



Australian  
Competition &  
Consumer  
Commission

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

**Discussion Paper**

**30 August 2011**

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# List of acronyms and abbreviations

## List of acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	Asymmetric digital subscriber line
AGVC	Aggregated virtual circuit
AIP	Accelerated Investigation Process
DSL	digital subscriber line
DSLAM	digital subscriber line access multiplexer
DTCS	domestic transmission capacity service
ESAs	exchange service areas
FTTP	fibre to the premises
GPON	Gigabit Passive Optical Network
HFC	hybrid fibre-coaxial
ISP	internet service provider
ITA	Independent Telecommunications Adjudicator
LCS	Local Carriage Service
LNP	Local number portability
LSS	line sharing service
LTIE	long term interests of end-users
MACI	Material Adverse Customer Impact
MPP	Migration plan principles
NBN	national broadband network
NTP	Network termination point
PEF	Price Equivalence Framework
POI	Point of interconnection

PSTN OA	public switched telephone network originating access service
PSTN TA	public switched telephone network terminating access service
RAF	Regulatory accounting framework
RSP	retail service provider
SAOs	Standard Access Obligations
SIO	services in operation
SSI	special service inputs
SSU	structural separation undertaking
STD	Subscriber Trunk Dialling
STS	standard telephone service
TEBA	Telstra Exchange Building Access Service
ULLS	unconditioned local loop service
USO	universal service obligation
VoIP	Voice over IP
WLR	wholesale line rental

## List of abbreviations

Abbreviation	Full reference
ACCC Regulatory Reform Submission	ACCC, submission to the Department of Broadband, Communications and the Digital Economy, <i>National Broadband Network: Regulatory Reform for 21<sup>st</sup> Century Broadband</i> , June 2009.
CACS Act	<i>Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010</i> (Cth)
CACS Bill	<i>Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010</i> (Cth)
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
Convergence Review Emerging Issues Paper	Department of Broadband, Communications and the Digital Economy, <i>Convergence Review- Emerging Issues Paper</i> , April 2011
DBCDE	The Department of Broadband, Communications and the Digital Economy
(the) Determination	<i>Telecommunications (Migration Plan Principles) Determination 2011</i>
Foxtel-Austar Statement of Issues	Statement of Issues – FOXTEL – proposed acquisition of Austar United Communications Limited, 22 July 2011.
FSR second position paper	ACCC, <i>Fixed Services Review- A Second Position Paper</i> , April 2007.
Hilmer Report	Independent Committee of Inquiry, National Competition Policy, 1993
Implementation Study	McKinsey & Company and KPMG, <i>National Broadband Network Implementation Study</i> , released 6 May 2010.
NBN Co	NBN Co Limited
NBN Co Corporate Plan	NBN Co Limited Corporate Plan 2011-2013
NBN Co section 577BA supporting submission	NBN Co, Submission to the Australian Competition and Consumer Commission (ACCC) in relation to section 577BA of the <i>Telecommunications Act 1997</i> , 22 August 2011



<b>Abbreviation</b>	<b>Full reference</b>
Ministerial Criteria Instrument	<i>Telecommunications (Acceptance of Undertaking about Structural Separation – Matters) Instrument 2011</i>
NBN Co migration guide	NBN Co, Migrating to the National Broadband Network—An information guide
Network and Services Instrument	<i>Telecommunication (Structural Separation – Network and Services Exemption) Instrument (No. 1) 2011</i>
Regulated Services Determination	<i>Telecommunications (Regulated Services) Determination (No. 1) 2011</i>
Regulatory Reform Discussion Paper	DBCDE, <i>National Broadband Network: Regulatory Reform for 21<sup>st</sup> Century Broadband</i> , Discussion Paper, April 2009
Specified Matters Instrument	<i>Telecommunications (Migration Plan – Specified Matters) Instrument 2011</i>
SOE	Senators The Honorary Penny Wong and Stephen Conroy, <i>Statement of Expectations</i> issued to NBN Co Limited, 17 Dec 2010
Telco Act	<i>Telecommunications Act 1997 (Cth)</i>
Telstra supporting submission	Telstra, Telstra’s Structural Separation Undertaking and Migration Plan, Issue date 31 July 2011
Telstra supplementary submission	Telstra, Letter to ACCC re Organisational arrangements and staff incentives under the draft Structural Separation Undertaking, 25 August 2011

# Executive Summary

The Australian Competition and Consumer Commission (ACCC) is considering whether to accept a structural separation undertaking and approve a draft migration plan submitted by Telstra. If the undertaking and plan are accepted and approved respectively, various protections would be provided from competition laws to facilitate the structural separation.

The undertaking and plan would, if accepted and approved, progressively implement structural reform of the telecommunications sector through Telstra ceasing to supply fixed-line voice and broadband services over its copper and HFC networks and commencing to supply those services using the national broadband network.

This reflects long held concerns that Telstra, as the vertically integrated provider of access to the ubiquitous copper network, has the incentive and ability to favour its retail businesses over its wholesale customers, and thereby impede competition, to the detriment of consumers.

It is the ACCC's view that structural separation of Telstra is the most appropriate mechanism to address these concerns to the benefit of competition and consumers. That said, there are a number of complex issues that need to be considered.

In particular, the ACCC must be satisfied that competition and consumer interests are supported by the specific reforms that have been proposed. This particularly means during the progressive transition to the new industry structure.

As is explained in this paper, the proposed structural reform would be implemented by:

- A structural separation undertaking that includes:
  - commitments by Telstra to cease the supply of specified services over networks under its control from the designated day – which is expected to be the day on which the construction of the new wholesale-only national broadband network will be concluded; and
  - equivalence and transparency measures regarding access to Telstra's key wholesale services in the period leading up to the designated day.
- A migration plan under which Telstra will cease supplying copper and most HFC services – including wholesale services (where they are supplied) – as part of the migration to the national broadband network.
- The commercial agreements between Telstra and NBN Co.

This paper also discusses the mandatory considerations and statutory tests for assessing the structural separation undertaking and migration plan, and advances preliminary views as to their interpretation and application to particular issues. This is to assist industry representatives and consumers in making submissions that focus on matters of importance.

In particular, the ACCC's consideration of the commercial arrangements between NBN Co and Telstra focuses on the implications of those agreements coming into effect as assessed against these mandatory considerations, and is not a broader examination of those arrangements.

The ACCC's preliminary view on the proposed consolidation of fixed-line access networks – which is a fundamental aspect of the proposed structural reform – is that a number of the mandatory considerations would appear to support that consolidation, while the possible effect of other of the mandatory considerations is less clear. The ACCC will further consider this important issue and reach an overall view on it in light of submissions provided in response to this discussion paper.

Importantly, it should be recognised that, although migration of fixed-line services to the national broadband network (NBN) has been chosen as the method of achieving the proposed structural reform, this remains an inquiry into the proposed structural reform and not an inquiry into the merits of the NBN.

### **Structural Separation Undertaking**

The ACCC's preliminary view is that the particular structural separation undertaking that has been provided could not be accepted, and hence Telstra will need to resubmit this document in a form that fully complies with the legislative requirements.

In this regard, the structural separation undertaking does not include a compliance plan for Telstra's primary commitment to be structurally separated from the designated day. This is a mandatory requirement established in the legislation.

The ACCC is also of the preliminary view that the following aspects of the proposed arrangements would militate against acceptance of the structural separation undertaking.

- The interim equivalence and transparency measures are not supported by a clear and enforceable commitment to an 'equivalence of outcomes' – which would enable wholesale customers and Telstra's retail businesses to access key input services of equivalent quality and functionality. Further, it is not clear that there are appropriate mechanisms that would ensure that the proposed measures remain fit for purpose for the duration of the interim period.
- Agreements that are subsequently negotiated between Telstra and NBN Co could potentially gain the benefit of a legislative authorisation (exemption from competition laws) without undergoing further ACCC scrutiny. This potential arises from:
  - the inclusion of a broad variation mechanism in the commercial agreements that Telstra and NBN Co have lodged with the ACCC, which could result in either of the parties imposing new or modified restrictions on the competitive behaviour of the other party; and

- this conduct potentially receiving the benefit of the legislative authorisation as a result of the ACCC's acceptance of the undertaking at this time or the undertaking coming into force.
- The provisions against Telstra promoting wireless services as substitutable for NBN Co's fibre services and the limitation on Telstra's ability to provide HFC services to new channel providers. The ACCC proposes to seek further information from the parties and others regarding the operation and likely effect of these restrictions.

This paper also outlines a number of other more detailed concerns regarding the appropriateness and effectiveness of Telstra's proposed interim equivalence and transparency measures. In this regard, the ACCC considers that the following limitations would also appear to militate against acceptance of the undertaking:

- *Enforcement* – Telstra's commitments on organisational matters and systems equivalence are subject to an enforcement threshold which precludes direct enforcement by the ACCC unless a failure to comply is material and not an isolated incident and which forms part of a demonstrable pattern of repeated non-compliance.
- *Service Level Guarantee scheme* – Telstra's proposed operational equivalence metrics are supported by an automatic payment to affected wholesale customers in some circumstances. However, the metrics are subject to numerous exceptions and exemptions, which will have a direct bearing on whether the pay and fix obligations are triggered. The exceptions (e.g. on low volumes of services and for NBN rollout regions) would exclude a very significant number of services. In addition, the proposed rebates are generally only equal to one month's recurrent charge for the relevant service and do not scale as service levels further degrade.
- *Metrics* – the proposed service level (and corresponding equivalence and transparency metric) offered to ULLS customers is inferior to those for retail and wholesale customers that use Telstra's PSTN and DSL services.
- *Independent Telecommunications Adjudicator (ITA) scheme* – Telstra proposes to establish an ITA to consider certain non-price equivalence disputes and disputes referred under the Migration Plan. However, it is unclear whether the SSU confers sufficient powers on the ITA to resolve disputes, including by requiring reasonable remediation of Telstra's processes and systems. In this context, it is incumbent on Telstra to clarify and explain these important aspects of the ITA scheme, as broad industry participation will be central to the potential effectiveness of the scheme.
- *Organisational arrangements* – Telstra proposes to maintain separate wholesale, retail and network services business units. However, the proposed ring-fencing measures are subject to a number of exceptions which have the potential to undermine their efficacy. For example, "where an employee has

management responsibilities” in relation to a separated business unit, they are not required to work principally for that business unit.

- *Information security* – Telstra commits not to use or disclose protected information to give retail business units an unfair advantage. However, it is unclear what, if any, protections would apply in relation to the potential use by a Telstra retail business unit of nationally aggregated information from which the identity of a wholesale customer is ascertainable.
- *Price equivalence and transparency* – Telstra proposes to publish reference prices for regulated services, and develop its management accounting system to specify internal wholesale prices faced by Telstra’s retail business units. The proposed measures will need to be modified so as to provide assurance that they are, and will remain, appropriate and effective, especially in supporting the equivalent use of wholesale ADSL services to provide high quality services and applications to end users.
- *Telstra Exchange Building Access (TEBA)* – Telstra commits to process requests for TEBA in an equivalent manner and manage queues for exchange capacity on a non-discriminatory basis. However, wholesale customers do not have an equivalent right to Telstra to place an order to reserve exchange capacity for future use.
- *Implementation* – there is no assurance regarding timing for implementation of many of the proposed equivalence and transparency measures in the undertaking which would not become operative until the later of 2 months after the undertaking commences or the date the commercial arrangements between NBN Co and Telstra come into effect (which in turn is subject to a number of conditions precedent).
- *Dispute resolution* - the undertaking does not provide a mechanism for the resolution of price equivalence disputes between Telstra and its wholesale customers.
- *Exempt areas* – the equivalence and transparency commitments would not apply to regulated services in those areas where Telstra is exempt from supply on regulated terms. Telstra has clarified that the exclusion for exempt areas is only intended to apply to price-related commitments and proposes to make amendments to the undertaking to this effect.

The ACCC is seeking industry and consumer views on the appropriateness and effectiveness of Telstra’s proposed equivalence and transparency measures as well as on whether the proposed measures have been documented with sufficient clarity and detail to minimise the potential for subsequent disputation around the nature of the commitments.

## **Migration Plan**

The ACCC's preliminary view - subject to submissions from interested parties - is that the draft migration plan submitted by Telstra addresses all of the statutory criteria. However, this discussion paper seeks input in relation to several issues where it is not clear whether the draft plan addresses the criteria to the required standard. These include:

- Whether the level of detail in various clauses of the draft migration plan is sufficient to satisfy the ACCC that it complies with the migration plan principles.
- Whether the dispute resolution process provided for in the draft migration plan is adequate.
- Whether the draft migration plan sufficiently minimises disruption to end-user services, for example through provision for the supply of interim carriage services.

### **Process**

The ACCC does not intend to issue a draft decision prior to finalising its decisions in relation to the undertaking and draft migration plan. Therefore, to assist in its decisions, the ACCC strongly encourages interested parties to make submissions in response to its discussion paper by no later than 5 pm on Tuesday 27 September 2011.

The timing of the ACCC's decision will be subject to a number of factors, including:

- the clarity with which Telstra explains its proposed interim equivalence and transparency measures. In this regard, it is clear from initial discussions that industry does not have sufficient information around Telstra's proposed price equivalence commitments and dispute resolution scheme;
- the timeliness with which those tasks already identified in the undertaking as requiring further development can be completed, including
  - the submission by Telstra of an ITA Company Constitution and Charter of Independence to the ACCC's and industry's satisfaction;
  - an appropriate wholesale DSL pricing formula and financial reporting templates being agreed;
- the quantity and range of submissions received in response to this discussion paper and the extent to which these raise other significant concerns; and
- Telstra's preparedness to address identified concerns.

# 1 Introduction

## 1.1 Overview

This consultation paper seeks submissions from interested parties in relation to the ACCC's assessment of Telstra's structural separation undertaking (SSU) submitted on 29 July 2011 and the revised draft migration plan (draft Plan) submitted on 24 August 2011.

The Telco Act requires the ACCC to consult publicly on its assessment of the draft Plan, but not the SSU. However, given the significance of the SSU in facilitating structural reform, the ACCC considers that it should be consulted on alongside the draft Plan.

The ACCC does not intend to issue a draft decision in relation to its assessment of the SSU and draft Plan.

The ACCC must either accept or reject the SSU, and either approve the draft Plan or request that Telstra provide a revised draft Plan for consideration. The ACCC will provide a statement of reasons explaining the basis for each decision.

## 1.2 Structure of this paper

This consultation paper is divided into two sections:

- Part A – Assessment of Telstra's SSU.
- Part B – Assessment of Telstra's draft Plan

Parts A and B outline the relevant assessment criteria and issues of potential importance to the decisions to be reached on the SSU and the draft Plan respectively.

Given that the criteria for assessment of the SSU and the draft Plan are quite different, the ACCC encourages industry participants and other interested parties to carefully consider the entire consultation paper and make submissions on the questions raised in both Parts A and B.

## 1.3 Timeline and consultation process

### 1.3.1 Deadline and format of submissions

Submissions should address the specific questions raised in Parts A and B, and are requested by no later than **5.00 pm on 27 September 2011**. A complete list of the questions for discussion is included at Attachment C.

The ACCC may be limited in its ability to fully consider late submissions, therefore it is important that interested parties make their submissions by the above deadline.

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](mailto:ssu-migration@acc.gov.au)

The ACCC also accepts hard copies of submissions. Any hard copy should be sent to the following address:

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

### **1.3.2 Confidentiality claims**

To facilitate an informed and open consultation, the ACCC will treat all submissions as public and publish them on the ACCC website. If interested parties wish to submit commercial-in-confidence material to the ACCC, they should submit both a public and commercial-in-confidence version of their submission. In the confidential version, confidential material should be clearly identified and marked as confidential. In the public version, confidential material should be redacted and replaced with an appropriate symbol or '[c-i-c]'.

It is the ACCC's preference that as much material is disclosed in the public response as possible.



# PART A: STRUCTURAL SEPARATION UNDERTAKING

## 2 Overview

The structure of this part is as follows:

- **Section 3 Background** – This section provides an overview of the structural reform and the existing regulatory regime.
- **Section 4 Structural Separation Undertaking** – This section provides an overview of Telstra’s SSU including the legislation relating to its scope and criteria for assessment as well as the conditions precedent that need to be satisfied before the SSU can come into effect.
- **Section 5 Assessment Framework** – This section sets out the legislative framework for the ACCC’s assessment of Telstra’s SSU including the requirement for structural separation, the required equivalence and transparency measures, required compliance measures and the matters to which the ACCC is to have regard.
- **Section 6 Assessing the Impact of the SSU** – The ACCC has set out its current views regarding the likely outcomes for both a future with this SSU and a future without this SSU.
- **Section 7 Promotion of a competitively neutral environment** – This section discusses how structural reform can assist in the promotion of a competitively neutral environment and specific factors of this structural reform.
- **Section 8 Consolidation of fixed-line access networks** – This section discusses the implications for competition and consumers of the Definitive Agreements and the migration of customers from existing fixed-line access networks to the wholesale only access network that will be operated by NBN Co.
- **Section 9 Other matters relating to the Definitive Agreements** – This section outlines a number of key matters arising from the Definitive Agreements that are not directly related to the consolidation of fixed-line access networks.
- **Section 10 Interim equivalence and transparency** – This section discusses the ACCC’s consideration of the proposed interim equivalence and transparency measures.
- **Section 11 Monitoring of compliance with the obligation to structurally separate** – This section discusses the ACCC’s consideration of Telstra’s proposed compliance measures.

## 3 Background

### 3.1 Structural reform of the telecommunications industry

In 2009 the Government issued a discussion paper (*National Broadband Network: Regulatory Reform for 21<sup>st</sup> Century Broadband*) seeking views on various reform options that the Government was considering to reform the telecommunications regulatory framework in the transition to the NBN.

Following this review, the CACS Act was passed in November 2010, which introduced a suite of amendments to the Telco Act that created a framework to address Telstra's vertical and horizontal integration.

The Explanatory Memorandum to the CACS Bill states that the legislative package was, among other things "aimed at enhancing competitive outcomes in the Australian telecommunications industry."<sup>1</sup> The Explanatory Memorandum cited Telstra's vertical and horizontal integration and stated:

Partly because of this integration, it has been able to maintain a dominant position in virtually all aspects of the market, despite more than 10 years of open competition. It is the Government's view that Telstra's high level of integration has hindered the development of effective competition in the sector.<sup>2</sup>

Key features of the new framework were provisions for the vertical and horizontal separation of Telstra and reforms to the telecommunications regulatory regime including the telecommunications specific sections of the CCA.

Under the framework introduced by the CACS Act, Telstra may elect to either submit a voluntary structural separation undertaking or be subject to mandatory functional separation.

The Telco Act was amended to provide that Telstra may be prevented from acquiring designated spectrum, which is anticipated to be required for advanced wireless broadband services, unless it submits an SSU and:

- an undertaking that it will not be in a position to control an HFC network;
- an undertaking that it will not be in a position to control a subscription television broadcasting licence (i.e. that Telstra divests its FOXTEL interest);

and the ACCC accepts those undertakings.<sup>3</sup>

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<sup>1</sup> Explanatory Memorandum, CACS Bill, p.1.

<sup>2</sup> Explanatory Memorandum, CACS Bill, p.1.

<sup>3</sup> Telco Act, Part 10, Schedule 1.

However, the Minister may exempt Telstra from the requirement to have an undertaking about HFC networks or subscription television broadcasting licences if the Minister is satisfied that Telstra's SSU is sufficient to address concerns about the degree of Telstra's power in telecommunications markets.

If an SSU does not come into force, Telstra will be required to functionally separate.<sup>4</sup>

## 3.2 Existing regulatory framework

### 3.2.1 Parts XIB and XIC of the CCA

Part XIB of the CCA establishes a specific regime for addressing anti-competitive conduct in the telecommunications industry. It operates in addition to the general competition provisions in Part IV of the CCA. At the time of its introduction, the Government considered that total reliance on Part IV to constrain anti-competitive conduct in telecommunications might be ineffective as:

Telecommunications is an extremely complex, horizontally and vertically integrated industry and competition is not fully established in some telecommunications markets. There is considerable scope for incumbents to engage in anti-competitive conduct because competitors in downstream markets depend on access to networks or facilities controlled by the incumbents.<sup>5</sup>

Broadly, the competition provisions in Part XIB prohibit a carrier or carriage service provider from engaging in anti-competitive conduct.<sup>6</sup>

Part XIC establishes an industry specific regime for regulated access to carriage services. At the time, the Government considered that there was a need for an industry-specific regime, in addition to the essential facilities access regime in Part IIIA of the CCA, which would reflect particular policy interests in promoting any-to-any connectivity; promoting diversity and competition in the supply of carriage services, content services and other services supplied by means of carriage services; and ensuring access to carriage services is established on reasonable terms and conditions and includes necessary ancillary services.<sup>7</sup> Part XIC has its own specific objective "to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services."<sup>8</sup>

Part XIC provides for the ACCC to declare carriage services<sup>9</sup> and related services (declared services). Telstra supplies a number of declared services to its wholesale

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<sup>4</sup> Telco Act, Part 9, Schedule 1.

<sup>5</sup> Explanatory Memorandum, *Trade Practices Amendment (Telecommunications) Bill 1996*, p.6.

<sup>6</sup> Defined as taking advantage of a substantial degree of power in a telecommunications market with the effect or likely effect of substantially lessening competition in that or any other telecommunications market; or contravening sections 44ZZRJ, 44ZZRK, 45, 45B, 46, 47 or 48 of Part IV of the CCA where that conduct relates to a telecommunications market.

<sup>7</sup> Explanatory Memorandum, *Trade Practices Amendment (Telecommunications) Bill 1996*, p.38.

<sup>8</sup> CCA, section 152AB.

<sup>9</sup> Currently declared services are listed on the ACCC's declared services register: <http://www.accc.gov.au/content/index.phtml/itemId/777921>.

customers and competes against these wholesale customers in downstream retail markets.

Providers of a declared service must comply with the standard access obligations (SAOs) set out in Part XIC,<sup>10</sup> unless an exception or exemption applies. Among other things, the SAOs require a provider of a declared service (the access provider), if requested by an access seeker to:

- supply an active declared service in order that the access seeker can provide carriage services and/or content services;
- take all reasonable steps to ensure that the technical and operational quality of the active declared service is equivalent to that which the access provider provides to itself; and
- take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the access seeker, fault detection handling and rectification of technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

The CACS Act amended the CCA to change the operation of Part XIC from a negotiate/arbitrate access regime to a regime which requires the ACCC to make access determinations for all declared services. Access determinations set default price and non-price terms, which apply in the absence of a privately negotiated access agreement between the service provider and access seeker. Compliance with access determinations is a condition of a carrier licence and a service provider rule.

### 3.2.2 Operational separation regime

In 2005, the Department of Communications, Information Technology and the Arts conducted a review of telecommunications competition regulation and introduced an operational separation regime to Telstra. This regime was intended to support greater equivalence and transparency in services provided by Telstra to its wholesale customers and its retail operations.<sup>11</sup> At the time, the Government noted that:

Telstra is a vertically integrated firm which retains a dominant market position in many telecommunications markets. Telstra also owns infrastructure which its competitors need to access and interconnect with in order to compete against it. Telstra's control over this infrastructure, combined with its market position, creates an incentive and the ability for it to favour its own retail business in the provision of access to this important infrastructure. Telstra's vertical integration also creates a lack of transparency that makes it harder for the ACCC to effectively enforce the competition regulations.<sup>12</sup>

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<sup>10</sup> CCA, section 152AR.

<sup>11</sup> Department of Communications, Information Technology and the Arts, *Telecommunications Competition Regulation – Issues Paper*, April 2005.

<sup>12</sup> Department of Communications, Information Technology and the Arts, *Telecommunications Competition Regulation – Issues Paper*, April 2005, p.3.

The current operational separation regime is governed by an operational separation plan (OSP) which was proposed by Telstra and approved by the Minister in June 2006. It contains a number of commitments around Telstra's organisational arrangements and commitments aimed at promoting equivalence in the standard of delivery of eligible services,<sup>13</sup> processes for providing information to wholesale customers about changes to Telstra's network, measures for Telstra to protect wholesale customers' confidential information and processes by which Telstra would resolve complaints from wholesale customers.

Telstra's OSP also provides for a price equivalence framework (PEF) which seeks to provide ongoing assurance that Telstra is not favouring its retail arm by supplying services to itself at prices which are unjustifiably lower than those offered to its downstream competitors. The PEF requires Telstra to conduct imputation testing of material price changes (as defined by Telstra). The PEF imputation testing is intended to assess whether there is sufficient margin for an efficient retail competitor to compete with Telstra in the relevant retail market(s) given the wholesale costs or costs of self supply that are, or would be, faced by an efficient competitor and the costs of transforming wholesale products or inputs that are self supplied into retail products.

The role of the ACCC with respect to the OSP is essentially to investigate and report matters to the Minister as appropriate.

The ACCC considers that the operational separation regime is ineffective. In June 2008, the ACCC noted in relation to the effectiveness of Telstra's OSP:

We continue to receive complaints of conduct that suggest that the objective of equivalence which was the objective of the regime, is not being achieved. There have been some instances of conduct since the regime's inception which, while it is not clear they breach the operational separation plan, do not promote the objective of equivalence which was the fundamental objective of the plan in the first place. In relation to the other objective of transparency, there is some additional reporting that the regime provides. However, this has been of limited benefit and is at a highly aggregated level... There are limited self regulatory mechanisms and unduly convoluted processes to implement any corrective action.<sup>14</sup>

In its submission to the Government's 2009 *National Broadband Network: Regulatory Reform for 21<sup>st</sup> Century Broadband* discussion paper (ACCC Regulatory Reform Submission), the ACCC stated:

The ACCC's experience is that the current operational separation regime aimed at promoting equivalence is ineffective and does not address Telstra's incentive and ability to discriminate against its competitors. Therefore any measures to improve at the margins the operational separation regime would just be an

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<sup>13</sup> Eligible services are defined in section 152AL of the CCA and include listed carriage services (as defined in section 16 of the Telco Act) and services which facilitate the supply of listed carriage services.

<sup>14</sup> ACCC, *Senate Estimates Standing Committee on Economics*, 5 June 2008.

attempt to develop upon a framework that is, at its core, unable to promote its fundamental objectives.<sup>15</sup>

In the same submission, the ACCC noted that:

The current operational separation regime is not an appropriate structural arrangement for Telstra during the transition to the NBN. Furthermore it is inconsistent with the structural framework envisaged for the future NBN environment and will not assist in facilitating opportunities for competitive outcomes in the transition period.<sup>16</sup>

Upon the coming into force of an SSU, the current operational separation regime will cease to operate.

