that, to the extent that it is in Telstra's control, minimises disruption to the supply of fixed-line carriage services?
3. Would the migration plan (as varied) provide for equivalent treatment of wholesale customers and retail business units in the implementation of the processes for disconnecting carriage services from a separating network at premises in each fibre rollout region?
4. Would the migration plan (as varied) fail to comply with any of the migration plan principles not addressed in questions 1-3?

8 How to make a submission

Submissions in response to this discussion paper will be accepted until **5:00 pm** on **Monday 22 July 2013**. Any submissions received after this time may not be considered.

All submissions will be considered public and posted on the ACCC's website. If stakeholders wish to submit commercial-in-confidence material to the ACCC they should submit a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or '[c-i-c]'.

The *ACCC-AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator (AER)

on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC website at www.accc.gov.au.

The ACCC prefers to receive electronic copies of submissions in either Adobe PDF or Microsoft Word format that is text searchable. Please send submissions to the following email address: ssu-migration@acc.gov.au. The ACCC also accepts hard copies of submissions. Any hard copy should be sent to:

Sean Riordan
General Manager
Industry Structure and Compliance, Communications Group
Australian Competition and Consumer Commission
GPO Box 520, Melbourne VIC 3001

Any questions about this consultation process should be directed to Ella Bourke at ella.bourke@acc.gov.au or by calling: (03) 9290 6923.