### **3.3 Competition in Australian telecommunications markets**

As noted in the *ACCC telecommunications reports 2008–09*, telecommunications markets typically exhibit factors that can impede the development of competition including high fixed and sunk costs of building certain networks. These can inhibit market entry or limit the extent to which entrants can compete. At the same time, there are many aspects of telecommunications that are, by their nature, highly dynamic and characterised by technological advances which can provide entrants with the means and opportunity to compete.<sup>17</sup>

Elements of Telstra’s fixed-line telecommunications networks continue to represent enduring bottlenecks and are therefore an important focus of current regulation under Part XIC of the CCA. An enduring bottleneck is a network element or facility that exhibits natural monopoly characteristics and is essential for the provision of services to end-users in downstream markets in a way that promotes competition.

Notwithstanding the regulation of access to Telstra’s fixed-line networks, Telstra has endured as the dominant force in Australian telecommunications. It is one of the most integrated telecommunications service providers in the world, with a high degree of vertical and horizontal integration. It owns the only ubiquitous fixed-line network in Australia, an HFC network in major capital cities and other key bottleneck infrastructure including exchange buildings and parts of its transmission network.

The current state of competition in relevant markets is discussed in Attachment A1.

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<sup>15</sup> ACCC Regulatory Reform Submission, p.8.

<sup>16</sup> ACCC Regulatory Reform Submission, p.9.

<sup>17</sup> ACCC, *ACCC telecommunications reports 2008-09*, p.9.

### 3.4 National Broadband Network

On 7 April 2009 the Government announced that it intended to establish a company, NBN Co, to build and operate a wholesale-only, open access NBN.<sup>18</sup>

The key features of the NBN including its rollout and operation have been shaped and are outlined by a number of documents and legislative provisions including:

- the NBN Implementation Study;
- the Government's Statement of Expectations (SOE);
- NBN Co's Corporate Plan;
- the NBN Companies Act; and
- the NBN Access Act.

The key features of the NBN framework, are set out in Attachment A2.

On 23 June 2011, Telstra announced the execution of commercial agreements with NBN Co, known as the Definitive Agreements. The Definitive Agreements govern, among other things, the terms on which Telstra will disconnect its fixed-line customers and provide services and access to key infrastructure to NBN Co.

The Definitive Agreements and their relevance to the assessment of Telstra's SSU are discussed in further detail in section 5.5.5 (conduct authorised under section 577BA).

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<sup>18</sup> Prime Minister, Treasurer, Minister for Finance, Minister for Broadband, 'New National Broadband Network,' (joint media release, 7 April 2009).

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## 4 Structural Separation Undertaking

### 4.1 Overview

Paragraph 577A(1)(a) of the Telco Act allows the ACCC to accept a written SSU from Telstra.

On 24 June 2011, following a public consultation period, the Minister published the following instruments relating to the scope and criteria for assessment of the SSU:

- *Telecommunication (Structural Separation - Network and Services Exemption) Instrument (No. 1) 2011* (Network and Services Instrument) - this determines the networks and services that will be exempt from the scope of Telstra's SSU. The scope of the SSU is discussed further at section 5.2.
- *Telecommunications (Regulated Services) Determination (No. 1) 2011* (Regulated Services Determination) - this specifies which services will be subject to interim transparency and equivalence measures, discussed further at section 10.2.
- *Telecommunications (Acceptance of an Undertaking about Structural Separation – Matters) Instrument 2011* (Ministerial Criteria Instrument) – this sets out matters to which the ACCC is to have regard in assessing the SSU in addition to those specified in section 577A of the Telco Act. This is discussed further at section 5.5.

These instruments and further detail on the consultation process, including stakeholder submissions, is available at:

[http://www.dbcde.gov.au/broadband/national\\_broadband\\_network/telecommunications\\_regulatory\\_reform](http://www.dbcde.gov.au/broadband/national_broadband_network/telecommunications_regulatory_reform).

On 29 July 2011, Telstra submitted an SSU to the ACCC and an accompanying supporting submission.<sup>19</sup>

### 4.2 Conditions precedent to the SSU

Section 577AA of the Telco Act provides that Telstra can nominate one or more events in accordance with the provisions of section 577AA as conditions precedent to the SSU coming into effect.

Attachment A to the SSU is “a document which accompanies [the] undertaking given by Telstra” and is given under section 577AA of the Telco Act. It nominates the following events as conditions precedent to the coming into force of the SSU:

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<sup>19</sup> Accessible at: <http://www.accc.gov.au/content/index.phtml?itemId=1003999>.



- the approval of the draft migration plan by the ACCC under section 577BDA or 577BDC of the Telco Act;
- the making of a declaration under subsection 577J(3) of the Telco Act;<sup>20</sup>
- the making of a declaration under subsection 577J(5) of the Telco Act;<sup>21</sup> and
- pursuant to subsection 577AA(1)(c)(iii) of the Telco Act, the passage of an ordinary resolution by Telstra’s members who are entitled to vote on the resolution which approves, or has the effect of approving, Telstra taking action to co-operate with NBN Co and the Commonwealth through implementing its obligations under the Definitive Agreements (subject to the satisfaction or waiver of conditions precedent).

Subsection 577AA(1) of the Telco Act specifies that any decision by the ACCC to accept the SSU must be expressed to be subject to the occurrence of the events nominated under section 577AA within a specified period after the SSU is accepted. That period must be 6 months, unless otherwise nominated by the Minister under subsection 577AA(5).<sup>22</sup> Therefore, if the ACCC decides to accept the SSU, it is required to express any decision to accept the undertaking to be subject to the occurrence of these events within 6 months, in accordance with the requirements of subsection 577AA(1).

## 4.3 The SSU and the Competition and Consumer Act

### 4.3.1 Section 577BA authorisation

Section 577BA of the Telco Act specifies a range of different contracts, arrangements and understandings (CAUs) and conduct relating to the agreements between NBN Co and Telstra and relating to Telstra’s SSU that are authorised for the purposes of subsection 51(1) of the CCA.

Subsection 51(1) of the CCA relevantly provides that in deciding whether a person has contravened Part IV of the CCA, anything specified in, and specifically authorised by an Act must be disregarded.

The section 577BA authorisation is extended to Part XIB by subsection 151AJ(9) of the CCA, which provides that a person does not engage in anti-competitive conduct if, under section 577BA of the Telco Act, the conduct is authorised for the purposes of subsection 51(1) of the CCA.

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<sup>20</sup> Subsection 577J(3) of the Telco Act provides that the Minister may declare, in writing, that Telstra is exempt from the requirement to have an undertaking under section 577C (i.e. with respect to its HFC network).

<sup>21</sup> Subsection 577J(5) of the Telco Act provides that the Minister may declare, in writing, that Telstra is exempt from the requirement to have an undertaking under section 577E (i.e. with respect to subscription television broadcasting licences).

<sup>22</sup> Telco Act, subsection 577AA(4).

The Explanatory Memorandum to the CACS Bill explains that:

This authorisation is proposed in recognition that Telstra's progressive migration of customers from its copper and subscription television cable networks to the new wholesale-only fibre network, in accordance with an undertaking accepted by the ACCC, is in the national interest and will promote structural reform of the telecommunications industry.<sup>23</sup>

A number of the authorisation provisions in section 577BA only come into effect once an SSU is in force. The ACCC is required, by the Ministerial Criteria Instrument, to have regard to conduct that would be authorised under section 577BA as a consequence of the ACCC's acceptance of the SSU or of the SSU coming into force when deciding whether to accept an SSU.<sup>24</sup>

The ACCC is not required to conduct an authorisation process under Part VII of the CCA. However, the ACCC proposes to consider the impact of the conduct that would be authorised if the SSU is accepted and comes into force as part of its overall decision. This aspect of the ACCC's assessment of the SSU is discussed at section 5.5.5.

#### **4.3.2 Other relevant provisions of the CCA**

In addition to the legislative authorisation, the CCA provides that if Telstra has engaged or is required to engage in conduct in order to comply with an SSU in force, then, in performing a function, or exercising a power under Part XIB or Part XIC in relation to Telstra, the ACCC must have regard to the conduct to the extent that the conduct is relevant.<sup>25</sup>

The CCA provides that the ACCC must not perform a function or exercise a power under Part XIC so as to prevent Telstra from complying with the undertaking.<sup>26</sup> For example, the ACCC could not make an access determination where a term of that access determination would prevent Telstra from complying with its SSU.

Section 152AR in Part XIC of the CCA sets out the SAOs that apply to a provider of declared services. Subsection 152AR(3)(a) provides that an access provider must, if requested to do so by a service provider, supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services.

The obligation to supply includes an obligation on the access provider to take all reasonable steps to ensure:

- technical and operational quality of the supplied service; and
- fault detection, handling and rectification of a technical and operational quality and timing

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<sup>23</sup> Explanatory Memorandum, CACS Bill, p. 3.

<sup>24</sup> Ministerial Criteria Instrument, paragraph 4(d).

<sup>25</sup> CCA, subsections 151CQ(2), 152ER(2).

<sup>26</sup> CCA subsection 152ER(3).

is equivalent to that which the access provider provides to itself.

The obligation to supply an active declared service is limited by subsection 152AR(4)(e) which provides that it does not apply to the extent (if any) to which the imposition of the obligation would have the effect of preventing Telstra from complying with, among other things, an SSU.

The ACCC notes that the SSU contains a number of commitments regarding equivalence in regulated services supplied by Telstra to its retail business units and to access seekers. Any inconsistency with the operation of the obligation to supply declared services in accordance with the SAOs is most likely to arise in relation to Telstra's equivalence obligations in the SSU.

## 5 Assessment framework

### 5.1 Overview

The legislative framework for the ACCC's assessment of Telstra's SSU imposes a bespoke statutory test which specifies a range of mandatory requirements that the SSU must meet, as well as a diverse range of matters to which the ACCC must have regard in deciding whether or not to accept an SSU that satisfies the mandatory requirements. The framework is unique in that it requires the ACCC to consider an unusually diverse range of matters.

More particularly, section 577A of the Telco Act sets out the mandatory requirements and the broad statutory criteria that the ACCC is required to apply in assessing the SSU.

Under this section, an SSU must meet the statutory requirements that before the ACCC could accept the SSU, it must be satisfied that it:

- provides for structural separation
- provides for appropriate and effective transparency and equivalence in relation to Telstra's supply of regulated services to its wholesale customers and retail business units during the interim period;<sup>27</sup> and
- contains appropriate and effective mechanisms for the ACCC to monitor Telstra's compliance with the SSU.<sup>28</sup>

Subsection 577A(6) of the Telco Act then sets out a number of matters to which the ACCC is to have regard in making its decision whether to accept an SSU that meets the mandatory requirements set out above.

The ACCC considers that some of the specified matters can be considered through a more conventional competition analysis, while others may require a different approach.

### 5.2 Requirement for structural separation

Subsection 577A(1)(a) of the Telco Act allows the ACCC to accept a written structural separation undertaking from Telstra that at all times after the designated day:<sup>29</sup>

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<sup>27</sup> Telco Act, section 577A(3).

<sup>28</sup> Telco Act, section 577A(5).

<sup>29</sup> Subsection 577A(10) of the Telco Act provides that the designated day will be 1 July 2018 unless the Minister specifies otherwise. Following the ACCC's acceptance of the SSU, the Minister may only nominate a date which is later than 1 July 2018.

- Telstra will not supply fixed-line carriage services to retail customers in Australia using a telecommunications network over which Telstra is in a position to exercise control; and
- Telstra will not be in a position to exercise control of a company that supplies fixed-line carriage services to retail customers in Australia using a telecommunications network over which Telstra is in a position to exercise control.

The scope of the section 577A(1)(a) requirement regarding Telstra's commitment to structurally separate is narrowed by the application of the Networks and Services Instrument. This instrument exempts certain networks and services from the structural separation requirement. Telstra is not required to commit to structurally separating in relation to services provided over exempt networks or in relation to the provision of exempt services.

The ACCC is confined to assessing whether Telstra has provided an SSU which meets the requirements of subsection 577A(1)(a) of the Telco Act, within the scope set by the Network and Services Instrument.

The Network and Services Instrument exempts the provision of fixed-line carriage services in any areas that are not passed by NBN fibre by the designated day or in relation to any area outside the NBN fibre rollout region. Telstra's structural separation is therefore limited to the geographical area that will be defined by NBN Co's fibre footprint. As is noted below, the Government's objective is that the NBN fibre footprint will extend to 93 per cent of Australian premises, with minimum fibre coverage of 90 per cent of Australian premises.<sup>30</sup>

Within the NBN fibre footprint, the Network and Services Instrument permits Telstra to operate and supply some networks and services after the designated day, including:

- pay TV services delivered over the HFC network other than IP based services;<sup>31</sup>
- all fibre networks and services delivered over those networks to the extent that they do not contain copper or form part of a HFC network;<sup>32</sup>
- services required by law to be supplied over a HFC or copper network;<sup>33</sup>
- any network used to connect international networks;<sup>34</sup> and
- backhaul networks.<sup>35</sup>

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<sup>30</sup> SOE, p.1.

<sup>31</sup> Ministerial Criteria Instrument, Schedule 1, item 5.

<sup>32</sup> Ministerial Criteria Instrument, Schedule 2, item 2.

<sup>33</sup> Ministerial Criteria Instrument, Schedule 1, items 8-9.

<sup>34</sup> Ministerial Criteria Instrument, Schedule 2, item 12.

<sup>35</sup> Ministerial Criteria Instrument, Schedule 2, item 1.

Part C of the SSU states that Telstra undertakes that, at all times after the designated day:

- (a) Telstra will not supply Non-Exempt Services to retail customers in Australia using a Non-Exempt Network over which Telstra is in a position to exercise control; and
- (b) Telstra will not be in a position to exercise control of a company that supplies Non-Exempt Services to retail customers in Australia using a Non-Exempt network over which Telstra is in a position to exercise control.

The ACCC considers that the commitment to structural separation given by Telstra in Part C of its undertaking is consistent with the requirements of subsection 577A(1)(a).

### **5.3 The required interim equivalence and transparency measures**

Subsection 577A(3) of the Telco Acts provides the ACCC “must not” accept an SSU unless it is satisfied that:

- the SSU provides for transparency and equivalence in relation to the supply by Telstra of regulated services to
  - its wholesale customers; and
  - its retail business units, during the period prior to Telstra’s full structural separation coming into effect; and
- that the SSU does so in an appropriate and effective manner.

The ACCC must be satisfied in this regard, irrespective of the view taken by the ACCC in relation to the SSU’s other components. Consequently, the interim equivalence and transparency measures form a discrete part of the ACCC’s assessment.

Section 10 outlines the ACCC’s approach to this assessment and discusses Telstra’s proposed interim arrangements.

### **5.4 The required compliance measures**

Subsection 577A(5) of the Telco Act provides that the ACCC must not accept the SSU unless the ACCC is satisfied that:

- the SSU provides for:
  - the ACCC to monitor Telstra’s compliance with the undertaking; and
  - Telstra to have systems, procedures and processes that promote and facilitate the ACCC’s monitoring of Telstra’s compliance with the undertaking; and
- that the SSU does so in an appropriate and effective manner.

As for interim equivalence and transparency measures, the ACCC must be satisfied in this regard irrespective of the view taken in relation to the SSU's other components.

The ACCC discusses this threshold in section 10.11 (in relation to the interim period) and section 11 (in relation to measures after the designated day).

## **5.5 Matters to which the ACCC is to have regard**

### **5.5.1 General**

In assessing the SSU as a whole, the ACCC must have regard to a number of considerations which are set out at subsections 577A(6) of the Telco Act. In having regard to these matters, the ACCC must give weight and genuine consideration to each of them.

Subsection 577A(6) provides as follows:

In deciding whether to accept an undertaking under this section, the ACCC must have regard to:

- (a) the matters set out in an instrument in force under subsection (7); and
- (aa) the national interest in structural reform of the telecommunications industry; and
- (ab) the impact of that structural reform on:
  - (i) consumers; and
  - (ii) competition in telecommunications markets; and
- (b) such other matters (if any) as the ACCC considers relevant.

Subsection 577A(7) refers to the Ministerial Criteria Instrument, which sets out a number of additional matters to which the ACCC is to have regard.

The matters to which the ACCC “must have regard” can be broadly divided into the following categories:

- Substantive criteria, which the ACCC will need to analyse and consider in some depth. For example, the impact of the structural reform on consumers and competition in telecommunications markets.
- Specific criteria, where the ACCC will have to form a view as to whether the SSU has satisfied that matter. For example, many of the factors set out in the Ministerial Criteria Instrument relating to interim equivalence and transparency will either be satisfied by the measures in the SSU or not.
- Additional matters that form part of the contextual background within which the ACCC will make its decision. For instance, some of the matters relating to the NBN as set out in the Ministerial Criteria Instrument would fall into this category.

The ACCC considers that it may be useful to apply a ‘future with and without’ test in assessing the likely impact of the proposed structural reform provided by the SSU against some of these matters.

However, the ACCC’s decision on whether to accept the SSU will be based upon an overall assessment, having regard to all of the specified matters.

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

Section 577A(6)(aa) requires that the ACCC have regard to “the national interest in structural reform of the telecommunications industry”.

The term ‘national interest’ is generally understood to refer to a worthwhile objective as viewed from a nation’s perspective. Such objectives could fall within a broad spectrum – for instance, they could involve matters of national defence, economic prosperity or social cohesion.

In the context of structural reform of the telecommunication industry, the ACCC’s preliminary view is that the most appropriate interpretation of this term appears to be the achievement of economic objectives. This is because structural reform is concerned with enhancing the way economic activity can be better arranged – for example, what should be produced, how resources should be organised, the way income and wealth should be distributed – to maximise the economic welfare of the country.

Examples of economic objectives could be to improve economic efficiency and output, and increase national wealth.

The potential for structural reform to promote economic efficiency, and therefore the overall welfare of a nation, is well established. This was recognised in the Hilmer Report and subsequently by the then Industry Commission, which estimated the growth and revenue implications from that report and related structural reforms.<sup>36</sup>

In particular, the Hilmer Report noted that structural reforms may be the appropriate response to vertical integration in order to promote effective competition:

The introduction of effective competition into markets traditionally supplied by public monopolies will often require more than the removal of regulatory restrictions on competition. Where the incumbent firm has developed into an integrated monopoly during its period of protection from competition, structural reforms may be required to dismantle excessive market power and increase the contestability of the market.<sup>37</sup>

The concept of ‘sabotage’, as referred to in the economic literature, occurs when an incumbent network-based provider uses its control over network facilities to engage in non-price discrimination to reduce the ability of new entrants to compete. Telstra’s

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<sup>36</sup> Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms: a Report by the Industry Commission to the Council of Australian Governments*, 1995.

<sup>37</sup> Hilmer Report, p.215.



undertaking provides principally for separating control of particular networks from its supply of downstream services and, until such time as that separation can be effected, provides certain safeguards against misuse of its ongoing market power arising from its control over those networks.

This is consistent with the Hilmer Report, which noted that there are alternatives for addressing concerns arising from vertical integration of natural monopoly elements and potentially competitive services. Broadly speaking, either the natural monopoly element should be separated from the potentially competitive elements, or regulatory controls should be established to guard against misuse of control over access to the natural monopoly element by the integrated operator.<sup>38</sup>

### **5.5.3 The impact of structural reform on competition**

Section 577A(6)(ab)(ii) provides that the ACCC is to have regard to “the impact of that structural reform on competition in telecommunications markets”.

For the purposes of its assessment, the ACCC is not required to precisely define the relevant telecommunications markets that may be affected. The ACCC intends to consider the affected markets in a broad sense and then assess any benefits or detriments that would arise in those markets from the impact of the structural reform proposed. The ACCC will assess the likely magnitude of those benefits and detriments by reference to the state of those markets ‘with and without’ the SSU.

The ACCC proposes to undertake a long term forward-looking assessment of the likely impact of structural reform upon relevant markets. In order to make this assessment, the ACCC must make an assessment regarding the likely impact that the SSU coming into force would have upon the markets that will develop during the next decade as the NBN is rolled out.

The ACCC proposes to consider the impact upon competition in relation to the following markets:

- Fixed access services;
- Transmission capacity services;
- Downstream (retail and wholesale) fixed broadband and voice services; and
- Wireless broadband and voice services.

These markets are discussed further in Attachment A1.

The assessment of the relevant markets, and the potential impact that the SSU may have upon those markets is, by its very nature, open to contention. The ACCC has

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<sup>38</sup> Hilmer Report, p.219.

therefore based its consideration of the relevant markets on its current understanding of how these market structures are likely to evolve into the future.

The impact upon competition will be considered having regard to the expected levels of both price and non-price competition. An important consideration to this assessment is whether or not the likely structure of the relevant market will give rise to one or more participants having market power.

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

Section 577A(6)(ab)(i) provides that the ACCC is to have regard to “the impact of that structural reform on consumers”.

The impact of this structural reform upon consumers will be highly related to the likely impact on competition and efficiency in telecommunications markets.

The Hilmer Report recognised the direct link that effective competition and the resulting efficiency has on welfare and its translated impact on consumers and society:

Economic efficiency plays a vital role in enhancing community welfare because it increases the productive base of the economy, providing higher returns to producers in aggregate, and higher real wages. Economic efficiency also helps ensure that consumers are offered, over time, new and better products and existing products at lower cost. Because it spurs innovation and invention, competition helps create new jobs and new industries...<sup>39</sup>

Increased economic efficiency also means that firms are better able to adjust to changes, including unforeseen changes. This makes the economy more resilient and robust, and better able to adjust to changes in global economic conditions.

The Government has stated that a key objective of its structural reform is “to promote an open, competitive telecommunications market to provide Australian consumers with access to innovative and affordable services”.<sup>40</sup>

The ACCC may also have regard to other matters relating to the likely impact of the proposed structural reform upon consumers, such as broader social benefits or detriments arising from the SSU coming into force.

#### **5.5.5 Matters set out in the Ministerial Criteria Instrument**

Subsection 577A(6)(a) of the Telco Act provides that the ACCC is to have regard to matters set out in an instrument in force under section 577A(7) (that is, the Ministerial Criteria Instrument).

In the following discussion the ACCC has grouped together some items included in the Ministerial Criteria Instrument for ease of reference only.

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<sup>39</sup> Hilmer Report, p.4.

<sup>40</sup> Explanatory Memorandum, CACS Bill, p.3.

## **Government policy objective**

The Minister has specified that the ACCC must have regard to:

[T]he Government’s policy objective of improving the accessibility and quality of broadband services for consumers in Australia, including those in regional, rural and remote areas.<sup>41</sup>

The Explanatory Statement to the Ministerial Criteria Instrument notes that the intent of the Government’s telecommunications policies is to “dramatically improve the availability of broadband across Australia by creating a national network that is not controlled by a retail company or companies.”<sup>42</sup>

## **Government’s support for a migration form of separation**

The Minister has specified that the ACCC must have regard to:

[T]he Government’s support for a form of structural separation whereby Telstra will progressively migrate fixed-line carriage services that it supplies to retail customers to the national broadband network as that network is rolled out.<sup>43</sup>

The Explanatory Statement to the Ministerial Criteria Instrument also notes that the proposed method of structural separation set out in Telstra’s SSU (that is, migration of customers to the NBN in accordance with the Definitive Agreements) is supported by the Government as it delivers the Government’s structural reform objectives.<sup>44</sup>

The ACCC considers that this criterion also requires the consideration of the practical support that the Government is providing in order to give assurance that the migration will proceed.

## **Expected distribution of the long-term economic benefits to consumers**

The Minister has specified that the ACCC must have regard to:

[The] expected distribution of the long-term economic benefits to different types of consumers in different geographic areas that would occur as a result of the [SSU] coming into force.

The ACCC considers that this criterion requires a segmented assessment, on a ‘future with and without’ basis, of the expected economic effect of structural reform. A key focus of this analysis is the likely effect of the SSU coming into operation on the level of investment and the range of competing product offerings likely to be available in particular market segments. If the proposed structural reform is likely to promote further investment and competition, and encourage additional economic efficiency, in the supply of services to a particular market segment, then long-term benefits would be likely to accrue for those consumers as a result.

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<sup>41</sup> Ministerial Criteria Instrument, paragraph 4(a).

<sup>42</sup> Ministerial Criteria Instrument, Explanatory Statement, p.3.

<sup>43</sup> Ministerial Criteria Instrument, paragraph 4(b).

<sup>44</sup> Ministerial Criteria Instrument, Explanatory Statement, p.4.

The ACCC proposes to undertake this assessment in respect of:

- business consumers and residential consumers, given the potential for them to have different requirements for their communications services and resulting differences in market characteristics; and
- metropolitan and regional areas, reflecting the different market characteristics that have been observed to date in respect of the supply of communications services in each area.

As noted in Attachment A1, investment in competitive fixed-line communications infrastructure has focused almost exclusively in metropolitan areas, suggesting that there are structural factors that inhibit competitive entry in regional areas.

Given the apparent structural impediments to enhanced competition outside of metropolitan areas as discussed above, it may be that structural reform has greater potential to bring economic benefits to regional and rural consumers.

### **Conduct authorised under section 577BA**

The Minister has specified that the ACCC must have regard to:

[T]he conduct that would be authorised under section 577BA of the Act as a consequence of the ACCC’s acceptance of the undertaking or the undertaking coming into force.<sup>45</sup>

The Explanatory Memorandum to the CACS Bill states that the requirement that the parties provide the Definitive Agreements to the ACCC is intended to “allow the ACCC to scrutinise the agreements between Telstra and NBN Co before the ACCC decides whether to accept the undertaking.”<sup>46</sup>

Consequently, the ACCC considers that its obligation to have regard to the agreements should be read in the context of the ordinary meaning of the term scrutinise, being to ‘examine in detail with careful or critical attention.’

An ACCC decision to accept Telstra’s SSU would trigger the benefit of various limbs of the legislative authorisation under section 577BA, providing protection for:

- NBN Co and Telstra “giving effect to” provisions of contracts, arrangements or understandings (CAUs) between NBN Co and Telstra (that is, the Definitive Agreements) once the SSU comes into force;<sup>47</sup>
- Telstra to engage in conduct if that conduct is required in order for Telstra to comply with the SSU;<sup>48</sup>

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<sup>45</sup> Ministerial Criteria Instrument, paragraph 4 (d).

<sup>46</sup> Explanatory Memorandum, CACS Bill, p.100.

<sup>47</sup> Telco Act, subsection 577BA(3).

<sup>48</sup> Telco Act, subsection 577BA(6).

- the acquisition of Telstra assets by an identified party that is specified in the SSU;<sup>49</sup> (Note: The SSU does not currently contemplate any such acquisition); and
- NBN Co and Telstra entering into or giving effect to provisions of future CAUs where Telstra has entered into that CAU in order to comply with the SSU.<sup>50</sup>

The ACCC considers that the Ministerial Criteria Instrument makes it clear that the ACCC must have regard to the conduct that will receive the benefit of the legislative authorisation under section 577BA should the ACCC make a decision to accept the SSU. The ACCC therefore considers that it is appropriate that in its assessment of the SSU the ACCC should consider, for example, the likely impact of that conduct upon competition in relevant markets.

The ACCC will consider the impact of the Definitive Agreements as a whole, although individual elements may affect the view taken. Where the Definitive Agreements are considered to promote competition or to enhance economic efficiency, they would be considered as a factor in favour of accepting the SSU. Where the Definitive Agreements are considered to impede competition or discourage economic efficiency, they would be considered as a factor against the SSU being accepted.

The Definitive Agreements are highly complex commercial documents that were negotiated between NBN Co and Telstra over some time. Telstra has made some public disclosure regarding the content of the agreements in its announcement to the ASX, however the parties have elected not to publicly disclose the content of the Definitive Agreements more fulsomely at this time.<sup>51</sup>

Telstra and NBN Co have provided the ACCC with a copy of various agreements between NBN Co and Telstra. The operative provisions of the following agreements are subject to a condition precedent, namely, the coming into force of an undertaking under section 577A and copies of these agreements were provided to the ACCC in accordance with section 577BA(3):

- Subscriber Agreement between NBN Co and Telstra dated 23 June 2011;
- Infrastructure Services Agreement between NBN Co and Telstra dated 23 June 2011;
- Access Deed between NBN Co and Telstra dated 23 June 2011; and
- Letter dated 23 June 2011, sent to John Stanhope and entitled ‘Condition Precedent - Optus’.

In order to assist stakeholders’ consideration of this matter, the ACCC has set out its preliminary views regarding the key types of conduct that it believes will be likely to receive the benefit of the authorisation under subsection 577BA(3) of the Telco Act in Attachment A3.

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<sup>49</sup> Telco Act, subsection 577BA(7).

<sup>50</sup> Subsection 577BA(8) of the Telco Act.

<sup>51</sup> See Telstra’s announcement to the ASX on 23 June 2011.

The conduct in the Definitive Agreements that will receive the benefit of the legislative authorisation as a result of subsection 577BA(3) of the Telco Act can be generally categorised as follows:

- the acquisition of assets and rights of use to Telstra’s infrastructure by NBN Co (infrastructure sharing arrangements);
- restraints upon Telstra’s ability to compete with the NBN using its existing copper and HFC fixed-line access networks and restraints regarding Telstra’s ability to dispose of those assets (restrictions regarding the use and disposal of existing networks);
- commitments from Telstra to NBN Co that it will acquire services from NBN Co, including provisions that attempt to incentivise Telstra to connect customers to the NBN in preference to its wireless network (commitments to use the NBN);
- restraints upon Telstra’s ability to compete with the NBN using a new fixed-line access network (such as a fibre access network)(restrictions regarding fibre networks);
- commitments from NBN Co that it will attempt to ensure that other vertically integrated owners of access networks also agree to disconnect their networks and that NBN Co will not incorporate those networks into the NBN (non-discriminatory disconnection obligations);
- the rights of the parties to subsequently renegotiate the definitive agreements on the occurrence of a substantial adverse event (the SAE clause); and
- restrictions on NBN Co in relation to the price that it sets for its Basic Service Offer (i.e. otherwise known as its basic access offer).

It is important to note that on its current understanding, the ACCC will have no mechanism for reviewing or monitoring how the parties give effect to the Definitive Agreements. Furthermore, given the complexity of the Definitive Agreements, it is difficult for the ACCC to have a high degree of certainty regarding how particular provisions in the Definitive Agreements will be enacted by the parties over the term of the arrangements.

### **Telstra’s governance framework**

The Ministerial Criteria Instrument states that the ACCC is to have regard to whether the SSU requires Telstra to implement a governance framework that provides for certain measures, including appropriate oversight by Telstra of its compliance with the SSU, regular reporting by Telstra to the ACCC on Telstra’s compliance with the SSU, and measures that provide assurance to wholesale customers that Telstra is meeting its obligations under the SSU.<sup>52</sup>

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<sup>52</sup> Ministerial Criteria Instrument, paragraph 4(f)

The Explanatory Statement notes that some of these matters respond to concerns raised in the consultation process by industry. The ACCC's consideration of the governance framework criteria as they relate to the interim equivalence and transparency measures (Part D of the SSU), and the primary commitment by Telstra to structurally separate, is set out in section 10.11 and section 11, respectively.

### **Specific factors relating to transparency and equivalence**

The Ministerial Criteria Instrument states that the ACCC is to have regard to a number of specific factors relating to interim transparency and equivalence. The ACCC is required to have regard to whether the SSU meets these requirements as a discrete part of its analysis. These specific factors would also inform an assessment of whether the SSU provides for transparency and equivalence in an appropriate and effective manner, as required by subsection 577A(3).

As the interim and equivalence measures form a discrete part of the ACCC's consideration of the SSU, the application of these criteria is further considered in section 10.

### **Matters relating to NBN**

The Ministerial Criteria Instrument<sup>53</sup> states the ACCC is to have regard to a number of matters relating to NBN. These include:

- the Government's SOE given to NBN Co dated 17 December 2010 (SOE);
- NBN Co's Corporate Plan ; and
- the governance and operating framework of NBN Co established by the NBN Companies Act and the NBN Access Act.

Combined, these documents provide the framework for how NBN Co will likely operate. This will inform the ACCC's considerations regarding the likely structure of telecommunications markets following the roll out of the NBN. The key feature of the regulatory framework that arises from these documents is set out in Attachment A2.

The ACCC will have regard to the fact that both the Government and NBN Co have indicated that they will act in a manner which is consistent with these documents.

### **5.5.6 Other matters the ACCC considers relevant**

Subsection 577A(6)(b) provides the ACCC discretion to have regard to "such other matters (if any) as the ACCC considers relevant". The ACCC's preliminary view is that the full suite of matters set out in subsection 577A(6) are sufficient for the ACCC to reach a view as to whether or not to accept the SSU. However, the ACCC invites stakeholders to make submissions as to whether there are other matters to which it should have regard.

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<sup>53</sup> Ministerial Criteria Instrument, paragraphs 4 (i), (j) and (k).  
Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan – Discussion Paper

## 6 Assessing the impact of the SSU

### 6.1 Overview

As is noted above, it may be useful to apply a ‘future with and without’ test in order to aid consideration of a number of the relevant matters that are specified in subsection 577A(6) of the Telco Act.

The ACCC uses this test in different contexts, including a number of its ordinary regulatory decisions under Part XIC of the CCA and its consideration of authorisation applications.<sup>54</sup> The Australian Competition Tribunal has also noted that a ‘future with and without’ approach can provide helpful guidance in the application of tests such as the long term interests of end users.<sup>55</sup>

Essentially, the test enables matters of importance to a particular consideration to be benchmarked, in this case, in the future with the SSU against a future without the SSU coming into effect. This is particularly important because the ACCC must assess the impact of the SSU over the long-term and not just in the near future.

The likely availability of fixed-line networks, including the NBN, is an example of a matter that could be benchmarked in this way and which would have important implications for an assessment of a number of the matters specified in subsection 577A(6) of the Telco Act. The ACCC is required to have regard to a number of bespoke criteria, such as the SOE and NBN Co’s Corporate Plan that inform the contextual background for both the future with and future without the SSU.

That said, applying this test requires a degree of speculation concerning the likely consequences should the SSU be accepted or rejected, particularly given the current legislative framework. The ACCC has set out its current views in this regard, however it is seeking further information through this consultation process, including from the relevant parties.

### 6.2 Future with the SSU

#### 6.2.1 Telstra’s structural reform

- Telstra will be structurally separated in accordance with its commitment in the SSU. That is, Telstra will permanently disconnect premises from its copper network and the broadband capability of its HFC network, and not supply other fixed-line services where it is prohibited from doing so by the operation of the Definitive Agreements (relevant aspects of these agreements are outlined in Attachment A3).

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<sup>54</sup> See, for example, ACCC, *Assessment of FOXTEL’s Special Access Undertaking in relation to the Digital Set Top Unit Service, Final Decision*, March 2007.

<sup>55</sup> *Seven Network Limited* [2004] ACompT 11.



- In general terms, the extent of Telstra’s structural reform will be determined by the extent of the rollout of the NBN fibre network by the designated day. The SOE (to which the ACCC is to have regard) provides that the Government’s expectation is that NBN Co’s fibre footprint will extend to 93 per cent of Australian premises. The Government has indicated that “it is expected that the designated day will align with the completion of disconnection processes associated with the rollout of the optical fibre national broadband network”.<sup>56</sup>
- Telstra will not be subject to functional separation established under Schedule 1 of the Telco Act or to the ‘excluded spectrum regime’ contemplated by section 577GA of the Telco Act; nor will it give undertakings in relation to its HFC network or its subscription television broadcasting licences (that is, its 50per cent ownership of FOXTEL). In this regard, Telstra has specified a number of events in the SSU as conditions precedent to the SSU coming into force including the making by the Minister of relevant declarations under sections 577J(3) and (5) of the Telco Act to exempt Telstra from the requirement to have HFC and FOXTEL undertakings in place.
- Telstra will continue to own its passive infrastructure, including infrastructure that would be relevant for access seekers to interconnect with the NBN, such as exchanges and external interconnect ducts.
- Telstra will continue to supply mobile services, but would be more likely to supply these services in a complementary way to its fixed-line services.

### 6.2.2 NBN Co and the NBN

For the purposes of its analysis, the ACCC is required to have regard to the Government’s expectation that the rollout of the NBN will be likely to occur in accordance with the NBN Co Corporate Plan (which was premised upon the assumption that the Definitive Agreements become operable)<sup>57</sup>, meaning that:

- the wholesale only access network will extend to 93per cent of Australian premises by FY2021.<sup>58</sup>
- the wholesale only access network will supply layer 2 bitstream services – which are access services that support a range of downstream service configurations and applications – with some potential for further unbundling of the access service in future.
- access services will be supplied on a non-discriminatory basis from the regulated point of interconnect (which must meet particular requirements in relation to the availability of competitive transmission infrastructure).

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<sup>56</sup> Explanatory statement to Network and Services Instrument, p.2.

<sup>57</sup> NBN Co Corporate Plan, p 51.

<sup>58</sup> NBN Co Corporate Plan, p 23.

### 6.2.3 Other fixed-line networks

- Optus would be likely to migrate its HFC customers onto the NBN consistent with an agreement that the parties have reached. The ACCC notes that his view reflects only the parties' current intention and in no way indicates the likely outcome of the parties' request for ACCC authorisation of the agreement.<sup>59</sup>
- While there will be potential for other fixed-line networks to be built, especially in greenfield estates, a number of factors make significant new build unlikely. These include:
  - the 'level playing field' requirements introduced by the NBN Access Act (to which the ACCC must have regard), which would apply to all new superfast networks.
  - NBN Co is the wholesale provider of last resort for particular types of greenfield estates<sup>60</sup> and hence estate developers may be inclined to require NBN Co to fulfil this role.
  - Telstra and Optus have a very significant share of downstream services and hence their network preference arrangements with NBN Co would further significantly deter another fixed-line network overbuilding the NBN.
  - elements of the Telstra or Optus HFC networks, or Telstra's copper access network, would not be available for use by a potential network operator.
- ULLS based services will migrate to the NBN as those services are disconnected from Telstra's copper access network.
- Other network operators may have increased incentives to invest in fixed-line facilities, such as core network and transmission facilities, as the promotion of a more competitively neutral environment would tend to reduce investment risk. This in turn is likely to reduce barriers to entry in downstream markets.

## 6.3 Future without the SSU

### 6.3.1 Telstra's structural reform and fixed-line access networks

The future without the SSU is more difficult to anticipate. Primarily, there appear to be two alternative paths available to Telstra should the ACCC decide not to accept the SSU.

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<sup>59</sup> The ACCC received applications for authorisation of this transaction on 29 August 2011. The applications will be considered in accordance with the ACCC's usual processes for authorisation applications. After considering validity and assessing any confidentiality claims, the ACCC will undertake public consultation processes and issue draft and final determinations. Further details of the authorisation applications will become available on the ACCC website.

<sup>60</sup> See DBCDE, Fibre in new developments: policy update, 22 June 2011.

- **Alternative form of structural separation:** Telstra could submit an alternative form of SSU which might include a proposal to divest or demerge parts of its business, rather than facilitating the migration of customers from its existing network to the NBN, in order to meet the requirements of subsection 577A(1)(a) of the Telco Act. In this scenario, the Definitive Agreements as currently formulated would likely not come into effect, however the parties could potentially reach an amended form of agreement regarding NBN Co's access to Telstra's infrastructure.
- **Telstra would be required to functionally separate and may be subject to the "excluded spectrum regime":** If a structural separation undertaking does not come into force, Telstra would be required to undergo functional separation in accordance with Schedule 1 of the Telco Act. The Minister may also determine that Telstra should be subject to the 'excluded spectrum regime' contemplated by section 577GA of the Telco Act, which may mean that Telstra is precluded from using or acquiring designated parts of the radiofrequency spectrum.

The ACCC considers that the most likely scenario for the future without the SSU is that Telstra would choose to undergo functional separation rather than undergo an alternative form of structural separation.

This reflects the view that, having chosen the specific path to structural separation contemplated by the SSU and the Definitive Agreements, Telstra would be unlikely to submit an undertaking that would give effect to a fundamentally different form of structural separation. Further, by letter to the ACCC dated 22 August 2011, the Government and NBN Co indicated that they also consider that an alternate form of structural separation would be unlikely to eventuate.<sup>61</sup>

The precise nature and timing of such a functional separation of Telstra is unclear, however it would be expected that any functional separation regime would take considerable time to implement fully. Further, while functional separation could provide material improvements to competition as it stands today, this would fall short of structural separation in terms of addressing the incentives and ability for Telstra to favour its own retail business units.<sup>62</sup>

Consequently, it is likely that Telstra would remain vertically integrated in relation to the supply of retail services over its existing fixed-line networks and any new fixed-line networks (subject to the operation of the 'level playing field' provisions) until such time as Telstra elected voluntarily to shut down its fixed-line networks and migrate to the NBN.

In this regard, the Implementation Study notes that there is likely to be a deterioration of the economics in maintaining Telstra's copper network over time:

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<sup>61</sup> Available at ACCC website.

<sup>62</sup> For further discussion on this point, see ACCC Regulatory Reform Submission, chapter 2.1.

Although there is significant uncertainty surrounding future regulatory changes and the long term economics of the copper network, the Implementation Study believes that as fibre penetration increases, the economics of Telstra's copper network will deteriorate. This could eventually lead to an economically-rational decision to shut down the copper and migrate the remaining customers to fibre, absent of any agreement up front.<sup>63</sup>

Further:

As users move off copper onto fibre, any fixed costs on copper will be spread over fewer users, increasing the average cost per user and, at some point, potentially making copper uneconomic to run. This effect will be more pronounced if Telstra's wholesale and retail divisions are separated and make decisions independently.<sup>64</sup>

On the other hand, it is unclear when this tipping point would be reached, and there is potential for Telstra to invest further in its networks – within the constraints set by the 'level playing field amendments – such that it will retain a significant proportion of its existing network services over a longer period.

For instance, Telstra may also be able to upgrade its copper network to provide greater accessibility to DSL infrastructure – and support better quality DSL networks – or be more inclined to use its wireless networks to compete with NBN in the provision of at least basic access services.

In addition, the NBN Co Corporate Plan sets out a potential upgrade path for HFC networks from DOCSIS 3.0 upgrades to node splitting, to Radio Frequency over Glass technology to full GPON overlay.<sup>65</sup>

The NBN Co Corporate Plan also expresses the view that:

In a fully competitive scenario (i.e. assuming no deal with Telstra...) it is likely that one of the existing HFC networks will be upgraded at least to encompass node splitting, thus being able to offer speeds of over 200Mbps to over 2 million premises but with substantially lower performance than GPON. It is considered less likely but still possible, that both networks would be upgraded, given the very substantial overlap between the two.<sup>66</sup>

### 6.3.2 NBN Co and the NBN

A future without the SSU, and therefore without the Definitive Agreements as contemplated, is likely to have the following impacts upon NBN Co and the NBN:

- NBN Co would be required to revise all core elements of its Corporate Plan and rollout schedule, including its means of access to civil infrastructure and transmission facilities necessary to support the NBN.

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<sup>63</sup> Implementation Study, p 248.

<sup>64</sup> Implementation Study, p 249.

<sup>65</sup> NBN Co Corporate Plan, pp 42-43.

<sup>66</sup> NBN Co Corporate Plan, p 43.

- NBN and Telstra would be unlikely to reach other commercial arrangements regarding access by NBN Co to Telstra’s infrastructure and transmission facilities.
  - Although NBN Co may be able to seek regulated access to Telstra’s infrastructure, it is likely that NBN Co’s access to Telstra infrastructure would not be to the same extent, quality or timeliness.<sup>67</sup>
  - NBN Co would either have to seek out and agree alternate access providers (where they exist) or build its own facilities.
- NBN Co has stated that if this were to occur this would be “likely to significantly extend the rollout period and to result in substantially higher costs to NBN Co.”<sup>68</sup> NBN Co also states that the “cost of building itself the infrastructure...is estimated to be significantly higher than the cost to NBN Co under the Definitive Agreements, and is subject to a significant level of risk on a number of levels”.<sup>69</sup>
  - NBN Co would be likely to face competition from Telstra (and potentially other fixed-line networks) which would likely slow demand for its basic services and potentially other services. NBN Co has noted that the “HFC provisions of the Definitive Agreements address the most significant threat of cherry picking to NBN Co”.<sup>70</sup>
  - Given the likely effect of the above on NBN Co’s cost base, in the absence of any amendments to the Government’s objectives for the NBN (including that it make a commercial rate of return), it is likely that the price for NBN Co’s services would be increased (subject to NBN Co’s desire to ensure that it maximises demand).
  - There would be some uncertainty regarding NBN Co’s ability to meet the Government’s objectives such as the coverage objective (including the specific requirements regarding technology type) and the uniform national wholesale pricing objective. NBN Co has stated that “the ability of NBN Co to deliver uniform national wholesale pricing while operating on a financially viable basis would be undermined if Telstra, or any other operator of Telstra’s HFC network, was able to continue to operate the network...”<sup>71</sup>

### 6.3.3 Other fixed-line access networks

It is unclear whether the Optus-NBN Co arrangements would proceed in the absence of the SSU coming into effect, as this could have some implications for the commercial rationale of the agreement being implemented. Should the arrangements not proceed,

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<sup>67</sup> NBN Co section 577BA submission, p.36 - 37.

<sup>68</sup> NBN Co section 577BA submission, p.36.

<sup>69</sup> NBN Co section 577BA submission, p.37.

<sup>70</sup> NBN Co section 577BA submission, p.29.

<sup>71</sup> NBN Co section 577BA submission, p.29.

then Optus would be likely to use its HFC network in order to supply basic and other fixed-line services in much the same way as previously outlined above in respect of Telstra. It is unlikely however that Optus would expand the footprint of its HFC network due to the level playing field provisions.

The potential for investment in other fixed-line access networks is likely to be similar in this scenario as it would be with the SSU. That is, such investment would be unlikely in established areas, with some potential in greenfield estates.

ULLS based networks would continue to operate until such time as the wholesale only access network became available in each serving area. While there could be potential for some operators to choose to remain on the copper network in particular areas, the ongoing threat of ‘sabotage’<sup>72</sup> (or non-price discrimination) would likely result in these services migrating. There is also the potential for the footprint of these networks to expand somewhat until the wholesale network rollout is completed, although the potential for this investment could be tempered by market characteristics and the anticipated timing of this access network.

Similarly, other network operators could have reduced incentives to invest in fixed-line network components (including transmission facilities and core network components), including due to uncertainty regarding:

- the timing and scope of the rollout of the NBN;<sup>73</sup> and
- ongoing wholesale access to Telstra’s copper network as the NBN is rolled out and the persistence of legacy issues relating to Telstra’s vertical integration (although some of these issues could be reduced through a functional separation regime).

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.
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<sup>72</sup> The concept of ‘sabotage’, as referred to in the economic literature, occurs when an incumbent network-based provider uses its control over network facilities to engage in non-price discrimination to reduce the ability of new entrants to compete.

<sup>73</sup> See NBN Co section 577BA submission, pp.36-37.

## 7 Promotion of a competitively neutral environment

### 7.1 Overview

- The coming into force of the SSU has the potential to lead to a competitively neutral environment for the supply of fixed-line telecommunications services by diminishing over time the extent to which Telstra is able to control key upstream infrastructure.
- This is likely to promote competition and encourage efficient investment.
- Telstra could retain some degree of control over upstream facilities and commercial interests in suppliers of related services, which might potentially reduce the extent to which these benefits are realised in practice.

### 7.2 Vertical and Horizontal Integration

The coming into force of the SSU will result in the progressive separation of Telstra's upstream and downstream functions as services are disconnected from Telstra's copper and HFC network, and migrate to the NBN.

Consequently, following the rollout of the NBN to a particular area, Telstra and other service providers will purchase wholesale access services from a provider that is not vertically integrated (that is, NBN Co).

This is likely to create a more competitively neutral environment as the operator of the main upstream input will not have the incentive to favour any downstream operations.<sup>74</sup>

By way of background, separation measures such as these can promote competitive neutrality by removing the potential for 'sabotage' that arises as a result of vertically integrated entities' incentives and ability to discriminate.<sup>75</sup> These measures can thereby permit downstream operators to compete on their merits, and be rewarded for superior efforts. In particular, these measures can reduce investment risk for competitors and hence encourage them to invest efficiently in the long term, such as through investment in competitive infrastructure. A number of models demonstrate that separation

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<sup>74</sup> Prices for access to the NBN are likely to be regulated through the mechanisms that are expected to be included in NBN Co's Special Access Undertaking. NBN Co is prohibited from discriminating between access seekers (apart from in limited circumstances) by section 152AXC(1) of the CCA.

<sup>75</sup> Sabotage only occurs where the regulated monopolist is vertically integrated. This is because, if there is no vertical integration, then non-price discrimination would only serve to lower access sales and therefore profit. Also see, for example, Cave, Correa and Crocioni (2006) who note that much of the UK case in favour of functional separation of BT rested on the proposition that the incumbent was practising sabotage and was likely to persist in doing so.

measures, and thus the removal of the potential for sabotage, is likely to be welfare improving.<sup>76</sup>

This can be contrasted with the situation where competition is introduced to downstream layers of the supply chain – which may potentially be competitive, but the provider of the main upstream input remains vertically integrated.

In that case, where access regulation is required, the vertically integrated access provider has incentives to engage in discrimination in relation to the supply of the upstream inputs, both on a price and a non-price basis.<sup>77</sup>

In particular, a vertically integrated access provider has an incentive to discriminate to favour the competitive position of its own businesses over its downstream rivals using price (such as applying different prices externally to those charged internally) and non-price means (such as refusing to supply or supplying competitors with an inferior product).

In this way, a vertically integrated access provider is able to improve its own competitive position, not by activities that improve its own operations and product quality, but with actions that improve its relative standing by raising the cost of its rivals or otherwise harming their ability to deliver products of comparable quality. Thus, competitors who may be more efficient than the incumbent in downstream markets may not be rewarded for their efficiency. This may reduce their incentives to compete, and invest, resulting in an overall efficiency loss.

If also horizontally integrated, a vertically integrated access provider may use its advantageous position in one market to leverage its market power into horizontally related markets, for example, through product bundling.

Telstra's ability to engage in discrimination under the current regulatory regime has been an area of concern for the ACCC.

### **7.3 Telstra's ongoing vertical integration**

It is relevant to note that even if the SSU were to come into force there is potential for Telstra to remain vertically integrated in relation to certain fixed-line access networks. These networks include those parts of the copper and HFC network not passed by the NBN fibre network and disconnected by the designated day, and any fibre access networks that Telstra continues to operate (subject to restraints in the Definitive Agreements and the application of the 'level playing field' provisions).

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<sup>76</sup> Bustoas, A and A Galetovic (2003), 'Vertical integration and Sabotage in Regulated Industries', *Centro de Economía de la Empresa Working Paper No. 9*, available at <http://ssrn.com/abstract=1104036>; and Crew, MA, PR Kleindorfer, and J Sumpter (2004), 'Bringing Competition in Telecommunications by Divesting the RBOCs', in Crew, MA and M Spiegel (eds), *Obtaining the Best from Regulation and Competition*, pp. 21-40

<sup>77</sup> The incentive to discriminate may not apply in the unregulated case as the monopolist can extract the full monopoly rent at the monopoly level.



Telstra will also maintain ongoing ownership of its passive infrastructure and transmission infrastructure that will be relevant to the supply of NBN-based services.

In this regard, under the Definitive Agreements, NBN Co has acquired rights to access, occupy and use:

- rack spaces in Telstra’s exchanges, including for its points of interconnect;<sup>78</sup>
- duct sections and associated duct infrastructure (such as pits and manholes); and
- dark fibre links for the provision of NBN Co’s core transit network.

NBN Co’s use of Telstra’s ducts and dark fibre links is intended to assist NBN Co in building its network, but it is not intended that NBN Co could resell access to this infrastructure.

Accordingly, access seekers to the NBN will require:

- Access to space within Telstra exchanges in order to interconnect with the NBN. Access seekers will be able to obtain access to this space from NBN Co or from Telstra.
- Access to ducts or external interconnection cables in order to interconnect transmission facilities at Telstra exchanges. Access seekers will be required to seek either regulated or commercial access to this facility directly from Telstra.

Consequentially, there is potential for Telstra to continue to engage in discrimination in relation to access to exchange facilities. Telstra may also retain a competitive advantage in relation to its ongoing ownership of facilities. For instance, Telstra would self-supply exchange space rather than use the same processes as other access seekers in order to interconnect to the NBN.

It is not yet clear whether these matters would, in practical terms, be likely to impede the development of competition in downstream markets following the SSU coming into effect.

The view taken as to whether these matters are likely to be a concern would appear to depend upon a number of factors, including:

- the likelihood that significant numbers of premises connected to Telstra’s copper and HFC services will not be passed by the NBN fibre network by the designated day;
- access seekers’ likely requirements for facilities access in interconnecting with the NBN at the known points of interconnect; and

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<sup>78</sup> Of the 121 points of interconnect, 111 will be located in Telstra exchange facilities (NBN Co, “*Facilities Access, Overview of the NBN Co facilities access product*”, 2011, p 4).

- whether commercial or regulatory arrangements can give adequate assurance that appropriate access rights to relevant facilities will be available on reasonable terms and conditions.

The ACCC would be interested in stakeholder views in relation to this matter.

2. Do you consider that Telstra’s ongoing ownership and control of passive infrastructure required by other access seekers to interconnect with the NBN is likely to impede the realisation of any of the expected benefits to competition from the structural reform? Please provide evidence that supports your reasoning.

## 7.4 Telstra’s ongoing horizontal integration

As is noted in section 6, both with and without the SSU it is likely that Telstra will continue to own 50per cent of FOXTEL.

Telstra’s ownership of FOXTEL may have implications for the development of competition within telecommunications markets over the NBN (both with and without the SSU), to the extent that bundling pay TV content with voice and broadband service (‘triple play’ bundling) becomes essential to a retail service provider’s ability to compete for telephony and broadband subscribers.

Telstra’s continuing interest in FOXTEL creates some risk that competition in fixed voice and broadband services over the NBN may be hindered by Telstra having an exclusive ability to bundle its services with FOXTEL’s pay TV package. However, the ACCC notes that currently Telstra and Optus both bundle FOXTEL’s pay TV content with fixed voice and broadband services.<sup>79</sup>

3. Do you consider that Telstra’s ongoing ownership of FOXTEL is likely to impede the realisation of any of the expected benefits to competition from the structural reform? Please provide evidence that supports your reasoning.

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<sup>79</sup> See: [http://www.telstra.com.au/bundle\\_save/home-bundles.html](http://www.telstra.com.au/bundle_save/home-bundles.html);  
[http://www.optus.com.au/store/phone/fusion\\_DTV\\_offer?sid=HAFeat2:Shiva:OSC:BUN:OCA:YF99:10082011](http://www.optus.com.au/store/phone/fusion_DTV_offer?sid=HAFeat2:Shiva:OSC:BUN:OCA:YF99:10082011).

## 8 Consolidation of fixed-line access networks

### 8.1 Overview

- There are a number of other factors that must be considered in reaching a view on this network consolidation. Some of these factors could support the consolidation of fixed-line access networks, whilst others could militate against it.
- Telstra's commitment to structural separation and many of the provisions of the Definitive Agreements will result in structural reform, and also a consolidation of certain networks.
- The implementation of this network consolidation appears to be consistent with a number of factors to which the ACCC is required to have regard in considering the SSU, including the national interest in structural reform and the Government's support for a migration form of structural separation.
- For instance, the potential loss of competitive tension through the removal of full-facilities based competition that would be likely to occur should the SSU come into effect may be able to be offset by:
  - (i) an increase in investment by service providers in the non-access components of their networks (such as transmission capacity and core network elements) as a result of the SSU coming into effect;
  - (ii) improvements to competition in relevant wholesale and retail markets as a result of the more timely rollout of the NBN and the consequent removal of Telstra's ability to engage in price and non-price discrimination; and
  - (iii) potential economies of scale and scope from wholesale fixed-line services provided by the one network operator.
- There are a number of other potential benefits and detriments for consumers that may arise as a result of this network consolidation. The ACCC is seeking to determine whether the impact is likely to result in overall benefits for consumers.

### 8.2 Introduction

The structural reform envisaged through Telstra's SSU and the coming into effect of the Definitive Agreements will essentially result in a migration of customers from multiple fixed-line access networks to the wholesale only NBN.

In the explanatory statement for the Network and Services Instrument the Government noted that:

Undertaking structural separation in this manner will lead to a national outcome where there is a wholesale only network operating across the country which is not controlled by any retail company.<sup>80</sup>

More particularly, as a result of the Definitive Agreements with NBN Co, Telstra's HFC and copper networks (located within the NBN fibre footprint) will effectively cease to be available for use by Telstra or other service providers for the supply of broadband or voice services.

Subject to, limited exceptions, Telstra will also be prevented by the Definitive Agreements from building or operating a fibre access network for a 20 year period.

The ACCC's preliminary view is that the following criteria are of most relevance to an assessment of this network consolidation:

- the national interest in structural reform;
- impact on competition in telecommunications markets;
- impact on consumers;
- the Government's policy objective of improving accessibility of broadband services;
- the Government's support for a migration form of structural separation;
- the expected distribution of the long-term economic benefits as a result of the SSU; and
- the conduct that would be authorised under section 577BA of the Telco Act.

The ACCC considers that the SOE, the NBN Co Corporate Plan, the NBN Access Act and the NBN Companies Act, together with further information provided by the parties, are all matters which will inform the contextual matrix of the ACCC's assessment of this issue.

### **8.3 Conduct that would be authorised under section 577BA of the Telco Act**

In assessing this issue, the ACCC proposes to have regard to the provisions of the Definitive Agreement that facilitate the network consolidation. The conduct that is most relevant to the consolidation of fixed-line access networks includes:

- the infrastructure sharing arrangements where Telstra will grant rights to NBN Co to access its passive infrastructure and parts of its network;

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<sup>80</sup> Network and Services Instrument, Explanatory Statement, p.1-2.

- restrictions regarding Telstra’s use of its copper and HFC network within the NBN fibre footprint;
- restrictions regarding Telstra’s ability to dispose of either its copper or HFC networks (or grant a third party rights to use those networks);
- commitments by Telstra to exclusively use the NBN for fixed-line access within the NBN fibre footprint; and
- restrictions regarding Telstra’s ability to use or operate fibre networks within the fibre footprint.

The relevant provisions of the Definitive Agreements are outlined in further detail in Attachment A3.

## **8.4 National interest in structural reform**

In assessing this issue against this criterion, it is relevant to consider whether the proposed network consolidation is a means by which to implement the intended structural reform of the telecommunications industry.

This structural reform is intended to address the issue of Telstra’s vertical integration across key upstream infrastructure and the supply of downstream services. As discussed in section 7, vertical integration can lead to significant competition concerns in downstream markets and, ultimately, harm to consumers. The economic consequences of the actual structural separation proposed in the SSU are discussed further below.

It would appear that the proposed network consolidation would be likely to reduce significantly the extent of Telstra’s control over relevant fixed-line facilities, thereby implementing the intended structural reform. That is, provided that NBN Co meets its coverage objectives in those areas where Telstra’s control of fixed-line networks has given rise to competition concerns, then the network consolidation will implement the intended structural reform.

This is consistent with a view expressed by NBN Co in its submission, which states that the commitments made by Telstra in the Definitive Agreements will enable NBN Co to deliver an NBN that meets the Government’s policy objectives.<sup>81</sup>

Consequently, it would appear that this particular consideration would support the SSU coming into effect and the network consolidation proceeding.

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<sup>81</sup> NBN Co section 577BA submission, p.22.

## 8.5 Impact on competition in relevant markets

### 8.5.1 Overview

Considering the impact of network consolidation on competition requires relevant markets to be identified, and for views to be reached on a range of matters that would potentially influence market structure and behaviour.

In this regard, potentially relevant markets are identified in Attachment A1, and views on the likely future with the SSU (and this network consolidation) coming into effect or not have been presented in section 6. In addition, a general discussion of how vertical integration can impact competition in markets has been provided in section 7.

### 8.5.2 Impact on competition in fixed-line access markets

It is clear that the network consolidation (as implemented by the Definitive Agreements and supported by the 'level playing field' provisions) will result in fewer fixed-line access networks, and significantly reduce the potential for full facilities based competition.

In particular, Telstra will disconnect services from the majority of its copper access network and cease to supply services (other than permitted services) over its HFC network to the extent to which those networks have been passed by the wholesale only NBN. This will also result in the disconnection of competing ULLS based networks.

There is also the potential for Optus to similarly cease to operate its HFC network either entirely or other than for a relatively small number of permitted services, although it is not yet clear whether this will occur.

In considering the impact of network consolidation on competition, it is relevant to note that, although infrastructure based competition will frequently lead to more efficient outcomes, there can be occasions where this competition is inefficient.

In this regard, sections of the telecommunications industry are characterised by natural monopoly features at the physical infrastructure layer of the supply chain. That is, if for a given stage of the supply chain, from a production perspective, the entire demand can be satisfied at lowest cost by one firm, rather than by two or more firms, the market can be considered a natural monopoly, irrespective of the actual number of firms operating in it.<sup>82</sup>

In such cases, the regulatory approach of introducing competition at that level of the supply chain is typically not efficient. While introducing competition may potentially still lead to lower (than monopoly) prices, it could also lead to excessively high production costs should it stop potential economies of scale and scope being realised.

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<sup>82</sup> Posner, R. A (1999), *Natural Monopoly and Its Regulation*, p. 1

Thus, production by more than one firm in a particular industry or stage of production can be socially undesirable where that facility is considered a natural monopoly.

The possible consequences of introducing competition into natural monopoly elements of telecommunications infrastructure is discussed in the Implementation Study:

...infrastructure competition has its drawbacks. It creates competition at the layer where innovation is limited- trenches and cables are commodity products- and results in duplicated infrastructure. For example, many houses in the United States and Europe are connected to two networks- cable and fibre- which deliver identical service offerings. Although they benefit from competition there is capital inefficiency in providing the multiple physical connections for each household. And despite the large capital investments of network operators, there are still many households in most developed nations which are not connected to a high speed network.<sup>83</sup>

The ACCC has previously noted that the natural monopoly characteristics of certain parts of a telecommunications network mean that it may not be efficient to introduce competition via a duplicate network:

[T]here are enduring features of telecommunications markets, in particular fixed-line networks, which suggest that full-facilities based competition across all elements of this infrastructure is not likely to be a realistic, or even a technically feasible goal in the foreseeable future.

Certain features of fixed-line markets suggest that there are likely to be enduring bottlenecks across particular elements of the network. At one level, these enduring bottlenecks may exist due to the ongoing presence of natural monopoly cost characteristics across particular elements of the network, and because these elements continue to represent essential facilities for the provision of downstream services.<sup>84</sup>

In considering the proposed consolidation of fixed-line access networks, what would therefore appear of most relevance is whether there would be a net efficiency increase or decrease from a reduction in full-facilities based competition, and how this outcome ultimately impacts upon consumers.

The vertical nature of service provisioning in telecommunications – where there is an upstream and downstream component – complicates the efficiency assessment. In this case, the efficiency effect at the upstream level has consequences for competition downstream and whether consumers receive the flow-on benefits from downstream competition.

On the one hand, competition between multiple upstream facilities can give additional assurance that a greater range of downstream services of differentiated price and quality will be available to service providers and hence consumers. On the other hand, duplicative networks may simply be socially wasteful if there are inherent productive efficiencies from economies of scale and scope.<sup>85</sup>

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<sup>83</sup> Implementation Study, p 439.

<sup>84</sup> ACCC, FSR 2nd Position Paper, p 21.

<sup>85</sup> It could also be relevant to consider the likely efficiency consequences arising from the need for ongoing regulatory intervention in a market. Here, while the existence of a single provider of the

Thus, it could be that the number of competing platforms would not necessarily determine the degree to which consumers receive better service offerings. Rather, the efficiency outcome at the upstream level is also likely to determine the scope for downstream competitors to compete in the form of more superior and differentiated product offerings to consumers. This is discussed further below.

### **8.5.3 Impact on competition in transmission capacity markets**

The ACCC considered issues arising in relation to transmission capacity markets in its advice to Government on the NBN points of interconnect.<sup>86</sup>

As noted in that advice, Telstra is currently the dominant owner of transmission facilities and provider of transmission services, particularly in relation to transmission facilities that serve less densely populated areas of Australia.

In this regard, the proposed network consolidation will involve NBN Co acquiring rights of use over Telstra's existing dark fibre facilities to connect NBN distribution nodes to the NBN points of interconnect. Hence, the introduction of the wholesale only NBN will not lead to competing facilities becoming available to service providers on these transmission routes.

However, the proposed network consolidation may encourage efficient investment in other transmission facilities. This is because:

- the network consolidation would provide greater assurance that the NBN will meet its targets in terms of coverage and timing
- as a result of the requirement that NBN points of interconnect must meet particular requirements in relation to the availability of competitive transmission infrastructure, there appears significant potential for other network operators to invest in competing transmission facilities between these points of interconnect.

Consequently, while the proposed network consolidation is likely to entrench some transmission routes as monopoly facilities, it will likely encourage efficient investment in other transmission facilities. This efficient investment would, in turn, promote competition in transmission capacity services on these routes over time.

The views expressed in section 8.5.2 on the possible efficiency effects of introducing competition in sections of the telecommunications industry can also be relevant here. This is because the transmission routes for which it is proposed that NBN Co will acquire rights of use over existing facilities have typically demonstrated natural monopoly characteristics.

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essential upstream input would require ongoing regulation, the potential for misuse of market power must also be considered under a duopoly or oligopoly structure.

<sup>86</sup> ACCC, *Advice to Government: National Broadband Network Points of Interconnect*, November 2010.



#### 8.5.4 Impact on competition in downstream markets

Whilst there have been improvements to the state of competition in downstream markets for retail and wholesale fixed voice and broadband services, this competition remains sub-optimal, particularly in some geographic areas.

Further, ongoing regulatory intervention has been required in order to promote this competition in the face of Telstra's vertical integration.

Consequently, there appears potential for competition in downstream markets to be significantly promoted by measures that effectively address Telstra's vertical integration.

The question for present purposes is what effect accepting the SSU would have on this structural reform being realised.

On the one hand, the replacement of the existing vertically integrated access network with a wholesale only access network (and associated investment in competing transmission facilities, discussed above) would directly address the issue of vertical integration, and promote a competitively neutral environment in which downstream service providers can compete, by reducing the potential for 'sabotage'.

In this regard, Telstra has noted that its commitment to structurally separate across the NBN fibre footprint, which the SOE requires to cover 93 per cent of Australian premises, will place it and its competitors on the same footing.<sup>87</sup>

On the other hand, without the SSU coming into effect, and the network consolidation occurring, there may be potential for:

- upstream competition to develop at the network level, as existing networks compete with the new wholesale only access network and new transmission networks; and
- Telstra's future ability and incentives to engage in sabotage to be countered to some extent as a result of Telstra being subject to functional separation as a consequence of its SSU not coming into effect.

Assessing the likely effect on competition of the SSU coming into effect, and the network consolidation occurring, raises questions around

- the productive efficiency of competition in upstream facilities; and
- the potential for wholesale service providers to differentiate their service offerings in either scenario.

These questions were introduced in section 8.5.2.

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<sup>87</sup> Telstra supporting submission, p 44.

Some factors that would appear relevant to reaching a view on the likely consequences of network consolidation for competition in downstream markets are:

*To what extent would the proposed network consolidation provide greater assurance that the wholesale-only open access NBN would meet its coverage and timing objectives?*

In this context, until the new NBN fibre access network passes a given service area, there would likely be no significant improvement in competition at the access layer than is observed today. In this regard, functional separation would take time to establish and implement, and might not completely safeguard against all forms of ‘sabotage’. The ongoing potential for ‘sabotage’ would continue to reduce the potential for effective competition to develop in downstream markets.

*Would greater product differentiation be likely to emerge in the presence of upstream competition as compared to the situation where network consolidation occurs?*

In this context, if similar product differentiation is likely to be supported in either case, including over time through further efficient investment, then similar competitive outcomes could be expected.

*To what extent would competition at the access layer and on additional transmission routes be efficient in a productive sense? Could this form of competition stop significant economies of scale and scope being realised?*

In this context:

- the productive efficiency of upstream supply will determine the scope for downstream competition, and the likely benefits for consumers that could flow from competition; and
- further investment in existing access networks would be required in order to provide effective competition over time

NBN Co has provided in its submission a number of views that appear relevant to considering these questions.

NBN Co has indicated that, if the SSU (and hence the network consolidation) did not come into effect

- this would be “likely to significantly extend the rollout period and to result in substantially higher costs to NBN Co.”<sup>88</sup>
- the “cost of building itself the infrastructure...is estimated to be significantly higher than the cost to NBN Co under the Definitive Agreements, and is subject to a significant level of risk on a number of levels”.<sup>89</sup>

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<sup>88</sup> NBN Co section 577BA submission, p.36.

<sup>89</sup> NBN Co section 577BA submission, p.37.

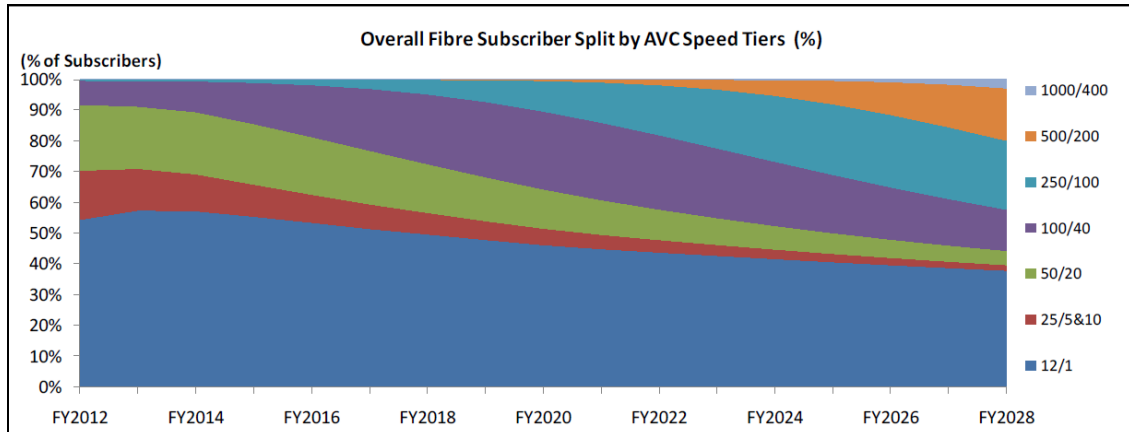
- NBN Co would be likely to face competition from Telstra (and potentially other fixed-line networks) which would likely slow demand for its basic services and potentially other services, and in this regard, the “HFC provisions of the Definitive Agreements address the most significant threat of cherry picking to NBN Co”.<sup>90</sup>

There are a range of other observations which also appear relevant to considering these questions:

- It is likely that service providers would have incentives to invest in their own network components, including in transmission and core network facilities, and also consumer services and applications, where the SSU comes into effect. Service providers could differentiate the price and non-price terms of their retail offerings on the basis of the differences in these components.
- NBN Co has announced that it will offer bitstream services at the active Layer 2) level, which would support a range of downstream service configurations and applications. In addition, there could be some potential for further unbundling of the access service and, with it, the potential for greater differentiation of downstream service offerings should this be required in the future.

The NBN Co Corporate Plan makes the following projections (based on a ‘with the SSU’ scenario) in relation to demand for its different access products.

Exhibit 1: NBN Co’s projections for subscriber demand for its access products<sup>91</sup>



NBN Co projects that by FY2028, with the SSU, approximately 50 per cent of subscribers would acquire services with download data rates greater than 100 Mbps, with 40 per cent acquiring a service with a download data rate of 250 Mbps or more.

As existing access networks generally do not currently support this level of technical quality, further investment would be required in order for them to support services that meet this consumer demand. Further, the NBN Co Corporate Plan notes that for

<sup>90</sup> NBN Co section 577BA submission, p.29.

<sup>91</sup> NBN Co Corporate Plan, p 129.

services of this level of technical quality with download speeds of greater than 250Mbps, an upgrade to fibre-to-the-premises infrastructure is likely to be the only access network technology that is able to meet that demand.<sup>92</sup>

The ACCC is seeking further information from industry and interested parties before reaching a view on the likely impact on competition of the SSU (and network consolidation) coming into effect.

4. What do you think will be the likely impact of the SSU coming into force on competition in:
    - (a) fixed access markets;
    - (b) transmission capacity markets;
    - (c) downstream (wholesale or retail) fixed voice and broadband markets; and
    - (d) any other relevant telecommunications markets.
  5. To what extent would the SSU coming into force provide greater assurance that the wholesale-only open access NBN would meet its coverage and timing objectives?
  6. What greater product differentiation would be likely to emerge in the presence of upstream competition as compared to the situation where network consolidation occurs?
  7. To what extent would competition at the access and transmission layer be efficient in a productive sense? Could this form of competition stop significant economies of scale and scope being realised?
  8. What other factors should be considered in assessing the likely impact of the SSU coming into effect, and the network consolidation occurring, on competition in downstream markets?
- For industry
9. Do you expect to provide retail or wholesale services based upon the wholesale-only open access NBN? Would this change if the SSU did or did not come into force?
  10. What investments have you undertaken to date in anticipation of the proposed structural reform and the creation of a wholesale-only open access network?
  11. Are you likely to invest in your own infrastructure, such as transmission facilities or core network elements, if the SSU and the network consolidation were to come into effect? If the SSU did not come into effect, would that have an impact on those plans?
  12. Do you intend to invest in new 'superfast' access networks (in established locations or greenfields), irrespective of the 'level playing field' provisions? Would this decision change depending upon whether the SSU comes into force?

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<sup>92</sup> NBN Co Corporate Plan, p 39.

## 8.6 Impact on consumers

The coming into effect of the SSU (and the consequential network consolidation) could have a variety of consequences for consumers.

Should it lead to an overall improvement in competition in retail markets, then it can be expected that consumers will benefit by being able to access a greater range of services of differentiated price and quality.

This will largely depend on:

- whether efficient investment can occur at the upstream level, and there is sufficient competitive tension at the downstream level to drive investment and pass through to consumers cost savings and product enhancements.
- where the upstream market is not effectively competitive, whether regulation can curb the exercise of market power and encourage ongoing efficient investments (see Attachment A2 for a discussion in relation to same).

Consumers may also benefit from the facilitation of the rollout of the NBN that will occur by virtue of the infrastructure sharing arrangements provided by the Definitive Agreements (compared with NBN Co needing to seek regulated access to Telstra's facilities or to overbuild).

In this regard, the infrastructure sharing arrangements could result in:

- a more timely rollout of the new wholesale only network, which is likely to lead to consumers receiving the benefits of the structural reform earlier;
- a more cost effective rollout of the new wholesale only network (to the extent that the lease payments to Telstra are less than what it would have cost to overbuild), which, all else equal, should lead to lower prices for downstream services than would otherwise be the case;
- less disruption to consumers through greater avoidance of civil works by NBN Co, including in relation to the lead in conduits and any disruption that would occur through the need to dig extensive new trenches and ducts; and
- less use of aerial cabling to connect consumers to the new wholesale only network.<sup>93</sup>

On the other hand, the coming into force of the SSU could have a negative impact on consumers during the migration process, and potentially on an ongoing basis:

- Existing copper services (or HFC broadband services where they are supplied) will be disconnected within the NBN Co fibre footprint, and new connections – and potentially in some cases, new customer premise equipment – will need to be installed.

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<sup>93</sup> NBN Co section 577BA submission, pp.36-38.

- Some consumers could potentially lose access to particular service features (in terms of functionality and/or price) that they value. Whether this will occur would likely depend upon the range of products and services that will be made available over the new wholesale only access network, and the extent to which economies of scale and scope can be realised and passed through to consumers.

Consequently, the likely impact on consumers should the SSU come into force will depend upon a weighing up of the likely costs and benefits overall for consumers.

The ACCC is seeking further information from industry and interested parties before reaching a view on the likely impact on consumers of the SSU (and network consolidation) coming into effect.

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?

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

For industry

15. What are your expected broadband offerings for customers over the NBN? How do you think that those offerings will compare in relation to price and service quality to services provided over existing networks? Are there any product features or applications you do not anticipate supporting?

## **8.7 Improving accessibility and quality of broadband services, including those in regional, rural and remote areas**

The coming into effect of the SSU could potentially improve the accessibility and quality of broadband services in a number of ways.

Firstly, should this promote competition in the supply of broadband services, then it would be expected that accessibility and quality would also improve as a consequence. The potential impact on competition is discussed above.

Relevantly, accepting the SSU could improve competition, and therefore the quality and accessibility of broadband services:

- By removing the potential for sabotage which could lead to investment in competing facilities that expand the reach of competing services. In this regard, it would appear relevant to consider whether the SSU could provide greater assurance that the NBN will meet its coverage and timing objectives and structural reform will be realised.
- By permitting greater network economies of scale and scope to be realised and passed through to end-users in the form of lower prices. This could be a factor that influences the extent to which broadband services are accessible to all consumers that value them.

However, these benefits might be realised in any case through network competition should NBN Co still reach its coverage and timing objectives without the SSU.

Further, accepting the SSU could potentially improve the accessibility and quality of broadband services by facilitating the delivery of relevant Government policies which are tied to the new wholesale only network. Again, it would appear relevant to consider whether the SSU would provide greater assurance that the NBN will meet its objectives, as there is greater potential for these policies to be implemented sooner or more effectively in that circumstance.

In this regard, the Government has noted in its SOE (to which the ACCC is to have regard) that “the NBN will be a significant piece of Australian critical infrastructure that will underpin the provision of a range of essential services to the Australian community”.<sup>94</sup>

Government policies are likely to be directed particularly at regional, rural and remote areas. This reflects that these areas have generally not benefitted from competition to the same extent as metropolitan areas.

In this context, pursuant to the ‘Commitment to Regional Australia’ agreement,<sup>95</sup> Government has committed to prioritise the rollout of fibre in regional areas. This was reinforced by the Government’s SOE, where the Government noted that it “expects that NBN Co will take into account the Government’s commitment that fibre will be built in regional areas as a priority”.<sup>96</sup> NBN Co has noted that these commitments “assume the entry into and giving effect to of the package of arrangements constituting the Definitive Agreements”.<sup>97</sup>

NBN Co has also expressed the view that the coming into force of the SSU and the Definitive Agreements will facilitate a faster rollout of its network and will provide increased confidence in NBN Co’s capacity to deploy its network and lower cost uncertainty.<sup>98</sup>

The Government has announced its policy of uniform national wholesale pricing, and each of NBN Co and Telstra has expressed the view that this will improve competition – and hence, accessibility and quality – of broadband services outside of metropolitan areas.

In this regard, Telstra notes in its supporting submission that the requirement for uniform national wholesale prices may further encourage competition in regional and rural areas.<sup>99</sup>

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<sup>94</sup> SOE, p.2.

<sup>95</sup> Entered into by the Government on 7 September 2010 with the Independent Members Mr Tony Windsor MP, the member for New England and Mr Rob Oakeshott MP, the member for Lyne.

<sup>96</sup> SOE, p 3.

<sup>97</sup> NBN Co section 577BA submission, p.10.

<sup>98</sup> NBN Co section 577BA submission, pp.36-37.

<sup>99</sup> Telstra supporting submission, p 44.

NBN Co has expressed the view that, as a result of uniform national wholesale pricing, it is likely that barriers to entry for the provision of retail voice and broadband products will be reduced, particularly in regional and rural areas.<sup>100</sup>

Relevantly, NBN Co has also expressed its view that “the ability of NBN Co to deliver uniform national wholesale pricing while operating on a financially viable basis would be undermined if Telstra, or any other operator of Telstra’s HFC network, was able to continue to operate the network...”<sup>101</sup>

The ACCC is seeking further information from industry and interested parties before reaching a view on the likely effect of the SSU (and network consolidation) on quality and accessibility of broadband services.

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

For industry:

17. Do you expect to be able to expand the geographic areas in which you offer services, or better be able to compete in certain areas, as a result of the SSU coming into effect?

## **8.8 Government’s support for a migration form of structural separation**

The ACCC must have regard to the Government’s support for a form of structural separation whereby Telstra will progressively migrate fixed-line carriage services to the NBN Co fibre network as that network is rolled out.

The provisions of the Definitive Agreements that are relevant to the consolidation of access networks, together with Telstra’s commitment to structurally separate, implement this Government objective. If the SSU was not accepted, this form of structural separation would be unlikely to occur; either to the same extent and/or within the same timeframes.

In terms of practical support for this form of structural separation, the Government has provided NBN Co with a funding agreement to enable NBN Co to enter into the long term commercial arrangements with Telstra (including the Definitive Agreements). In addition, the Government has provided guarantees in respect of NBN Co’s financial commitments to Telstra.

Furthermore, in recognising the importance of an available and appropriately trained workforce for the successful rollout of the NBN, the Government has agreed to provide funding of up to \$100 million to Telstra to undertake retraining of relevant employees to enable their transition to employment in deploying and supporting a fibre network. NBN Co will enter into arrangements with Telstra to access the services of this retrained workforce.

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<sup>100</sup> NBN Co section 577BA submission, p.22.

<sup>101</sup> NBN Co section 577BA submission, p.29.



This practical support provides some assurance that this form of structural separation will be able to be implemented.

Consequently, it would appear that this particular consideration would support the SSU coming into effect and the network consolidation proceeding.

## 8.9 Expected distribution of long-term economic benefits

The ACCC is required to have regard to the expected distribution of the long-term economic benefits for different types of consumers in different geographic areas that would occur as a result of the undertaking coming into force.

As noted previously, the SSU (and the Definitive Agreements) coming into force will result in structural reform. A number of studies have shown that structural reform can have a beneficial effect on the economy.<sup>102</sup>

For instance, the Hilmer and related reforms were estimated to result in an annual gain in real GDP of 5.5 per cent (or \$23 billion a year), than if the reforms did not occur. This gain was expected to be due to improved productivity through greater domestic competition and incentive this provides to adopt better work and management practices.<sup>103</sup>

In terms of the effect of specific telecommunications structural reform, ACIL Tasman (2005) estimated this as contributing 0.24 per cent to Gross State Product in 2003-04 to 2004-05, which is substantial compared with overall national growth at that time of two to three per cent per annum.<sup>104</sup> This growth was attributed to advances in technology, from competition and from the interaction of these two factors.<sup>105</sup>

The distribution of the benefits of structural reform is likely to depend upon the characteristics of each market. In general, the consideration of the distributional benefits can compare the benefits between areas that currently experience competitive entry (largely metropolitan areas) and areas which do not (largely regional areas).

Whilst there are ongoing issues relating to the development of competition across all geographic areas, those areas which are not currently competitive are likely to especially benefit from additional competitive entry, and the corresponding increase in

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<sup>102</sup> Although quantitative analysis of this type can be subject to conjecture and is to be treated with caution, the ACCC believes that it is useful to consider the analysis proposed by these studies.

<sup>103</sup> Industry Commission (1995), *The Growth and Revenue Implications of Hilmer and Related Reforms, A report by the Industry Commission to the Council of Australian Governments*, March, p. 53.

<sup>104</sup> ACIL Tasman (2005), Prepared for the Australian Communications and Media Authority, *Consumer Benefits Resulting from Australia's Telecommunications Sector*, 3 November, p xv. This result is similar to the Allen Consulting Group (2004), which estimated the net benefits of telecommunications structural reform as an increase in GDP by 1.25 per cent in 2003-04, than it would have been if the reform had not occurred.

<sup>105</sup> ACIL Tasman report, p 1.

available retail broadband offerings, that would potentially follow as a consequence of structural reform.

The level of competition between these areas is varied due to a number of reasons, including Telstra's ability and incentive to discriminate in favour of its retail businesses. This is particularly the case where it would be inefficient for access seekers to rely upon their own infrastructure (such as in high cost, lower density areas which are usually in rural locations). Here, access seekers are more reliant upon Telstra's wholesale services in order to provide retail services.

For example, in metropolitan areas, competition is vigorous amongst DSL network operators who use their own DSLAMs installed in Telstra's exchanges and ULLS or LSS services to supply broadband and voice services to consumers. In many metropolitan areas service providers other than Telstra have over 60 per cent share,<sup>106</sup> and as a result many consumers are already offered a range of competitive service offerings.

In other areas, service providers resell Telstra's wholesale ADSL or do not participate at all due to the lack of access to competitive backhaul or other factors. Consequently, Telstra's retail market share in these areas remains high. The Implementation Study has expressed the view that structural reform could result in competition reaching a significant number of additional services in these areas.<sup>107</sup>

In terms of the distribution of benefits between residential households and businesses, businesses are more likely to experience more competitive offerings as they represent a higher value customer than residential customers.

ACIL Tasman found that businesses have already benefited from structural reform as a result of lower prices, increased volumes purchased and/or improved service quality. ACIL Tasman estimate that aggregate real gross operating surplus for small businesses<sup>108</sup> from telecommunications services were approximately \$2.4 billion in 2004-05, than if the reform did not occur.<sup>109</sup>

Empirical studies also suggest that residential households may benefit from structural reform. For instance, ACIL Tasman (2005) estimates that household or private consumer benefits, as measured by real household consumption, was almost \$1.3 billion higher in 2004-05 than if structural reform did not occur.<sup>110</sup>

This result was partly driven by large price reductions (as well as increased availability of internet services). The currently proposed structural reform would appear on its face

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<sup>106</sup> Implementation Study, p.26.

<sup>107</sup> There are around 300 Telstra exchanges (serving approximately 2 million premises) that are capable of supporting competitive DSL based on the number of customer premises they each service, but in which no competitive DSL has been installed. (Implementation Study, p.27)

<sup>108</sup> ACIL Tasman calculated the gross operating surplus caused by the telecommunications service and multiplied this with Australian small business profits (p.57)

<sup>109</sup> ACIL Tasman (2005) p 57-58.

<sup>110</sup> The increase in the ability to purchase goods and services, indicated by the increased in household consumption relative to the reference case, is a proxy for an increase in welfare.

capable of realising significant benefits to residential consumers as a result of a wider range of service quality and new service offerings becoming available.

It is relevant to note that pricing of NBN Co's products is likely to have a significant influence on the degree of competition emerging in retail markets, and in turn, the extent to which service providers pass on the benefits of competition in the form of better service offerings. In its supporting submission, Telstra notes that NBN Co's pricing and products will influence the scope, extent and shape of competition but that the NBN Co non-discriminatory obligation at least ensure that all service providers are in equivalent positions on the NBN.<sup>111</sup>

18. What long-term economic benefits could be expected to flow to consumers from the SSU coming into effect? How would these benefits likely be distributed amongst different types of consumers in different geographic areas? Please provide reasons for your view.

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<sup>111</sup> Telstra supporting submission, p. 45.

## 9 Other matters relating to the Definitive Agreements

### 9.1 Overview

- The ACCC has discussed the consolidation of networks in section 8 above – which is a key matter arising from the Definitive Agreements.
- There are a number of further important matters arising from the Definitive Agreements that are not directly related to the achievement of this network consolidation. These matters include:
  - (a) the Substantial Adverse Events (SAE) clause;
  - (b) the non-discriminatory disconnection obligations (i.e. the provisions relating to Optus' HFC network);
  - (c) the restrictions regarding future use of the HFC network for the provision of Pay TV services;
  - (d) restrictions regarding Telstra's wireless services; and
  - (e) the commitments NBN Co has made to Telstra in relation to the price of its BSO service.
- The ACCC has considered each of these matters against the relevant criteria, as a part of the requirement that it have regard to the conduct that is likely to receive the benefit of the authorisation in section 577BA.

### 9.2 Introduction

The relevant provisions of the Definitive Agreements are described in more detail in Attachment A3. At the ACCC's request, on 23 August 2011, NBN Co provided a public submission about the Definitive Agreements and section 577BA of the Telco Act.<sup>112</sup>

19. Are there any other matters set out in the Definitive Agreements that are likely to receive the benefit of the legislative authorisation that may have detrimental impacts upon competition in telecommunications markets or consumers, or when viewed against any other of the mandatory considerations? Please provide reasons and evidence for your view.

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<sup>112</sup> A copy of NBN Co's public submission to the ACCC in relation to the Definitive Agreements and section 577BA of the Telco Act is available here:  
<http://intranet.acc.gov.au/content/index.phtml/itemId/1361698>

## 9.3 Substantial Adverse Events clause

### 9.3.1 Overview

The Subscriber Agreement includes a variation mechanism that may be triggered if a substantial adverse event (SAE) occurs in relation to either NBN Co or Telstra within 20 years from the Commencement Date. The party which is affected by the SAE may initiate the variation procedure.

The SAE mechanism will be triggered if either party engages in competition with the other party in particular markets and that conduct has the effect (or is highly likely to have the effect) of substantially adversely affecting the other party's relevant business. The parties have also agreed particular types of conduct that will not constitute an SAE.

In its submission to the ACCC, NBN Co states that the "Substantial Adverse Events mechanism is no wider than required to effectuate the policy and legislative settings set by the Government for structural reform of the telecommunications industry"<sup>113</sup> and considers that the test:

...sets a high threshold that limits the regime to applying only where a party acts in a manner that is fundamentally inconsistent with the commercial assumptions on which the Definitive Agreements were based and only where that conduct has a substantial adverse effect on the core business of the other party.<sup>114</sup>

Further, NBN Co considers that the Subscriber Agreement "provides clear boundaries as to the scope of the changes that can be made" as a result of the operation of the SAE clause:

Specifically, the variation must only be a modification or deletion of existing provisions in the Subscriber Agreement which puts the affected party in a position to more effectively compete with the other party and/or the imposition of restrictions which have the effect of putting each party in the same position in which it would have been had the SAE not occurred.

Further, in all circumstances, the overall effect of the variation must be proportionate to the competitive activities of the party which gave rise to the SAE.<sup>115</sup>

The SAE clause is also further described in Telstra and NBN Co's response to an ACCC question in relation to same.<sup>116</sup>

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<sup>113</sup> NBN Co section 577BA submission, p.33.

<sup>114</sup> NBN Co section 577BA submission, p.34.

<sup>115</sup> NBN Co section 577BA submission, p.34.

<sup>116</sup> See ACCC website: "Questions regarding Definitive Agreements".

### 9.3.2 Assessment

The ACCC considers that the coming into force of the SAE clause is likely to have the following consequences:

- The parties would be less likely to engage in conduct that may be classified as an SAE for the other party – and hence could further discourage competitive behaviour by the parties, as it will trigger a right for the other party to request amendment to the Subscriber Agreement.
- The parties would be able to vary the Definitive Agreements, the precise nature or consequences of which variations are not able to be anticipated at this time, and could potentially change the fundamental nature of them.

As a result of the broad nature of the variations that could be agreed in the event of an SAE, the conduct that the parties could engage in under the Definitive Agreements over the next 20 years could not be known by the ACCC at the time that it makes its decision regarding Telstra's SSU. It is therefore difficult for the ACCC to properly fulfil the requirement that it have regard to the conduct that would be likely to receive the benefit of authorisation under section 577BA of the Telco Act in making its decision on the SSU.

Importantly for present purposes, it appears that variations under the SAE clause, including any competitive restraints thereby imposed, could receive the benefit of the legislative authorisation, without independent consideration as to whether those restraints would be appropriate when viewed against the mandatory considerations to which the ACCC must have regard in considering the SSU.

These considerations have been discussed previously and include the consequences for competition and efficiency, the national interest in structural reform, and the Government's policy objective of improving the accessibility and quality of broadband services.

In short, acceptance of the SSU could give rise to the risk that the parties will give effect to commercial agreements that are inappropriate when viewed against the mandatory considerations. As a result of the legislative framework, those commercial agreements could not be prevented or subsequently unwound through the operation of competition laws.

The ACCC therefore believes that the absence of a mechanism for regulatory assessment to provide assurance that the varied agreement would be appropriate is a factor that would militate against acceptance of Telstra's SSU.

20. Could the operation of the substantial adverse events clause have a detrimental impact upon competition in telecommunications markets or consumers, or when viewed against other of the mandatory considerations? Please provide reasons and evidence for your view.

## 9.4 Restraints relating to Optus' HFC Network

### 9.4.1 Overview

The Definitive Agreements are subject to a condition precedent that NBN Co commits to Telstra that it will enter into an arrangement with Optus regarding the closure of its HFC network.

On 23 June 2011, Optus announced that it had entered into an agreement with NBN Co to migrate its customers from its HFC network. The ACCC has received applications for authorisation of this transaction.<sup>117</sup>

The parties have also agreed a provision in the Subscriber Agreement that restrains NBN Co from incorporating Optus' HFC network into the NBN.

### 9.4.2 Assessment

As the Optus-NBN Co arrangement was announced on the same day as the Definitive Agreements were executed, it is unclear if the condition precedent had an effect upon the parties conduct or whether it relates to conduct that would have occurred irrespective of whether that condition precedent had been agreed.

It is therefore unclear what impact this condition precedent would have upon competition and consumers. Furthermore, an assessment as to the impact of the coming into force of the Optus-NBN Co transaction will be separately considered by the ACCC in its consideration of the parties' authorisation application.

When viewed against the mandatory considerations, the restriction in the Subscriber Agreement that NBN Co will not incorporate Optus' HFC network, or components of it, into the NBN could potentially be a cause of concern. This could be seen to be an inappropriate restriction to be placed upon NBN Co's commercial freedom which might not be necessary for the structural reform of Telstra.

However, even absent this restriction, it would appear unlikely that Optus' HFC network, or components of it, would be permanently incorporated into the NBN.

In its SOE (to which the ACCC must have regard), the Government has specifically stated that its expectation is that NBN will "connect 93 per cent of Australian homes, schools and businesses with fibre-to-the-premises technology".<sup>118</sup> NBN Co could not operate the HFC other than on a short term basis and still meet this expectation.

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<sup>117</sup> The ACCC received applications for authorisation of this transaction on 29 August 2011. The applications will be considered in accordance with the ACCC's usual processes for authorisation applications. After considering validity and assessing any confidentiality claims, the ACCC will undertake public consultation processes and issue draft and final determinations. Further details of the authorisation applications will become available on the ACCC website.

<sup>118</sup> SOE, p 1.

Similarly, as noted in the Implementation Study, there could be several technical challenges NBN Co would have to overcome for an HFC network before it could be used to meet other requirements specified in the SOE.<sup>119</sup> In particular, the Implementation Study states:

The challenge of maintaining upgrades in line with FTTP and the difficulty of unbundling on HFC networks however, suggest that NBN Co would need to overbuild HFC networks by the end of the roll-out to provide for future growth.<sup>120</sup>

Consequently, it appears unlikely that this particular restraint in the Definitive Agreements would have a significant negative impact upon competition or consumers.

21. Are there any detrimental impacts to competition or consumers that are likely to arise *directly* as a result of the condition precedent (noting that the substance of the Optus-NBN Co transaction will be subject to separate consideration by the ACCC)? Would other of the mandatory considerations either support or militate against the proposed restrictions coming into effect? Please provide reasons and evidence for your view.
22. Are there any detrimental impacts to competition or consumers, or for other of the mandatory considerations, that are likely to arise as a result of the restraint upon NBN incorporating elements of Optus' HFC into its network? Would other of the mandatory considerations either support or militate against the proposed restrictions coming into effect? Please provide reasons and evidence for your view.

## **9.5 Restrictions regarding the use of Telstra's HFC by independent channel operators**

### **9.5.1 Overview**

Following the rollout of the NBN fibre network to a particular region, the Subscriber Agreement limits Telstra's ability to provide pay TV carriage services over the HFC. Telstra may supply these services only to FOXTEL and those independent channel operators that currently have contractual arrangements with Telstra. These independent channel operators use this carriage service to access viewers via the FOXTEL special access undertaking (FOXTEL SAU).

However, the Subscriber Agreement does not allow for Telstra to provide HFC services to new providers that may seek access to FOXTEL's set top box in accordance with the FOXTEL SAU without NBN Co's consent.

### **9.5.2 Assessment**

The ACCC has some concerns that these provisions of the Definitive Agreements may limit independent channel operators in accessing FOXTEL's set top box under the

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<sup>119</sup> Implementation study p.106.

<sup>120</sup> Implementation study p.107.



FOXTEL undertaking, thereby limiting the providers that are able to supply broadcast services independently of FOXTEL's pay TV package over that medium.

The ACCC is also concerned that these provisions inappropriately place a limit upon FOXTEL's regulatory obligations under its SAU.

However, it is not clear the extent to which these concerns would arise as a practical matter. This is because it is not clear whether and if so how many additional independent channel operators would seek to utilise the FOXTEL platform.

In particular, as these restrictions would only occur in relation to areas where the NBN has been rolled out, content providers may potentially have alternative methods of accessing end users using NBN-based carriage services.

23. Is this provision likely to impact adversely upon competition in relevant telecommunications markets (such as markets for the provision of content services or other telecommunications markets) or for consumers? Would any of the other mandatory considerations either support or militate against the proposed restrictions coming into effect? Please provide reasons and evidence for your view.

## **9.6 Wireless restrictions**

### **9.6.1 Overview**

Telstra has agreed that for a period of 20 years from the Commencement Date it will not promote wireless services as substitutable for fibre services.

In addition, Telstra is not entitled to any fee for disconnecting a premises if that premises is not connected to the NBN within six months after the Disconnection Date and an individual at that premises contracts with Telstra for a wireless service (see Attachment A3 for further explanation).

### **9.6.2 Assessment**

NBN Co states that the wireless provisions:

[S]upport the migration of customers to the NBN and are integral to the viability of NBN Co's business case.

...

Telstra's dominant position in retail markets means it is in a position to influence the migration choice of many customers. The disconnection payments are made to Telstra upon disconnection of premises in accordance with the Definitive Agreements, rather than upon migration of Telstra's customers to the NBN. Accordingly, appropriate limitations on Telstra's ability to migrate customers to another Telstra platform are integral to the viability of the NBN Co business case. The ability of NBN Co to roll out the NBN in accordance with the Government's objectives depends upon the viability of the NBN Co business case. In essence, Telstra required certain value to its shareholders in exiting its access network business. NBN Co required sufficient confidence that

Telstra would provide business to NBN Co (rather than Telstra migrating customers to another Telstra platform). The terms agreed in the Definitive Agreements reflect the balance struck between these objectives.<sup>121</sup>

In addition, NBN Co has expressed its view that these provisions will have no effect on competition for wireless broadband services.<sup>122</sup>

Telstra has indicated that in its view these provisions are a very limited constraint on its business activities, and that it intends to continue to market and provide wireless services as complementary to a fixed-line service, even over the NBN.<sup>123</sup>

Notwithstanding these views, there remains the potential for these provisions to be detrimental to competition in the markets for the supply of wireless voice and broadband services. Similarly, these provisions may also reduce a potential source of restraint upon NBN Co's supply of voice only services and potentially very basic broadband services. If so, these provisions could lead to detrimental outcomes for consumers.

In this regard, as NBN Co has noted, while the parties each consider that wireless services are complementary to fibre services, it is possible for wireless broadband services to deliver speeds of 12Mbps (the initial entry level services to be offered by NBN Co on its fibre network).<sup>124</sup>

Whether and if so the extent to which these restrictions would result in detrimental impacts for competition or consumers would appear to depend upon a number of factors, including:

- the extent to which the advertising restraint would prevent Telstra from engaging in marketing activities that would otherwise be lawful (i.e. in accordance with the provisions of the Australian Consumer Law);
- how the marketing restriction and the disincentives provided by the calculation of the disconnection payments will impact upon Telstra's competitive activities in the supply of wireless voice and broadband services; and
- the likely detriment (if any) that would arise in relevant markets as a result of these provisions.

The ACCC is seeking further information in relation to these matters.

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? Would other of the mandatory considerations either support or militate against the proposed restrictions coming into effect? Please provide reasons and evidence for your view.

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<sup>121</sup> NBN Co section 577BA submission, p.26.

<sup>122</sup> NBN Co section 577BA submission, p.26.

<sup>123</sup> *NBN will not stop wireless promotion: Thodey*, Technology Spectator, 27 June 2011.

<sup>124</sup> NBN Co section 577BA submission, p.27.

## 9.7 BSO price commitments

### 9.7.1 Overview

NBN Co has announced its intention to submit a Special Access Undertaking to the ACCC which will include terms relating to the price of its basic access offer (i.e. the BSO).<sup>125</sup> If a Special Access Undertaking is accepted by the ACCC, the price of the BSO provided by the SAU will be the standard offer available to all access seekers.

The Access Deed limits what NBN Co can advocate in submissions to the ACCC concerning the price it will propose in the special access undertaking for the BSO.

More particularly, NBN Co must not make any submissions to the ACCC seeking a price for the supply of the BSO that is more than \$24 per service, per month for the period from 5 years from the Commencement Date. In practical terms, this provision would appear to set a maximum price that NBN Co can propose in its undertaking.

### 9.7.2 Assessment

NBN Co states that the restrictions relating to the price it can seek in relation to its BSO product:

[G]ive Telstra certainty as to the terms on which NBN Co will provide access to the Basic Service Offering (BSO) (but NBN Co will ensure that those terms do not discriminate between Telstra and other RSPs [Retail Service Providers]).<sup>126</sup>

While this on its face appears to be a restraint on NBN Co's commercial freedom, it is unclear what impact (if any) the inclusion of this provision would have upon competition, consumers or any other criteria to which the ACCC is to have regard.

25. Given that it effectively operates as a price ceiling rather than a price floor, is the BSO price commitment likely to have any adverse impacts upon competition, consumers or any other criteria to which the ACCC is to have regard? Please provide reasons and evidence for your view.

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<sup>125</sup> See: NBN Co Discussion Paper: "Introducing NBN Co's Special Access Undertaking", July 2011.

<sup>126</sup> NBN Co section 577BA submission, p.12.

## 10 Interim Equivalence and Transparency

### 10.1 Overview

- The ACCC “must not” accept the SSU unless it provides transparency and equivalence in relation to the supply by Telstra of Regulated Services and does so in an appropriate and effective manner.
- Part D of Telstra’s SSU adopts a set of prescriptive rules – pursuant to which Telstra must do or refrain from doing things intended to achieve equivalence of outcomes – as opposed to an overall commitment to achieve equivalence of outcomes. In addition, some commitments are subject to an enforcement “safe harbour” within which Telstra will not be subject to enforcement action. The weakness in the proposed approach is that there is no assurance that the detailed rules will in fact remain appropriate until Telstra achieves structural separation.
- The ACCC’s initial view is that there needs to be a clear and enforceable commitment to an ‘equivalence of outcomes’ that enables wholesale customers and Telstra’s retail businesses to gain access to key input services of equivalent quality and functionality.
- In addition, the ACCC is seeking clarification on the mechanisms that would ensure the proposed equivalence and transparency measures remain fit for purpose for the duration of the interim period.
- *Price Equivalence:* Telstra proposes to publish reference prices for Regulated Services. Telstra also proposes to develop its management accounting system (TEM) to report on internal wholesale prices faced by Telstra’s retail business units and external wholesale prices faced by access seekers. The proposal to offer a wholesale ADSL reference price could provide significant improvements to competition in retail markets, but this is dependent on the pricing formula being properly specified and applied.
- The TEM provides transparency over the effective internal wholesale prices faced by Telstra’s retail business for Regulated Services and represents an improvement on current public reporting. Should this transparency reveal non-equivalence, existing regulatory mechanisms (Part XIC) would be the basis for any recalibration of prices.
- *Organisational Measures:* Telstra undertakes to maintain wholesale, retail and network services business units; to ring-fence the staff of those units and to implement localised incentive remuneration. A potential weakness of the organisational arrangements is the weak separation of the network services business units from the wholesale/retail business units. There are also a number of exceptions and exclusions to the separation of staff which could undermine the effectiveness of the organisational measures.

- *Information security:* Telstra has proposed various information security measures. The measures appear to be an improvement on those in Telstra's OSP. However, the scope of Telstra's commitments may not extend to limit misuse of all relevant information obtained by Telstra.
- *Operational equivalence:* Telstra commits to systems and processes which are intended to deliver operational equivalence. It also commits to reporting on operational equivalence metrics quarterly. The metrics form the basis for proposed 'pay and fix' mechanisms i.e. the payment of rebates and rectifying non-compliance by Telstra.
- The ACCC has a number of concerns with the effectiveness of the 'pay and fix' mechanism in achieving equivalence of outcomes. For example, the ACCC notes that there are a number of exceptions and exemptions which are likely to curtail the operation of the mechanisms. Further, it is unclear if the rebates are sufficiently high to incentivise Telstra to deliver operational equivalence.
- *Technical equivalence:* Telstra commits to facilitate simultaneous commercial launch dates for wholesale customers and its retail business if it develops any DSL upgrades. Provided that the proposed 28 days notice period to wholesale customers is sufficient, this may address previous concerns that have arisen in respect to technical equivalence.
- *Quality of systems support:* Telstra commits to establish and maintain certain wholesale customer facing systems. The ACCC considers the proposed measures could result in fewer unscheduled outages provided that the proposed benchmark of 98 per cent and the rebate amount paid under the service level agreement is appropriate.
- *Information equivalence:* Telstra undertakes to establish and maintain wholesale customer engagement arrangements with respect to matters likely to effect operational quality of Regulated Services. In addition, Telstra proposes to provide notifications to wholesale customers in relation to planned events; availability of ADSL capability; exchange service area information; major service impacting network incidents; operational support system announcements; and disaster recovery plan information. As the notice periods are not tied to an equivalence standard, it is unclear whether the measures would achieve equivalence of outcome.
- *Telstra Exchange Building Access:* Telstra has proposed measures regarding managing exchange building orders and queues, and access to external interconnection facilities. A limitation is that wholesale customers do not have an equivalent right to Telstra's to reserve exchange capacity.
- *Dispute resolution:* The ACCC considers that the effectiveness of the Independent Telecommunications Adjudicator (ITA) depends on industry participation, the independence of the ITA, and the ITA's power to resolve disputes including by requiring reasonable remediation of processes and systems. Subject to these considerations, the ITA could be an effective dispute resolution mechanism to resolve non-price equivalence disputes.

- *Monitoring of compliance during the interim period:* Telstra is proposing an internal governance framework and measures regarding ACCC monitoring of Telstra's compliance with the SSU.

## 10.2 Statutory framework for interim equivalence and transparency measures

Telstra's vertical integration has led to long-standing and widespread competition concerns in markets for fixed-line communications.

Vertical integration and incentives to discriminate are discussed in section 7. A vertically integrated network operator such as Telstra would be expected to have a strong incentive to discriminate where:

- it has market power in the upstream market;
- equivalence in access might risk profit contribution – that is, when:
  - a materially higher return is available on retail supply than from providing network access services; and
  - effective competition in downstream markets would result in the erosion of excess profits if access seekers had equivalent access to the upstream input; and
  - countervailing incentives – such as those that might exist under the threat of effective competition from competing networks (for example, if HFC and/or wireless networks provided strong competitive constraint) – are weak.

As a vertically integrated access provider to the ubiquitous access network, Telstra has retained its incentive and ability to engage in both price and non-price discrimination in favour of its retail business units. This can deter more efficient competitors in retail markets from competing which can result in an overall efficiency loss.

The most effective way to respond to the concerns that the existing structure of the telecommunications industry is failing consumers is to address Telstra's vertical integration through structural separation. However, it will be some time until Telstra's structural separation takes effect and the industry transitions to a more competitively neutral environment involving a fixed-line access network controlled by a wholesale only access provider (the designated day is currently 1 July 2018).

Accordingly, the Government has recognised the crucial importance for competition and consumers that access to Telstra's bottleneck infrastructure should be provided on an equivalent and transparent basis during the transition to the NBN. This is expected to promote retail competition throughout this period, and provide a safeguard against existing market power being leveraged onto the new access network.

Subsection 577A(3) of the Telco Act provides that the ACCC must not accept an SSU unless the ACCC is satisfied that it:

- provides for transparency and equivalence in relation to the supply by Telstra of Regulated Services to Telstra’s wholesale customers and Telstra’s retail business units beginning when the SSU comes into force and ending at the start of the designated day; and
- does so in an appropriate and effective manner.

‘Regulated Services’ are declared services (within the meaning of section 152AL of the CCA) and additional services specified by the Minister. The *Telecommunications (Regulated Services) Determination (No 1) 2011* (Regulated Services Instrument) specifies that Wholesale ADSL Layer 2 and Telstra exchange building access are Regulated Services.

Upon the coming into force of an SSU, the current operational separation regime will cease to operate.<sup>127</sup> The Explanatory Memorandum to the CACS Bill explains that due to this:

Telstra will need to put in place, through the mechanism of its structural separation undertaking, appropriate interim arrangements to apply from that time until the point at which Telstra achieves full structural separation, to ensure that there is equivalence in supply of Regulated Services to Telstra’s wholesale customers and Telstra’s retail business unit during this interim period.<sup>128</sup>

The Ministerial Criteria Instrument (at paragraph 4(g)) sets out in greater detail transparency and equivalence matters for the period Telstra is migrating customer services to the NBN that the ACCC must have regard to in deciding whether to accept Telstra’s SSU. The Explanatory Statement to this Instrument notes that:

The measures set out under this paragraph are aimed at providing meaningful improvements to the current transparency and equivalence measures and are planned to complement the recent changes to the telecommunications access regime.<sup>129</sup>

In making this Instrument, the Minister reiterated that the measures:

[A]re intended to provide meaningful improvements to existing arrangements for industry access to Telstra’s copper network,

The instruments I made today will require Telstra to make new commitments to equivalence and provide for stronger transparency measures during Telstra’s transition to full structural separation.<sup>130</sup>

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<sup>127</sup> See *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*, Schedule 1, Part 1, Division 3.

<sup>128</sup> EM to the CACS Bill, p. 91.

<sup>129</sup> Explanatory Statement to the *Telecommunications (Acceptance of Undertaking about Structural Separation—Matters) Instrument 2011*, p. 5.

<sup>130</sup> The Hon Stephen Conroy, *Media Release: Structural reform of telecommunications a step closer*, 24 June 2011 ([http://www.minister.dbcde.gov.au/media/media\\_releases/2011/206](http://www.minister.dbcde.gov.au/media/media_releases/2011/206)).

As discussed in section 3.2.2, the ACCC considers that the current transparency and equivalence measures in the operational separation regime are ineffective and fail to address Telstra's ability and incentive to discriminate against wholesale customers.

### **10.2.1 Equivalence and transparency**

Subsection 577A(4) states that "equivalence" has the same meaning as in Part 9 of Schedule 1 of the Telco Act, which states that equivalence means:

equivalence in relation to the terms and conditions relating to price or a method of ascertaining price; and equivalence in relation to other terms and conditions.

The Explanatory Memorandum to the CACS Bill states:

Equivalence is where Telstra provides essential business inputs on equivalent terms and conditions to both its own retail business and its wholesale customers. Equivalence relates to both price and non-price terms and conditions such as service provisioning and availability of information about the network, and is considered an essential factor in promoting effective competition in downstream retail markets.<sup>131</sup>

In regards to transparency, the Explanatory Memorandum to the CACS Bill states:

Transparency can be achieved by implementing processes and reporting requirements so that the regulator and Telstra's wholesale customers can be confident that Telstra's wholesale customers are being treated in an equivalent manner to how Telstra supplies its own retail business.<sup>132</sup>

In other words, equivalence in terms and conditions of access that are offered to both wholesale customers and the access provider's own retail divisions promotes an environment where service providers are more likely to compete on their respective merits, as they are more likely to be rewarded for being superior in terms of efficiency.

Further, transparency measures demonstrate the extent to which equivalence is being achieved. This is important in providing industry with confidence to invest and compete.

### **10.2.2 Appropriate and Effective**

The transparency and equivalence measures must be "appropriate and effective" in order for the ACCC to accept the SSU, regardless of the view taken of the SSU's other components. Consequently, the ACCC's assessment of these measures must form a discrete aspect of the overall assessment of the SSU.

The term "appropriate and effective" has not been defined in the legislation or supporting legislative materials. The meaning of a term such as this is however reasonably well understood as being informed by the subject matter, purpose, and scope of the statute in which it appears. In this case, the relevant statutory provisions were introduced as part of a policy to significantly promote competition and economic

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<sup>131</sup> Explanatory Memorandum, CACS Bill, p. 15.

<sup>132</sup> Explanatory Memorandum, CACS Bill, p. 15-16.



efficiency until structural separation is completed in markets that are dependent upon the Regulated Services as key inputs.

Put in this context, appropriate and effective measures would result in significant improvements in access to Regulated Services that better allow Telstra's wholesale customers to compete on their respective merits against Telstra's retail business units in converting network access into downstream services throughout the interim period.

Whether particular measures are appropriate and effective potentially involves questions of degree and judgement. Further, there could be a variety of measures which may be considered as appropriate and effective.

To assist it in forming a view as to whether particular measures are appropriate and effective, the ACCC proposes to consider the following questions:

- Do the measures represent genuine commitments that will significantly promote competition and allow more efficient service providers to be rewarded for investment and innovation?
- Can the measures be implemented efficiently – in terms of time and cost?
- Are the measures sufficiently documented and explained so as to minimise potential disputation around what they actually require?
- Are the measures accompanied by a suitable public reporting framework?

It is unlikely that interim measures would necessitate Telstra's retail business units to use exactly the same access services using the same systems and processes as wholesale customers before they could be considered appropriate and effective (equivalence of input).<sup>133</sup>

In this regard, the Minister has stated that the requirement for interim transparency and equivalence measures was not intended to require Telstra to implement functional separation during this period.<sup>134</sup> Functional separation would, at a minimum, require an "equivalence of input" standard and require a much stricter form of organisational separation than is intended under the interim transparency and equivalence measures. Functional separation involves more substantial investment by the incumbent in redesigning legacy systems.

This is not to say that the interim measures cannot include other initiatives that might be a feature of a functional separation model which would be appropriate to apply during the interim period. That is, although functional separation is a different separation model to the model of structural separation, there should be no implication

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<sup>133</sup> DBCDE, Discussion Paper on Structural Separation instruments: exposure drafts, p.3.

<sup>134</sup> The Hon Stephen Conroy, *Media Release: Structural reform of telecommunications a step closer*, 24 June 2011 ([http://www.minister.dbcde.gov.au/media/media\\_releases/2011/206](http://www.minister.dbcde.gov.au/media/media_releases/2011/206)).

that any model proposed for the interim measures cannot include similar matters to those envisaged for functional separation.<sup>135</sup>

### 10.2.3 Further considerations

In deciding whether to accept Telstra's SSU, the ACCC is required to consider whether the interim equivalence and transparency measures in the SSU include the matters set out in subparagraphs 4(g)(i)-(vii) of the Ministerial Criteria Instrument.

In addition, the interim equivalence and transparency measures will also be relevant in considering a number of other matters to which the Minister has directed the ACCC to have regard. These are:

- *The government's policy objective of improving the accessibility and quality of broadband services for consumers in Australia, including those in regional, rural, and remote areas;* (paragraph 4(a) of the Ministerial Criteria Instrument)
- *The expected distribution of the long term economic benefits for different types of consumers in different geographic areas that would occur as a consequence of the ACCC's acceptance of the undertaking or the undertaking coming into force;* (paragraph 4(c) of the Ministerial Criteria Instrument)
- *Whether the undertaking requires Telstra to implement a governance framework that has specified attributes;* (paragraph 4(f) of the Ministerial Criteria Instrument)

The ACCC intends to consider whether Telstra's proposed measures are consistent with the above and provide for each of the specified matters in paragraph 4(g) of the Ministerial Criteria Instrument relating to transparency and equivalence in Telstra's supply of Regulated Services, and

- if so, to take that as a consideration that supports acceptance of the SSU
- if not, to take that as a consideration militating against acceptance.

## 10.3 Overview of Part D of the SSU

Part D of Telstra's SSU contains a range of commitments intended to provide for equivalence and transparency during the interim period (interim equivalence and transparency measures).

For the purposes of this discussion paper, the ACCC has considered these as follows:

- Price equivalence and transparency measures (section 10.4)

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<sup>135</sup> EM to the CACS Bill, p. 94.

- Organisational arrangements within Telstra to support equivalence (section 10.5)
- Information security (section 10.6)
- Operational, systems, and technical equivalence (section 10.7)
- Information equivalence (section 10.8)
- Equivalence in relation to the Telstra Exchange Building Access Service (section 10.9)
- Dispute resolution processes including an internal Telstra complaints-handling system and an ITA (section 10.10)
- ACCC monitoring of compliance and systems, procedures and processes that promote this and measures which ensure appropriate oversight of compliance by Telstra (section 10.11)

### **10.3.1 Nature of Telstra’s commitments**

Equivalence and transparency measures could potentially take the form of a set of prescriptive rules, the implication being that acting in accordance with the rules will naturally lead to appropriate and effective outcomes. Alternatively, the measures could specify simple overarching style commitments to achieve the desired outcomes, but which leaves the detail to be developed over time.

Each approach can potentially have advantages and disadvantages. A prescriptive approach establishes detailed rules that must be followed, but can be piecemeal unless all issues can be foreseen or where proposed measures cease to be appropriate over time. Consequently, this can be problematic where there are strong information asymmetries.

On the other hand, a simple principles approach can give greater assurance that issues remain within scope, but will likely be problematic in practice if its effect is simply to shift disputation from interpreting one set of principles (such as the standard access obligations) to another.

Here, the proposed measures are in the form of a number of discrete commitments to do or refrain from doing particular things, but with particular mechanisms that could potentially keep the rules appropriate and effective over time. For instance, Telstra commits to investigating certain things (operational performance metrics or access seeker complaints) and taking positive steps to resolve equivalence complaints over time.

Telstra does not however provide an overarching commitment to equivalence of outcomes. Nor does the SSU contain a general regulatory review mechanism to ensure that the proposed equivalence measures remain fit for purpose.

This is a fundamental weakness in Telstra's proposed measures as there is no assurance that the detailed rules will in fact remain appropriate and effective until Telstra achieves structural separation (on the designated day 1 July 2018). The proposed mechanisms that could achieve this end depend in large part on a range of factors – including the suitability of triggers for investigation (the operational performance metrics) and the ability of access seekers to discern non-equivalent (as opposed to just poor quality) service. They also rely upon Telstra's diligence to resource investigations and respond to complaints in a genuine and timely manner.

Without a clear statement of expected outcomes and the potential for regulatory review, there seems little prospect that Telstra's proposed mechanisms to keep the prescriptive rules appropriate and effective over time would achieve the objective of ensuring equivalence of outcome for wholesale customers.

The ACCC's initial view is that there needs to be a clear and enforceable commitment to an 'equivalence of outcomes' that enables wholesale customers and Telstra's retail businesses to gain access to key input services of equivalent quality and functionality.

In addition, the ACCC is seeking clarification on the mechanisms that would ensure the proposed equivalence and transparency measures remain fit for purpose for the duration of the interim period.

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

### **10.3.2 Duration of interim equivalence and transparency measures**

If the ACCC accepts Telstra's proposed SSU, the interim equivalence and transparency measures will remain in place until the designated day. The designated day is currently 1 July 2018, but the Minister can specify a different date.<sup>136</sup> Where an SSU has been accepted by the ACCC, the Minister can not then bring forward the designated day. Therefore, if the ACCC accepts the proposed SSU, the interim equivalence and transparency measures will remain in place until at least 1 July 2018, even if the NBN roll-out ceases.

### **10.3.3 Scope of Telstra's commitments**

A number of the interim measures are subject to general limitations. These arise, for example, from how common terms have been defined. These general limitations are discussed in full here rather than repeated in the discussion of the particular measures that they affect.

#### **Services covered**

The Telco Act defines Regulated Services as including declared services within the meaning of section 152AL of the CCA. However, the SSU defines Regulated Services

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<sup>136</sup> Telco Act, subsection 577A(10)(b).

as excluding a service to the extent that an access determination in force in respect of that service (declared under section 152AL) provides that the standard access obligations do not apply to Telstra in respect of that service.<sup>137</sup>

In response to concerns raised by the ACCC about the extent to which Telstra's commitments would apply to regulated services in areas where Telstra is exempt from supply on regulated terms (exempt areas), Telstra has indicated that it intends to make amendments to the SSU.<sup>138</sup> The proposed amendments would clarify that the exclusion for exempt areas would only apply to price related commitments. This limitation is discussed in section 10.4 below.

In addition, a number of the proposed commitments in the SSU are limited to Regulated Services supplied using the Copper Network, whereas Regulated Services are not only supplied over copper networks. For example, clause 10.1 provides that:

Telstra will maintain systems and processes for issuing tickets of work to field staff so that tickets of work in relation to Regulated Services supplied to a Wholesale Customer and Comparable Retail Services supplied to a Retail Customer **using the Copper Network** are:

- (a) issued and processed with Telstra's systems using equivalent order management; and
- (b) managed and performed by Telstra field staff in an equivalent manner.

## **Implementation**

A large number of the interim equivalence and transparency measures in the SSU do not become operative until the later of 2 months after the SSU commences or the Definitive Agreements come into effect.<sup>139</sup> As a result, the ACCC and industry have no certainty in respect of the commencement of these measures given that the Definitive Agreements are subject to the occurrence of a number of events.

## **Enforcement**

The ACCC considers that, in general, appropriate and effective interim equivalence and transparency measures must provide a sufficient level of assurance that equivalence is actually being delivered.

In its submission, Telstra puts considerable emphasis on it committing to a range of binding and directly enforceable commitments:

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<sup>137</sup> Telstra is exempted from the standard access obligations for the provision of the declared WLR, LCS and PSTN OA services in the Exemption ESAs pursuant to the Australian Competition Tribunal's WLR, LCS and PSTN OA Individual Exemption Orders made in 2009.

<sup>138</sup> Telstra, Letter to the ACCC re Telstra's SSU and Migration Plan, 24 August 2011.

<sup>139</sup> SSU, clause 20.

Importantly, unlike the existing operational equivalence rules (with their indirect rectification notice regime for enforcement) the provisions of the SSU are directly enforceable by the ACCC in the Federal Court.<sup>140</sup>

However, some of the provisions of the SSU are not directly enforceable, but rather provide that Telstra must take certain steps in the event of non-equivalence. In addition, some of the commitments that are potentially enforceable by the ACCC are qualified by a very broad safe harbour.

For example, a failure to comply with the organisational requirements in clause 8 of the SSU:

[W]ill not constitute a breach of this Undertaking that is capable of being directly enforced by the ACCC unless the failure:

- (a) is material and is not an isolated incident; and
- (b) forms part of a demonstrable pattern of repeated non-compliance by Telstra.

Additionally, a safe harbour applies to Telstra's commitments around the service quality and operation equivalence provisions in clause 10. Non-price non-equivalence arising from systems and processes will not be enforceable if the ACCC cannot establish that the failure is material, and is not an isolated incident, and forms part of a demonstrable pattern of repeated non-compliance by Telstra.

There are also equivalence and transparency metrics in clause 15 which are designed to measure equivalence, but repeated failure of a metric does not of itself give rise to any ACCC intervention. Instead, Telstra agrees to pay rebates and to take certain steps to investigate and/or remediate the conduct.

These are significant limitations, however wholesale customers may have recourse to the ITA. In this regard, the ITA has the power to make binding determinations in response to non-price equivalence complaints. Absent provisions for direct ACCC enforcement, an effective ITA scheme may provide a means for wholesale customers to obtain redress for non-price equivalence complaints. Whether the currently proposed scheme is effective is discussed further in section 10.10.

In general, other commitments in the undertaking are directly enforceable by the ACCC. These include Telstra's commitments in respect of information security, maintaining certain business to business interfaces as "fit for purpose" and technical equivalence in relation to DSL upgrades. In such cases where Telstra breaches the precise commitment that has been provided, it risks enforcement action being taken against it. However, Telstra's commitments are subject to exceptions and exemptions which limit the application of commitments. Therefore, while provisions are potentially enforceable by the ACCC whether the ACCC can enforce particular provisions will depend on the nature of the commitment.

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<sup>140</sup> Telstra supporting submission, p. 8.

27. Is the scope of Telstra’s proposed commitments - in terms of services covered, implementation, and enforceability – appropriate?

## 10.4 Price equivalence and transparency measures

### 10.4.1 Introduction

Appropriate and effective interim price measures will have an important bearing on market outcomes in the lead up to full structural separation. As discussed in section 10.2, this is because non-equivalent pricing of access to bottleneck infrastructure can significantly impede competition in downstream markets. Similarly, a lack of transparency over equivalence of access prices can discourage an access seeker from proceeding to make efficient investments, and thereby result in an overall efficiency loss.

The Ministerial Criteria Instrument requires the ACCC to have regard to whether the SSU provides, in relation to the supply by Telstra of Regulated Services:

measures to provide sufficient transparency to enable the ACCC to provide assurance to stakeholders that the undertaking provides for equivalence in relation to terms and conditions relating to price or a method of ascertaining price.<sup>141</sup>

The Ministerial Criteria Instrument also requires the ACCC to have regard to whether the SSU provides an effective dispute resolution mechanism. In relation to price equivalence disputes, this is discussed in section 10.10.

The sufficiency of the interim price measures would also appear relevant to considering other of the mandatory considerations in deciding whether to accept the undertaking. As discussed below, these measures potentially have important consequences for:

- Accessibility and quality of broadband services for consumers in Australia, including rural, regional and remote areas
- The expected distribution of economic benefits for different types of consumers in different geographic areas

### 10.4.2 Overview of proposed interim price measures

Telstra has proposed price equivalence and transparency measures that essentially comprise two commitments:<sup>142</sup>

1) *Reference prices for various of the Regulated Services.*

Telstra will publish a rate card with reference prices for a number of regulated services, and unless Telstra and an access seeker expressly agree another price, will supply the regulated service at the reference price.<sup>143</sup>

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<sup>141</sup> Ministerial Criteria Instrument, paragraph 4(g)(i).

<sup>142</sup> The relevant provisions are contained in clause 17 and Schedules 8, 9, and 10, SSU.

For declared services, the reference prices will be as per an access determination made by the ACCC under Part XIC of the CCA<sup>144</sup> – this reflects that for declared services there is already a regulatory arrangement to provide assurance that access prices will promote competition and encourage economic efficiency.

For wholesale ADSL, the reference price will be set on a retail-minus methodology to provide a protected retail margin.<sup>145</sup> That is, the wholesale ADSL price will generally be maintained at or below the average retail price by an amount equal to the costs Telstra would avoid if it ceased to provide retail services. This is discussed further below.

The reference prices will be available from the next time an access seeker is out of contract for the relevant service. The default position is that access seeker contracts will then incorporate the reference prices as they exist from time to time.<sup>146</sup>

Telstra does not propose for all Regulated Services to be included on the rate card.<sup>147</sup> The rate card will not include reference prices for declared services that are not subject to standard access obligations (Exempt ESAs),<sup>148</sup> and Wholesale DSL services that are ‘substantially different’ to the Wholesale ADSL Reference Service (i.e. Telstra BigPond high speed ADSL 2+ services).<sup>149</sup>

Also, the rate card will not address Telstra exchange building access services. However competition concerns around these services have traditionally centred on non-price terms of access.

## 2) *Public reporting of Internal and External Wholesale Prices and financial data*

Firstly, Telstra will develop its internal management accounting system (TEM) – which is fully reconciled to its statutory accounts and used for internal business decisions to support additional financial reporting which will:

- specify the effective internal wholesale prices (IWP) faced by Telstra’s retail business units for access to various Regulated Services when supplying retail products;
- specify the external wholesale prices (EWP) faced on average by access seekers for access to those same Regulated Services; and

Telstra will also use the TEM to publish capital adjusted profit and loss statements for its retail business units and its wholesale business units which will demonstrate whether:

- Telstra’s retail business units are pricing downstream services as though the IWPs are a real cost;

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<sup>143</sup> SSU, clause 17.2.

<sup>144</sup> SSU, Schedule 8, paragraph 1.2(a).

<sup>145</sup> SSU, Schedule 8, paragraph 1.2(c), paragraph 2.

<sup>146</sup> SSU, clause 17.2(f).

<sup>147</sup> SSU, Schedule 8, paragraph 1.1.

<sup>148</sup> SSU, clause 1.2(f).

<sup>149</sup> SSU, Schedule 8, paragraph 2.1(g).



- Telstra’s retail and wholesale business units face equivalent costs for internal management purposes.

Telstra does not expect the IWPs and EWPs to be exactly the same – that is, some IWPs could be higher while others lower. Where the EWP is not within +/- 5per cent of the IWP, Telstra will submit a substantiation report explaining the difference, although pricing will not be automatically adjusted to bring the IWP closer to an EWP or vice versa. The ACCC may however take the IWP into account in any relevant Part XIC process.

### **10.4.3 Assessment against appropriate and effective requirement**

#### **Promotion of competition and economic efficiency**

As discussed in section 10.2, Telstra’s vertical integration means that it has been able to advantage its own competitive position not by improving its operations and product quality but by improving its relative standing by raising the cost of its rivals and potentially excluding them from markets.

The competition concerns that have arisen from Telstra’s supply of Regulated Services to date can provide a suitable context against which to assess the potential for interim price measures to promote competition and economic efficiency.

Telstra’s pricing decisions of wholesale access services and its own retail services has regularly led to concerns that access seekers cannot profitably compete with Telstra in downstream markets (vertical price squeeze conduct). These complaints have tended to focus on services that have not been declared, and hence are not subject to regulatory price determinations under Part XIC of the CCA.

On two occasions (in 2001 and 2004), the ACCC issued Part A competition notices alleging contraventions of the ‘competition rule’ in s. 151AK of the *Trade Practices Act 1974*. The alleged contraventions each related to vertical price squeeze conduct in the supply of ADSL services. Both competition notices resulted in Telstra reducing its Wholesale ADSL pricing.<sup>150</sup>

Most recently, in 2010 the ACCC noted the following competition concerns arising from Telstra’s then pricing of wholesale ADSL services:

- The apparent cycle whereby material delays occur between the release of new Telstra retail broadband pricing and the finalisation of negotiations around Telstra Wholesale ADSL pricing.

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<sup>150</sup> ACCC, Media Release: Telstra’s wholesale ADSL prices falling, but ACCC to maintain watch over competition for high speed internet services, 30 November 2001 (<http://www.accc.gov.au/content/index.phtml/itemId/87915/fromItemId/378012>); and ACCC, Media Release: Resolution of Broadband Competition Notice, 21 February 2005 (<http://www.accc.gov.au/content/index.phtml/itemId/651386/fromItemId/620299>).

- The ability of and incentive for Telstra to leverage its position as sole supplier of ADSL access services in regional areas to discourage the use of competitive infrastructure in CBD and metropolitan areas (for example, by seeking to impose restrictive contractual terms on Wholesale ADSL customers).
- The level and structure of prices for Wholesale ADSL and wholesale fixed telephony services relative to Telstra's retail pricing.

Of particular concern was that those access seekers that invested in DSL networks were required to pay charges to access Telstra's wholesale ADSL service in other areas that were significantly higher than those paid by access seekers that had not invested. This has the potential to lessen competition in downstream markets as those service providers facing a higher access price will be at a competitive disadvantage, and over time will be excluded from the market. Importantly, in these circumstances, Telstra is not required to innovate or seek out efficiencies in transforming network access into retail services in order to maintain its dominant position, and access seekers are effectively discouraged from doing so as benefits are lost through higher access charges elsewhere.

Telstra's proposed measures concerning wholesale ADSL services appear on their face to provide significant improvements when viewed against these competition concerns, and appear to have potential for generally improving competition and efficiency. This is because:

- A reference price would be offered for Wholesale ADSL services, to be set on a retail minus retail cost (RMRC) methodology to provide a protected margin.
- The reference price would be updated ahead of material retail price changes, and each six months, having regard to changes in retail prices, retail costs and also changes in backhaul transmission requirements.
- A separate reference price would apply in those areas without competitive infrastructure, so that services supplied efficiently in those areas would receive a protected return. This would appear to provide a safeguard against access seekers, and in particular those access seekers that have invested in their own DSL networks in metropolitan (including CBD) areas, being required to pay uncompetitive rates in order to supply services in the monopoly regional areas.
- Consequently, a properly specified, frequently reassessed, protected margin would on its face provide for competitors that were equally efficient as Telstra to enter or expand into both metropolitan and regional markets.
- The requirement to have a standing reference offer, and flow through automatically the results of price adjustments to those access seekers, would also appear to remove competition concerns arising from retail price reductions occurring significantly before commensurate wholesale price changes.
- The RMRC price would place a ceiling – not a floor – on Wholesale ADSL prices. As Telstra explains in its submission:

[W]hile Telstra wholesale customers have the option of taking the reference prices, they can continue to negotiate alternative prices or an alternative price structure with Telstra. Telstra undertakes to amend its standard wholesale contract terms for the relevant set of wholesale products so that the reference prices, as updated from time to time, will apply automatically in the absence of alternatively agreed prices.<sup>151</sup>

Consequently, requirements of particular access seekers for different pricing will not be prevented by the proposed measures.

- Taken as a whole, efficient access seekers could have greater assurance than they do today that they can compete on their merits and retain the rewards from investing and innovating in processes to transform network access into retail services.

The proposed measures provide that the level and structure of reference prices for other Regulated Services continue to be as specified under Part XIC of the CCA. This recognises that these other services are declared and their pricing has been the subject of detailed regulatory scrutiny over a considerable period, and hence already benefit from reference pricing that promotes competition and encourages economic efficiency.

The main feature that Telstra proposes for the pricing of these other Regulated Services is that new contracts for these services would take the default position that changes in reference prices are passed through automatically to access seekers. Otherwise, access seekers would have to come off contract before they could benefit from ACCC pricing decisions made under Part XIC of the CCA.

A further proposed measure is that Telstra will provide substantiation reports where its IWP (i.e., its unit cost measure) does not align with the EWP. These reports would be of potential use at the time of the next regulatory review of fixed-line access prices, should the ACCC then reach the view that adopting the set of IWPs would better promote competition and encourage economic efficiency. Whether adopting the IWPs would better achieve those objectives could be a matter to be determined in the course of that regulatory review, and the proposed interim measures do not limit the ACCC's discretion in conducting that regulatory review.

### **Further detail appears necessary**

That said, it is difficult to reach firm views on the efficacy of the interim price measures as some elements are not yet fully developed. Telstra will prepare and maintain a set of guidelines for preparing TEM reports and ensure the process and methodology used for allocating revenue and cost amounts accords with principles set out in the SSU.<sup>152</sup> However, it will be important that the TEM reports (which are a matter yet to be fully specified) are sufficiently detailed to provide the requisite degree of assurance that price equivalence is being delivered. In effect, in order to support this equivalence objective, these reports would likely need to make public:

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<sup>151</sup> Telstra supplementary submission, p.10.

<sup>152</sup> SSU, Schedule 9, paragraph 5.

- the extent of any differences between the IWPs and EWPs (on a like for like basis) that may exist from time to time, and
- the likely effect of these differences on an efficient service provider's ability to compete – which could require the reporting framework to be structured in a way that also allows an assessment of financial performance based on the EWPs.

This reporting is also discussed below in terms of its suitability to provide transparency.

Similarly, whether the wholesale ADSL reference price will in fact promote competition and efficiency will depend upon the pricing formula being properly specified and applied. Also, there is no certainty as to the level at which the wholesale ADSL price ceiling (for connection, port and AGVC charge items) would initially be set.

In addition, while a price floor mechanism for the wholesale ADSL reference price could be appropriate to prevent gaming behaviour (by which retail prices are continually reduced by wholesale customers to trigger wholesale price reductions), the actual mechanism is yet to be fully specified.

### **Apparent limitations**

The proposed price measures do appear to have limitations which question the extent to which they would promote competition and encourage efficiency in practice. Given this, there would appear to be clear potential for the interim price measures to be improved. Such improvements would of course bolster support for acceptance of the undertaking.

*Including additional services of relevance on the rate card:* In this regard, further assurance should be provided that the Rate Card will feature all of the Regulated Services where price related terms have given rise to competition concerns.

In this context, the proposed wholesale ADSL price measures do not appear to apply to a wholesale ADSL service that is 'substantially different' from the Wholesale ADSL Reference Service. As a consequence, it is unclear whether these price measures will be available to 'premium service providers', i.e., those providers whose customer profile involves higher than average download quotas and/or backhaul provisioning.

Further, there could be some areas in which Telstra does not sell the nominated Wholesale ADSL Reference Service (which is an ADSL 2+ service), but rather sells standard ADSL services. It would appear appropriate for the Wholesale ADSL Reference Service for any such areas to be defined as the standard ADSL Layer 2 service, and for a reference price for this service to also be included on the rate card.

*Basis of wholesale ADSL reference price:* There is potential for wholesale ADSL services to be declared in future, and for an access determination to be made under Part XIC in respect of it. If so, it would appear more appropriate for the reference price for the wholesale ADSL Reference Service to be taken from the access determination from

that time. This is consistent with the view already reflected in the proposed price measures that where a service is declared, then the reference prices should adopt the price terms from ACCC access determinations.

*Price adjustments as backhaul capacity requirements increase:* The Wholesale ADSL Reference Price will be a multi-part tariff which separately identifies a connection charge, port charge and AGVC charge,<sup>153</sup> with the method to calculate AGVC charges outlined in schedule 10. The AGVC charge relates to throughput capacity for backhauling data to the service providers' point of presence.

It is important that, as downloads and line speeds – and hence AGVC requirements – increase, the wholesale ADSL reference prices reduce (or BigPond increase its retail prices) so as to maintain the protected margin. Without this recalibration, efficient access seekers would not be able to compete as AGVC usage continues to grow strongly.

The interim price measures broadly reflect this principle, although there will be important points of detail to be considered in terms of which usage is included or excluded, how frequently this assessment is done and whether the assessment is done on a forecast basis.

In this regard, Telstra proposes a rule that non-standard AGVC usage, including all AGVC used to distribute applications or content that is separately charged to the underlying ADSL service – such as a pay-per-view movie service, would be excluded from the calculation.<sup>154</sup>

There could be grounds to exclude some AGVC usage where it was clear that the associated AGVC charges were being fully recovered in retail charges. However, the rule as currently proposed appears to extend beyond that situation and also, for example, exclude AGVC used to distribute nominally charged content or applications.

*Frequency of wholesale ADSL reference price resets:* Under the proposed SSU, the wholesale ADSL reference price would be reset at least every six months, and more frequently should there be a change in a headline retail ADSL price point of five percent or more. There are however some retail price changes that would not trigger an immediate reset, such as offering short terms discounts. While requiring all price movements to trigger an immediate reset would provide maximum assurance that a protected margin would exist, this would potentially require testing of quite small price fluctuations at the wholesale level, and hence a minimum threshold would seem appropriate. That said, it will be important to get this balance right.

*Periodic review of ADSL reference price mechanism:* The SSU contains a mechanism for independent expert review of the wholesale ADSL Reference Price calculation after three years of operation.<sup>155</sup> Such a review mechanism is important for dynamic markets such as communications as the price methodology could cease to be effective due to

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<sup>153</sup> SSU, Schedule 8, paragraph 2.1(c).

<sup>154</sup> SSU, Schedule 8, paragraph 2.1(f).

<sup>155</sup> SSU, Schedule 8, paragraph 4.

changes in market conditions. There is however little in the way of assurance that recommended changes will be made in the circumstance that it is the ACCC, as opposed to Telstra, that initiates the review.

#### **10.4.4 Time and cost of implementation**

The proposed measures should be able to be implemented relatively quickly and at a reasonable cost having regard to the competition and efficiency benefits potentially available. Some aspects of the proposed price equivalence arrangement are yet to be fully developed and specified, and Telstra will need to expand and explain its proposed approach so that the measures can be implemented in a timely fashion.

In this regard, the proposed measures build upon Telstra's existing wholesale supply arrangements and internal management reporting processes, with necessary enhancements to be introduced progressively and be fully operational by August 2012.

The ACCC understands that wholesale ADSL contracts predominantly expire by no later than the first half of 2012, meaning that the proposed wholesale ADSL reference offer will be available from that time for the majority of wholesale customers. However, the proposed arrangements would not appear to assist wholesale customers in renegotiating existing wholesale ADSL contracts with Telstra sooner than this should they wish to do so.

#### **10.4.5 Sufficiently documented and explained**

The interim price measures are documented in some detail, but a range of additional details are yet to be developed and specified. For example, the interim price measures note that Telstra will meet and agree with the ACCC the methodology by which the wholesale ADSL reference price will be specified. This additional work would need to be completed before the undertaking could be accepted.

There is potential for disputes to emerge regarding the application of the proposed price measures over time, and hence a dispute resolution mechanism would provide assurance that any such disputes could be resolved expeditiously. These disputes could for example centre upon whether the wholesale ADSL reference price had been correctly calculated, or whether a wholesale ADSL service was 'substantially different' to the wholesale ADSL reference service.

#### **10.4.6 Public reporting framework**

The proposed public reporting framework appears to be capable of providing appropriate transparency of wholesale prices applying in respect of Regulated Services, and would represent a significant improvement on the current public reporting.

Of particular significance is that the ACCC and wholesale customers will have transparency over the management accounting systems that Telstra uses for day-to-day business decisions.

This can be contrasted to the public reporting arrangements under Telstra's Price Equivalence Framework, which it established under its Operational Separation Plan. Those reports draw heavily on assumptions and modelling, and hence there is a risk that reported margins do not reflect Telstra's business and/or are not indicative of margins potentially available to efficient access seekers.

That said, the precise form of public reporting is uncertain, as the format and level of detail to be provided in them is yet to be specified, and this is crucial to giving confidence to the industry and to delivering appropriate transparency..

#### **10.4.7 Assessment against other relevant considerations**

##### **Accessibility and quality of broadband services for consumers in Australia, including rural, regional and remote areas**

##### **The expected distribution of economic benefits for different types of consumers in different geographic areas**

As noted above, Telstra has remained the monopoly access provider for ADSL infrastructure in many regional areas. Further, Telstra's pricing of wholesale ADSL services in those areas has given rise to significant competition concerns. These areas contain roughly one third of all access lines.

Consequently, there is potential for the interim price measures to improve the accessibility and quality of broadband services in regional areas, as well as to provide economic benefits to consumers in those areas. Interim measures could have an effect that would extend beyond the interim period, where they 'act as a bridge' to more competitive and efficient markets.

In this regard, Telstra proposes to provide a protected margin on wholesale ADSL services in each of Zone 1 (metropolitan) and Zone 2 (largely regional and rural) areas.<sup>156</sup> That is, across both zones an efficient retail service provider would be able to recover its fixed and marginal retail costs; and in either zone will be able to recover at least its marginal costs of supplying in those areas.

As a result, if properly specified and applied, these interim price measures would appear to support access seekers in expanding into the relatively non-competitive regional and rural areas during the interim period, as their operations in each zone would contribute positively to their overall profit margin.

This in turn would significantly promote competition, and improve accessibility and quality of services in regional and rural areas in particular, with consequential economic benefits for consumers in those areas.

Hence, the inclusion of interim price measures of this nature would tend to support acceptance of the undertaking when considered against these particular mandatory considerations.

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<sup>156</sup> SSU, Schedule 8, paragraph 2.2.

## **Measures that provide sufficient transparency to enable the ACCC to provide assurance to stakeholders that the SSU provides for equivalence in price terms**

As noted above, the proposed price measures have the potential to provide sufficient transparency to the ACCC in this regard, however the proposed measures have not yet been fully developed.

## **Effective mechanisms for the resolution of disputes about equivalence between Telstra and its wholesale customers**

As noted above, the proposed interim measures do not currently provide a mechanism for the resolution of disputes about price equivalence.

28. Do the interim price measures – the rate card and TEM Reports - provide for appropriate and effective price equivalence and transparency? If not, what changes to the price measures and/or additional price measures should be considered?

## **10.5 Organisational measures**

### **10.5.1 Introduction**

Organisational measures are intended to address the underlying incentives that vertically integrated access providers have to favour their own retail businesses. Suitable organisational arrangements within Telstra would better align Telstra's incentives to deliver price and non-price equivalence to greater ensure that Telstra does not have incentives to discriminate in favour of its retail business.

In assessing the organisational measures it is relevant to note that the Minister has clearly stated that the requirement for interim transparency and equivalence measures was not intended to require Telstra to implement functional separation during this period.<sup>157</sup>

The ACCC must consider whether the SSU is consistent with s.577A(3) and “must not” accept the SSU unless it appropriately and effectively provides for equivalence and transparency during the interim period. In considering the organisational arrangements the ACCC proposes to also consider how well they support Telstra's commitments on price and non-price equivalence; and will align incentives in order to significantly promote competition and allow more efficient service providers to be rewarded for investment and innovation.

In addition, the Ministerial Criteria Instrument (at subparagraph 4(g)(ii)) requires the ACCC to have regard to whether the SSU provides for Telstra to maintain organisational arrangements within Telstra that promote interim transparency and equivalence, including the arrangements and measures set out in Schedule 1 to the Instrument. The ACCC intends to consider whether Telstra's proposed measures are

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<sup>157</sup> The Hon Stephen Conroy, *Media Release: Structural reform of telecommunications a step closer*, 24 June 2011 ([http://www.minister.dbcde.gov.au/media/media\\_releases/2011/206](http://www.minister.dbcde.gov.au/media/media_releases/2011/206)).



consistent with the Ministerial Criteria Instrument relating to transparency and equivalence in Telstra's supply of Regulated Services, and

- if so, to take that as a consideration that supports acceptance of the SSU
- if not, to take that as a consideration militating against acceptance.

## 10.5.2 Overview of proposed organisational arrangements

Telstra has proposed the following interim organisational measures:

### 1) *Separate Business Units*

Telstra undertakes to maintain as separate business units one or more wholesale, retail, and network services business units.<sup>158</sup> The organisational arrangements set out in Schedule 1 to the Ministerial Criteria Instrument include maintaining one or more wholesale and network business units separate from Telstra's retail business units.<sup>159</sup> The rationale for a three way split is to allow for both access services and wholesale services to be offered on an equivalent basis. A three way split is currently maintained under Telstra's OSP.

The SSU ring-fences the separate business units by identifying 'required functions' of the separated business units and stating that other separated business units cannot – generally - perform those required functions.<sup>160</sup>

The SSU does not identify all the roles and functions of each of the business units. Generally, business units may perform additional functions that are not required functions. For example, while the network services business unit has principal control regarding faults, service activation and service provision, it would also likely perform other functions such as network planning and general network maintenance. There are however further specific prohibitions on the retail business unit performing particular functions (for example, network planning or the pricing of wholesale products).<sup>161</sup>

Telstra undertakes that employees engaged to work for a wholesale business unit are located in premises that are physically separate from retail business unit premises and to have certain supporting security measures in place.<sup>162</sup> Similar restrictions already exist under the OSP. In addition, Telstra undertakes that the wholesale business unit will be appropriately resourced and managed to adequately serve wholesale customers.<sup>163</sup>

### 2) *Staffing of separated business units*

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<sup>158</sup> SSU, clause 8.1(a).

<sup>159</sup> Ministerial Criteria Instrument, Schedule 1, item 1.

<sup>160</sup> SSU, clauses 8.1(c) and (d).

<sup>161</sup> SSU, subclause 8.1(f)(iii).

<sup>162</sup> SSU, clause 8.3(c).

<sup>163</sup> SSU, clauses 8.3(a) and (b).

The Ministerial Criteria Instrument requires the ACCC to have regard to whether the SSU requires staff to work principally for the business units they are engaged by, subject to various stated exceptions.<sup>164</sup>

Telstra undertakes to ensure that an employee engaged to work for a business unit works principally for that business unit. Wholesale and network services business unit employees are prohibited from working for retail business units.<sup>165</sup> Conversely, retail business unit staff are prohibited from working for a network services or wholesale business unit.<sup>166</sup> There is no prohibition on network and wholesale staff performing work for each other (although they must work principally for their own business unit).

There are a number of exceptions to the proposed organisational arrangements specified in the SSU.<sup>167</sup> Telstra has sought to explain the basis of the exceptions to the staff ring fencing requirements in Annex 1 of its Submission. Many of the exceptions are consistent with those outlined in the Ministerial Criteria Instrument – for example work undertaken in relation to the supply of services outside of Australia.

Two of the proposed exceptions - those in relation to Customer excellence and staff with management responsibilities – are additional to those specified in the Ministerial Criteria Instrument.<sup>168</sup>

The senior management carve-out has two aspects.<sup>169</sup>

- Firstly, where an employee has “management responsibilities” in relation to a Separated Business Unit that Employee is not required to work principally for that Business Unit and may perform other management functions provided those functions comply with clause 8.
- Secondly, there is an exception to incentives and employee benefits restrictions (discussed below) where the employee’s management responsibilities in relation to the relevant wholesale or network services business unit are not a “substantial part” of the overall management responsibilities of that employee.

The customer excellence clause also has two aspects.<sup>170</sup>

- Firstly, a statement that nothing in Part D of the SSU “is intended to be a disincentive to Telstra management’s efforts to encourage the growth of a customer-oriented, problem solving service culture within Telstra to the benefit of Retail Customers and Wholesale Customers alike.”<sup>171</sup>

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<sup>164</sup> Ministerial Criteria Instrument, Schedule 1, item (2); See also items (3), (5), (6), (8) to (11).

<sup>165</sup> SSU, clause 8.2(a).

<sup>166</sup> SSU, clause 8.2.

<sup>167</sup> SSU, clause 8.2(c), clause 8.4, and clause 8.5; Schedule 2.

<sup>168</sup> SSU, clause 8.9 and clause 8.10.

<sup>169</sup> SSU, clauses 8.10(a) and (b).

<sup>170</sup> SSU, clause 8.9.

<sup>171</sup> SSU, clause 8.9(a).

- Secondly, that certain bona fide efforts to resolve a customer issue will not breach an undertaking and that nothing in Part D of the SSU. However, there are explicit limitations in the SSU preventing Network Services business unit employees from engaging in any “win back” activities.

### 3) *Incentives and employee benefits*

The Ministerial Criteria Instrument requires the ACCC to have regard to whether the SSU provides for:

Measures that ensure that any incentive remuneration scheme applying to staff who are engaged to work for Telstra’s [wholesale or network] BUs is solely based on the performance of the [wholesale or network] BUs, unless otherwise approved by the ACCC.<sup>172</sup>

Telstra undertakes that all incentive remuneration for employees working for a wholesale or network services business unit will reflect solely the objectives and performance of that wholesale or network services business unit and, if Telstra wishes, any other business unit (which is not a separated retail, network services or wholesale business unit).<sup>173</sup>

However, these commitments are subject to a number of exceptions, including the following:

- Telstra is not prevented from continuing the operation or term of an Employee incentive remuneration scheme that exists at the date on which the SSU comes into force (including in respect of new employees).<sup>174</sup>
- As above, localised incentive arrangements will not apply to employee who has management responsibilities provided that the management responsibilities in relation to the relevant Wholesale BU or Network Services are not a “substantial part” of the overall management responsibilities.<sup>175</sup>

### **10.5.3 Assessment against appropriate and effective requirement**

One means of assessing the appropriateness and effectiveness of the organisational measures is to consider how comprehensively they separate functions, staff, systems and processes necessary to support wholesale customers and its retail business alike.

The organisational arrangements are intended to support Telstra’s commitments on price and non-price equivalence, which take the form of equivalence and transparency measures (see section 10.7) rather than formal arms-length contracts in relation to the supply of services between business units.

Telstra’s proposed organisational arrangements do not comprehensively list all functions of business units. This preserves a degree of flexibility in how Telstra decides

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<sup>172</sup> Ministerial Criteria Instrument, Schedule 1, items (4) and (7).

<sup>173</sup> SSU, clauses 8.6(a) and (b).

<sup>174</sup> SSU, subclause 8.6(c)(iii).

<sup>175</sup> SSU, clause 8.10.

to structure its business units. Telstra notes in its submission that the rationale for ring-fencing the required functions is that these functions could impact both retail and wholesale services.<sup>176</sup>

The ring-fencing arrangements in place for the network services business units are comparatively weak. In support of its organisational arrangements Telstra submits:

The main focus on the ring fencing arrangements is on dealings between the retail BUs and other separated BUs (wholesale BUs and, to a lesser extent, the Network Services BUs). This approach is consistent with concerns about vertical integration.<sup>177</sup>

As between the network services business unit and other business units:

- Telstra does not undertake to maintain physically separate premises for the network services business unit. This may be co-located with either of Telstra’s retail or wholesale business units.
- Staff working for the network services business unit may perform work for a wholesale business unit provided they work “principally” for their own business unit.
- A network services business unit may engage in marketing activity and sales of Telstra products and/or services to end users while attending a premise of an end user, provided that customer is already a Telstra retail customer<sup>178</sup>.

The weaker ring-fencing in place for the network services business has potential implications for the effectiveness of the broader organisational arrangements. For example, the physical co-location of network services business units with retail or wholesale business units could undermine the efficacy of information security arrangements. Telstra has provided a supplementary submission explaining the rationale for the weaker ring-fencing.<sup>179</sup> In particular, Telstra submits that the measures are appropriate because:

The Network Services business unit’s activities are largely technical and process-oriented tasks that can (and will be) objectively measured in terms of equivalence. There are a range of measures that have already been adopted in the SSU specifically targeted at these functions, to ensure they are performed in a ‘customer agnostic’ manner, including equivalence metrics with rebates, incentive restrictions, prohibitions on Network Services staff performing any work for Retail business units that is not in the SSU or otherwise ACCC approved and specific restrictions on Marketing Activities.

It is also a far more difficult exercise for Telstra to implement physical separation between retail and Networks Services staff than between retail and Wholesale staff.<sup>180</sup>

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<sup>176</sup> Telstra supplementary submission, p.12.

<sup>177</sup> Telstra supplementary submission, p.12.

<sup>178</sup> SSU, Schedule 2, paragraph 2.

<sup>179</sup> Telstra supplementary submission, p. 6.

<sup>180</sup> Telstra supplementary submission, p. 7.

A second means of assessing the likely effect of the measures that Telstra has proposed is to consider whether their operation is curtailed by exclusions and the like. As outlined above, there are a number of exceptions and exclusions to the separation of staff and the localised incentive arrangements.

Some exceptions – those outlined above regarding customer excellence and staff with management responsibilities -- appear to have the potential to undermine Telstra’s incentives to comply with its substantive commitments on price and non-price equivalence.

Telstra has explained that the purpose of the customer excellence clause is to benefit both retail and wholesale customers and reflect Telstra’s commitment to improving the customer experience. Telstra submits there are other checks and balances in place.<sup>181</sup> -

The exception for staff with management responsibilities could substantially weaken the effectiveness of the ring-fencing arrangements. The performance of those functions must comply with clause 8 – such that, for example, when performing a management function on behalf of a wholesale business unit a manager could not make a retail pricing decision. However, this broad exception would appear to allow management staff to perform both retail and wholesale/network functions on behalf of those business units. The scope of this exception is also not sufficiently documented, as “management responsibilities” is not defined.

A third means of assessing the likely effect of the measures is to consider the adequacy of the supporting measures. In this respect, the inclusion of localised incentive remuneration measures in the SSU represents an improvement on the OSP. Localised incentive remuneration is instrumental to supporting organisational arrangements by minimising any incentive for wholesale or network staff to favour the interests of Telstra’s retail businesses.

However, Telstra’s proposed exclusions to localised incentive remuneration for staff with management responsibilities and the continuation of existing incentive schemes could weaken the broader ring-fencing arrangements.

Telstra has provided some public supporting materials on when existing incentive remuneration schemes will cease. Telstra states:

- There are 10 Group Managing Directors within the ring-fenced Wholesale and Network Services business units who participate in current long term incentive remuneration schemes. The 2009 and 2010 Growthshare plans expire on 30 June 2012 and the 2011 plan expires on 30 June 2013.<sup>182</sup>
- There are also annual short term incentive schemes for a wider set of employees, which measure performance from 1 June 2011 to 1 July 2012 and will be paid out in September 2012.<sup>183</sup> With the exception of the COO, all of these staff will be moved to BU-specific short term incentive arrangements.

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<sup>181</sup> Telstra supplementary submission, p. 6.

<sup>182</sup> Telstra supplementary submission, p. 2.

<sup>183</sup> Telstra supplementary submission, p. 2.

- In addition to the above, there is also currently a ‘customer satisfaction bonus scheme’ which is available to all non-Short Term Incentive staff. This will be grandfathered for the current 2011-12 fiscal year.

This information is relevant to assessing the effect of the carve-out for the continuation of existing incentive schemes, and suggest that this carve-out will only have effect for the first two years of the operation of the proposed SSU.

Telstra has explained in a supplementary supporting submission that it is seeking a carve out in relation to the localised incentive remuneration requirement for its Chief Operations Officer (COO). Telstra has indicated that various lines report to the COO including the network services BU. However, the lines of the network services BU “do not comprise a substantial part of the COO’s overall management responsibilities”.<sup>184</sup> Accordingly, Telstra submits that the COO should continue to participate in the long term incentive and short term incentive group level schemes. However, in the SSU itself the management carve-out is not explicitly limited to the COO and therefore the breadth of its operation is currently unclear.

A third means of assessing whether Telstra’s proposed organisational arrangements are appropriate and effective is to consider what level of assurance they provide that ring-fencing of functions and staff will be complied with. Telstra’s commitments in relation to organisational arrangements are directly enforceable by the ACCC. However a failure by Telstra to comply with the proposed organisational ring-fencing arrangements is only enforceable by the ACCC if it is material and not an isolated incident and forms part of a demonstrable pattern of repeated non-compliance by Telstra.<sup>185</sup> This may weaken assurance of Telstra’s compliance with the proposed organisational measures.

29. Does the SSU appropriately ring-fence functions to effectively promote equivalence?
30. Are the proposed limits on staffing of separated business units, including any exceptions/exemptions, appropriate and effective in promoting equivalence?
31. Are the proposed limits on incentives and employee benefits, including any exceptions/exemptions, appropriate?
32. Are the proposed arrangements with regard to the network services business unit appropriate given the objective of ensuring downstream competitors can compete on their merits?

## 10.6 Information security

### 10.6.1 Introduction

Information security measures are necessary to ensure that Telstra does not misuse information regarding wholesale customers to its own commercial advantage. That is,

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<sup>184</sup> Telstra supplementary submission, p. 3.

<sup>185</sup> SSU, clause 8.8.

to safeguard against Telstra’s misuse of information obtained by virtue of its vertical integration to gain an unfair competitive advantage in a downstream market.

Information security measures are an important consideration in assessing whether the interim arrangements are appropriate and effective.

Further, the Ministerial Criteria Instrument requires the ACCC to have regard to whether the SSU provides for:

Effective measures to protect from unauthorised disclosure or use confidential information and commercially sensitive information that Telstra holds in relation to Telstra’s wholesale customers, or in relation to customers of those wholesale customers or other end-users of services supplied by those wholesale customers, which Telstra obtains for the purposes of, or in the course of, supplying wholesale carriage services to those wholesale customers<sup>186</sup>

## 10.6.2 Overview of proposed information security measures

Telstra has proposed the following interim measures relating to information security:

### *1) Commitment to not misuse or disclose Protected Information*

Telstra undertakes to not use or disclose Protected Information to “enable a Retail BU to gain or exploit an unfair commercial advantage over that Wholesale Customer in any market.”<sup>187</sup>

Protected Information is defined in the SSU as information obtained in the course of supplying Regulated Services that is:

- Confidential information identifying a wholesale customer or a customer of that wholesale customer, and commercially sensitive information (primary information).<sup>188</sup>
- Information which is derived from primary information which would enable the identity of a wholesale customer, or a customer of that wholesale customer, to be ascertained.<sup>189</sup> However, this does not include information that would enable the identify of a wholesale customer to be ascertained and which is aggregated on a national basis.<sup>190</sup>
- Primary information which relates to a Wholesale Customer but where the identity of the wholesale customer cannot be identified only by reason of the name of the wholesale customer not being identified (e.g. being masked).<sup>191</sup>

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<sup>186</sup> Ministerial Criteria Instrument, subparagraph 4(g)(iii).

<sup>187</sup> SSU, clause 9.3.

<sup>188</sup> SSU, clauses 9.1(a) and (b).

<sup>189</sup> SSU, clause 9.1(c).

<sup>190</sup> SSU, clause 9.1(e).

<sup>191</sup> SSU, clause 9.1(d).

2) *Information security measures regarding the exchange of Protected Information between Business Units*

Telstra also undertakes to adopt certain information security measures in relation to Protected Information – Telstra ensures wholesale Business Units do not disclose Protected Information to any Retail BU unless authorised by the Wholesale Customer; and any Network Services BU otherwise than on a ‘need to know basis’ or where authorised.<sup>192</sup> Additionally, Network BUs do not disclose Protected Information to Retail BUs unless authorised.<sup>193</sup>

Telstra commits to ensuring that its systems are engineered so that the default position is ‘no access’ for network services staff to Protected Information.<sup>194</sup>

In relation to certain sharing of staff between the BUs under Clause 8, (e.g. short-term secondments or transfers of Employees in certain circumstances), Telstra will ensure that the Employees comply with the information security measures in Clause 9.<sup>195</sup> However a corresponding requirement does not apply to work undertaken by employees working for or with other BUs in relation to the supply of certain services under Clause 8.4 of the SSU.

3) *Additional restrictions on the use of aggregated information*

In addition to restrictions on “Protected Information”, Telstra undertakes not to disclose to a retail business unit information that is derived from primary information, in relation to which Telstra cannot identify the wholesale customer or their customers and which is aggregated on a sub-national basis; unless the ACCC approves making that information available to wholesale customers at the same time.

4) *Supporting compliance measures*

Telstra will establish and maintain effective measures to monitor compliance with the information security requirements, including that any breaches by Employees of the information security measures in Clause 9 may be met with performance management in appropriate cases.<sup>196</sup>

### **10.6.3 Assessment against appropriate and effective requirement**

The proposed commitments would appear on their face to have potential to promote competition and economic efficiency by limiting any informational advantage Telstra receives in downstream retail markets from its position as a vertically integrated access provider.

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<sup>192</sup> SSU, clause 9.4(a).

<sup>193</sup> SSU, clause 9.4(a).

<sup>194</sup> SSU, clause 9.4(c).

<sup>195</sup> SSU, clauses 8.2(c) and (d).

<sup>196</sup> SSU, Schedule 2, paragraph 4(a).



A useful means to assess whether the proposed measures would in practice promote competition and economic efficiency is to consider how they would:

- directly address particular equivalence concerns that have emerged, and/or
- would provide assurance that these or similar concerns will be remedied effectively through the operation of the various supporting mechanisms.

In this regard, the proposed measures can be assessed against concerns that have been expressed by access seekers involving:

- the use of derived wholesale customer information for retail purposes, and
- the level of assurance that behavioural undertakings are implemented in practice.

In relation to the first concern, Telstra's undertaking on the use of derived information could promote competition by limiting Telstra's ability to obtain a competitive advantage through use of aggregated market data. Optus has previously - prior to the implementation of the OSP - taken Federal Court action alleging use of its confidential long distance traffic information provided by Telstra Wholesale to Telstra Retail and used by Telstra Retail to prepare "Market Share" Reports.<sup>197</sup> These reports formed the basis for marketing attacks to win Optus customers back to Telstra.

The scope of Telstra's commitments in respect of Protected Information and derived information may not extend to limit misuse of all information obtained by virtue of Telstra's vertical integration to gain an advantage in a downstream market. For example, it is not clear how the restrictions would operate in relation to nationally aggregated information which would enable Telstra to identify the wholesale customer. This lack of clarity potentially limits the efficacy of the arrangements in providing assurance to wholesale customers.

On the second concern, Telstra's proposed undertakings on information security improve upon a solely behavioural commitment. For example, Telstra commits that, from the commencement of the undertaking, the default position for Telstra's processes and systems will be 'no access' for network services staff to Protected Information.<sup>198</sup> These measures provide a higher level of assurance than a behavioural undertaking alone.

### **Time and cost of implementation**

The information security measures will be implemented at the commencement of the Undertaking. This is appropriate because the OSP will cease to operate at the time the SSU comes into force, and so new information security measures are immediately required to ensure that retail business units cannot access protected information for any period of time.

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<sup>197</sup> See: *Optus Networks Pty Ltd v Telstra Corporation Ltd (No 4)* [2011] FCA 485.

<sup>198</sup> SSU, clause 9.4(c).

## **Sufficiently documented and explained**

As discussed above, it is unclear how the information security arrangements apply to certain types of nationally aggregated information.

## **Public reporting framework**

Telstra will report against its compliance with Clause 9 in its Annual Compliance Report<sup>199</sup> and may disclose the content of that report to wholesale customers except where that content is confidential or commercially sensitive.

33. Do the proposed information security arrangements provide sufficient assurance to stakeholders that confidential and commercially sensitive information is protected from unauthorised disclosure or use?

## **10.7 Non-price equivalence and transparency measures**

### **10.7.1 Introduction**

Non-price terms of access can also have significant implications for the nature and extent of competition and economic efficiency that emerges in downstream markets.

In particular, these terms of access can directly affect the ability of access seekers to compete on the quality of service that they offer.

As discussed at section 7, a vertically integrated access provider can have strong incentives to limit the quality of service it provides to access seekers through non-price terms of access (described in the economic literature as sabotage). Individual cases of sabotage can be difficult to identify and establish, and hence are difficult to counter through access regulation.

Hence, the interim non-price measures will be an important consideration in assessing whether the interim arrangements are appropriate and effective.

Further, the Ministerial Criteria Instrument requires the ACCC to have regard to:

(g) whether the undertaking provides for the following matters relating to transparency and equivalence in relation to the supply by Telstra of Regulated Services:

(iii) measurable standards for the equivalent supply of Regulated Services to Telstra's wholesale customers and retail business units and enforcement of those standards, including through service level guarantee payments.

(viii) measures to ensure that systems used for wholesale customers in relation to billing information, ordering, provisioning, fault reporting and fault rectification provide outcomes and functionality that are equivalent to the outcomes and functionality provided by systems used for those matters by Telstra's retail business units.

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<sup>199</sup> SSU, subclause 22.2(b)(ii).

## 10.7.2 Overview of proposed interim quality of service measures

Telstra has proposed a range of measures which relate to equivalence and transparency on the quality of service it offers to access seekers.

Service quality can be broken down into various types:

- Operational quality – e.g., the time to provision or fix a service;
- Technical quality – e.g., the throughput rates or download quotas that can be offered on ADSL plans;
- The quality of systems support – e.g., the support provided to an access seeker to interact with the access provider’s operational support systems, e.g., to place customer orders or diagnose faults.

### Operational quality

Telstra has proposed the following interim measures relating to operational quality:

#### *1) Systems and processes to support equivalence in operational quality*

Telstra has provided commitments at clause 10 around particular systems and processes which influence its capability to deliver equivalence in operational quality. These commitments are pegged to an equivalence based standard.

For instance, Telstra’s systems and processes used to issue and perform tickets of work to field staff will apply equivalent rules in respect of work performed for wholesale and retail customers.<sup>200</sup>

Similarly orders and fault reports of Basic Telephone Services and ADSL services that do not require field staff involvement will also be treated using equivalent management rules so that the work can be performed in an equivalent manner for wholesale and retail customers.<sup>201</sup>

For ULLS, LSS and DTCS, Telstra undertakes to establish management systems and other measures that allow Telstra to meet the performance metrics for those services.<sup>202</sup>

While these commitments are enforceable by the ACCC, they are subject to the broad “safe harbour” (discussed at section 10.3.1).

#### *2) Operational performance metrics*

Telstra has proposed a range of metrics relating to its operational performance in activating services and remedying faults.<sup>203</sup> Telstra will measure and report quarterly its

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<sup>200</sup> SSU, clause 10.1.

<sup>201</sup> SSU, clause 10.2 and clause 10.3.

<sup>202</sup> SSU, clause 10.4 and clause 10.5.

<sup>203</sup> SSU, clause 15.

performance against these metrics in relation to wholesale customers and retail business units (the Operational Equivalence Report).<sup>204</sup>

The operational metrics and the associated performance standards are set out in Schedule 3 of the SSU. They focus on activation and fault rectification for Regulated Services. Many of the performance metrics are adopted from Telstra's OSP, although there are some additional metrics (for example, for DTCS and TEBA).

These metrics are relevant in a number of respects. For ULLS, LSS and DTCS, they inform the nature of Telstra's commitment to establish order management systems and other processes.

The metrics also trigger the proposed 'fix' and 'pay' mechanisms outlined in clauses 15 and 16, and may provide additional support to an access seeker to itself agitate for systems and process improvements to be made via a complaint dealt with under the Telstra accelerated investigation process and the ITA scheme outlined under clauses 18 and 19.

Telstra's obligations to 'pay' and 'fix'<sup>205</sup> in cases of poor performance are as follows:

- For wholesale customers that have entered into a service level agreement, Telstra will pay rebates to wholesale customers (what Telstra describes as 'pay')<sup>206</sup>. Wholesale customers will be able to enforce payment of these rebates directly against Telstra.
- Telstra will investigate poor performance as measured by the metrics and, where Telstra determines the result is due to non-compliance, set out and take steps to further investigate or remedy that non-compliance (what Telstra describes as 'fix').<sup>207</sup>

### **Technical quality**

Telstra has proposed interim measures that would require it to upgrade both retail and wholesale DSL services in a way that facilitates simultaneous commercial launch dates by its retail divisions and wholesale customers. A DSL upgrade could be either new network capability (delivered at layer 2) – such as new line 'speeds'<sup>208</sup> or a naked DSL product. However it does not include product testing.<sup>209</sup>

Commitments around the technical quality of other Regulated Services have not been included in the interim measures. This could reflect a view that there is far less potential for material advancements to be made in the interim period over the technical quality of those services.

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<sup>204</sup> SSU, clause 15.2.

<sup>205</sup> Telstra supplementary submission, p.10-11.

<sup>206</sup> SSU, clause 16 and Schedule 7.

<sup>207</sup> SSU, clause 15.3.

<sup>208</sup> Telstra supplementary submission, pp 11-12.

<sup>209</sup> SSU, clause 14.

### **Quality of systems support**

Telstra commits to establish and maintain certain business to business interfaces as “fit for purpose”, and will introduce an Applications Monitoring System to provide wholesale customers with additional assurance around the availability of the business support systems that Telstra provides for wholesale customers.<sup>210</sup>

This undertaking is directly enforceable by the ACCC, and backed by a metric (of 98per cent service availability) on which rebates are payable.

### **10.7.3 Assessment against appropriate and effective requirement**

#### **Promotion of competition and economic efficiency**

A number of the proposed commitments would appear on their face to have potential to promote competition and economic efficiency.

For instance, the measures that would require operational systems and processes to be operated using equivalent rules, or in a way that promotes Telstra meeting the proposed performance metrics, as well as the measures Telstra has proposed to provide assurance around wholesale business support systems, would appear capable of significantly improving the quality of service it provides to wholesale customers.

Similarly, a ‘pay and fix’ approach, together with supporting mechanisms to investigate and remedy issues, such as an AIP scheme and an ITA scheme, would have potential to address equivalence and transparency issues that arise over time. Further, these mechanisms could represent an improvement on Telstra’s OSP, by triggering direct financial consequences for poor operational performance.<sup>211</sup>

A useful means to assess whether the proposed measures would in practice promote competition and economic efficiency is to consider how they would

- directly address particular equivalence concerns that have emerged, and/or
- would provide assurance that these or similar concerns will be remedied effectively through the operation of the various supporting mechanisms.

In this regard, the proposed measures can be assessed against concerns that have been expressed by access seekers involving:

- The commercial introduction of new network services through retail business units ahead of wholesale service offerings
- The availability and reliability of Telstra’s wholesale business support systems and interfaces
- Delays in ULLS activations as compared to DSL, LSS and PSTN activations.

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<sup>210</sup> SSU, clause 12.

<sup>211</sup> Telstra supplementary submission, p 10.

The first of these concerns stems from Telstra's introduction of retail ADSL2+ services in November 2006 without offering a wholesale equivalent until some 18 months later.<sup>212</sup> At the same time as launching retail ADSL2+ services, Telstra announced and introduced higher speed ADSL1 services (up to 8Mbps) before wholesale customers could acquire an equivalent wholesale service. These delays had the clear potential to impede wholesale customers reliant on Telstra's wholesale ADSL service from competing for retail customers.

Telstra's proposed measures around technical product equivalence would appear to provide a direct assurance that responds to this concern, provided that the proposed 28 days notice period to wholesale customers is sufficient to enable them to prepare retail product offerings and execute wholesale agreements with Telstra.

The next concern arises from the potential for Telstra's wholesale support systems to be unavailable, or to fail with the consequent loss of wholesale customer transactions. Where this occurs it has the clear potential to significantly disrupt competition, as wholesale services are fundamentally affected.

Telstra's proposed measures around wholesale customer facing systems would appear to provide direct assurance that fewer unscheduled outages of these systems would be experienced in future. That said, this could depend in part upon the suitability of the proposed benchmark of 98per cent, and the appropriateness of the level of payments that Telstra would provide under the 'fix and pay' mechanisms.

The third concern reflects that the timeframes in which Telstra activates ULLS can be materially longer than timeframes in which Telstra activates DSL services or LSS, or PSTN services that require new jumper wire to be installed at the exchange.

This is notwithstanding that, in an operational sense, ULLS activations and these other order activations each involves broadly similar provisioning work as they each typically require a technician to attend the exchange and run jumper wire across the distribution frame.

This delay in activating services can place ULLS access seekers at a competitive disadvantage, as they are less able to respond to customer orders for voice and DSL services in the same timeframes as Telstra or wholesale customers that use different access services.

In this regard, Telstra has proposed to preserve the existing differentiated target timeframes for activating these services. These timeframes are set out in schedule 3 of the undertaking. Accordingly, the target timeframe for ULLS remains as the 'customer requested date' – which is effectively the date that the access seeker nominates (which in urban areas must be more than five business days from the date on which the order is placed) or the next available date according to Telstra's scheduling system.<sup>213</sup> The other

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<sup>212</sup> Telstra, *BigPond marks 10th Anniversary with launch of national High Speed Broadband*, 10 November 2006 (<http://www.telstra.com.au/abouttelstra/media-centre/announcements/bigpond-marks-10th-anniversary-with-launch-of-national-high-speed-broadband.xml>).

<sup>213</sup> SSU, Schedule 3, paragraph 5.

activations have target timeframes of three days or five days respectively in urban areas.<sup>214</sup>

Hence, the proposed measures would not provide any immediate improvement when viewed against this particular equivalence concern. Further, as Telstra's obligations to 'fix and pay' are also anchored to these operational performance metrics, those mechanisms would not provide assurance that this concern would be addressed over time.

Another means of assessing the likely effect of the measures that Telstra has proposed is to consider whether the proposed supporting mechanisms – and in particular, the performance metrics and associated 'fix and pay' arrangements – will apply in all circumstances, or whether their operation is curtailed by exclusions and the like.

These mechanisms take on additional significance due to the absence of a simple direct commitment to provide for equivalence in service quality. Further, the proposed limitations on breaches of the undertaking being enforceable in the Federal Court place further emphasis on these mechanisms. In this regard, the undertaking proposes that

- repeated failure to provide an equivalent quality of service (as identified by a reported metric) could not, of itself, result in enforcement action; and
- a breach of the fundamental commitment to have equivalent systems and processes can only be enforced where the failure is material *and* is not an isolated incident *and* the failure forms part of a demonstrable pattern of non-compliance<sup>215</sup> – the appropriateness of limitations such as this has been discussed previously.

In this regard, the performance metrics are subject to numerous exceptions and exemptions, which will have a direct bearing on whether the fix and pay obligations are triggered.<sup>216</sup> Telstra will also provide a set of ghost reports – identifying the results that would have been observed had the various exemptions not been applied – but these will not trigger the fix and pay mechanisms.

A number of these exceptions and exemptions are long standing and relatively well understood – for example, the metrics are suspended by issuing mass service disruption notices on the occurrence of natural disasters.<sup>217</sup>

In addition, the proposed performance metrics exclude all regions where NBN Co is undertaking installation or connection activities or regions affected by those activities.<sup>218</sup>

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<sup>214</sup> Metropolitan target timeframes are provided for ease of comparison. Longer timeframes apply for all activation types outside metropolitan areas.

<sup>215</sup> SSU, clause 10.7(c).

<sup>216</sup> SSU, Schedule 3, paragraphs 10 and 11.

<sup>217</sup> SSU, Schedule 3, subparagraph 11(c)(ii).

<sup>218</sup> SSU, Schedule 3, paragraph 11(a).

Telstra submits that migration to the NBN is not ‘business as usual’ and that the metrics are “intended to demonstrate equivalence of operational activities by Telstra in its day-to-day operations.”<sup>219</sup> Why NBN roll-out should not be treated as ‘business as usual’ for the duration of the rollout period is unclear. However for present purposes it is important to note that

- this will exclude a very significant number of services from the operation of the operational performance metrics.
- all activities in roll-out regions, or other ‘affected regions’ are excluded from the performance metrics irrespective of whether or not they are in fact affected by NBN Co roll out activities.

Further, performance will not be measured against a number of metrics where there are less than 1500 wholesale orders in aggregate for the relevant quarter or less than 10 per cent of the volume of orders placed for Telstra’s retail customers in that quarter.<sup>220</sup>

Telstra states the purpose of this exclusion is to ensure results are ‘statistically significant’. It is unclear why the number of wholesale orders – either in absolute terms or relative to the number of retail orders – could compromise the validity of the observed results as Telstra suggests. However, for present purposes it is important to note that Telstra has advised the ACCC that this threshold is likely to exclude a number of metrics, including a number of metrics relating to the Basic Telephone Service.

A number of further exclusions have also been proposed, the purpose and effect of which is currently not known.

There are some further aspects of the proposed ‘pay and fix’ arrangements which could influence their effectiveness in practice in providing appropriate incentives on Telstra to provide high quality services to access seekers.

1. Wholesale customers will be required to enter into a ‘Regulated Services SLA Agreement’<sup>221</sup> and agree to waive any previously agreed service level agreement, and this may discourage take up of the SLA scheme.

2. The rebates are generally equal to one month’s recurrent charge for the relevant service, and do not scale as service levels further degrade, which might not be sufficient to incentivise Telstra to investigate and fix causes of poor performance.

That is, if the rebates are set at too low a level, Telstra will not be appropriately incentivised to deliver upon its commitments. Similarly, if the amount of the service level rebates does not scale in proportion to the duration or seriousness of Telstra’s failure to meet a relevant service level, Telstra will have no incentive to take immediate steps to remedy a continuing failure.

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<sup>219</sup> Telstra supporting submission, p 11.

<sup>220</sup> SSU, clause 15.1(e).

<sup>221</sup> SSU, Schedule 7.



3. Telstra undertakes to promptly investigate the cause of poor performance.<sup>222</sup> However, the obligation to implement a ‘fix’ as a result of this poor performance applies where Telstra determines that the result is due to ‘non-compliance by Telstra with the SSU’.<sup>223</sup> It is unclear whether and the extent to which Telstra would make such a determination and take steps to rectify the poor performance.

As a consequence, the extent to which the proposed operational metrics and associated pay and fix provisions will be likely to lead to improvements in operational quality is unclear, and it is likely that considerable improvements will be required before the proposed measures could be considered appropriate and effective in this regard.

#### **10.7.4 Time and cost of implementation**

The proposed measures should be able to be implemented relatively quickly and at a reasonable cost having regard to the competition and efficiency benefits potentially available.

This is because, the proposed measures are comparatively simple and straightforward to implement, and build upon existing processes established under Telstra’s enhanced accounting separation and its Operational Separation Plan.

Importantly, a functional separation involving an ‘equivalence of inputs’ – which is a far more encompassing framework by which to deliver non-price equivalence – is not being proposed as part of these interim measures.

That said, it is not certain by when many of the initiatives that Telstra has proposed would actually commence, as they are tied to the commencement of the Definitive Agreements. This approach discounts the possible benefits that could otherwise be expected to accrue as a result of the proposed measures.

Further, it is unclear why this should be the case as there does not appear to be any relationship between the commencement of those agreements and Telstra’s ability to implement the arrangements or the appropriateness of doing so.

#### **10.7.5 Sufficiently documented and explained**

The proposed measures are documented in considerable detail, but as already discussed the likely or intended operation of some aspects of the proposed measures is unclear. This could be remedied by additional explanatory material and/or changes to the text of the undertaking.

Further, there is considerable uncertainty around the circumstances in which Telstra would breach the fundamental obligations that have been established in clause 10 of its undertaking.

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<sup>222</sup> SSU, clause 15.3.

<sup>223</sup> SSU, clause 15.3.

### 10.7.6 Public reporting framework

The proposed public reporting framework generally appears to be capable of providing appropriate transparency around a number of operational quality measures for wholesale customers and Telstra's retail business units respectively.

That said, the suitability of these metrics is obviously dependant upon the appropriateness of the target timeframes and performance standards.

The ULLS activations metric has been discussed above. This particular metric is unlikely to provide a meaningful measure of the operational quality that Telstra provides to ULLS access seekers since activations that occur after the date that the customer requested can be treated as meeting the target. Further, there is no transparency over the extent to which Telstra in practice extends the target timeframe in this way, or the additional time it adds to the customer requested date when it does so.

The ACCC seeks comments from interested parties on the appropriateness of the metrics for the purpose of measuring equivalence with the supply of Regulated Services.

34. Do the proposed interim non-price measures provide appropriate assurance that known equivalence and transparency issues will be remedied? What other such issues should be considered in assessing the appropriateness of these measures? Please consider issues that affect operational quality, technical quality and quality of systems support.
35. Do the proposed mechanisms for addressing equivalence and transparency issues that emerge over time provide appropriate assurance that these issues would be remedied appropriately and effectively? Is it clear and certain that all such issues would be within the scope of those mechanisms? What changes would potentially address perceived limitations?
36. Are the proposed equivalence and transparency metrics appropriate? Please consider the proposed target timeframes and performance standards, and the proposed exceptions and exemptions.
37. Is the proposed SLA scheme likely to be effective? For example, is the SLA scheme comprehensive and are the rebates sufficient to incentivise Telstra.
38. Does the SSU appropriately provide for equivalent service level and functionality of Regulated Services to comparable products?

## 10.8 Information equivalence

### 10.8.1 Introduction

Information Equivalence measures are necessary to allow Telstra’s wholesale customers to compete with Telstra on a fair and equal basis when supplying services to their customers that make use of regulated services.<sup>224</sup>

For example, equivalent notice of network upgrades allows wholesale customers to plan the launch of new retail products on an equivalent footing to the vertically integrated access provider. Conversely, non-equivalence could allow the vertically integrated access provider to have a ‘first-mover advantage’ in new and emerging retail markets.

Hence, the interim information equivalence will be an important consideration in assessing whether the interim arrangements are appropriate and effective.

Further, the Ministerial Criteria Instrument (at subparagraph 4(g)(v)) requires the ACCC to have regard to:

equivalent notification to Telstra’s wholesale customers and Telstra’s retail business units of matters relating to Telstra’s networks which affect the delivery or operational quality of Regulated Services.

### 10.8.2 Overview of proposed information equivalence measures

Telstra has proposed the following interim measures relating to information equivalence:

*1) Engaging with wholesale customers.*

Telstra undertakes to appoint a manager or customer team that is appropriately resourced to deal with and respond in a “timely and effective” manner on matters likely to effect the delivery or operational quality of Regulated Services.

Telstra commits to use monthly customer reviews to update wholesale customers of relevant network, system, or product upgrades or developments through monthly customer reviews.

*2) Network notifications*

Telstra proposes to provide network notifications and notice of major network modernisation or upgrade in accordance with Schedule 4.

This includes notifications on planned events in relation to

- planned maintenance or repair work,

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<sup>224</sup> Explanatory Statement to the Ministerial Criteria Instrument, p.8.

- availability of ADSL capability,
- exchange service area information,
- major network incidents,
- other general service or provisioning matters impacting operational support systems (OSS notifications),
- disaster recovery plan information,
- major network modernisation and upgrades (at least 30 weeks notice).

Generally, the notice periods for other notifications are not tied to an equivalence based standard.

### **10.8.3 Assessment against appropriate and effective requirement**

#### **Promotion of competition and economic efficiency**

Taken collectively, the information equivalence measures could promote competition by limiting any informational advantages Telstra may gain through its vertical integration. In particular, wholesale customer engagement has the potential to increase the timeliness and quality of information available to wholesale customers. Wholesale customer engagement measures are also supported by organisational arrangements and localised incentives intended to limit any incentive of wholesale staff to favour Telstra's own retail business (see section 10.5).

One means of assessing the appropriateness of the measures is to consider whether they would provide information relevant to wholesale customers' ability to compete with Telstra on a fair and equal basis. The scope of Telstra's information equivalence measures appears to encompass matters relevant to delivery or operational quality of Regulated Services. The proposed notifications improve on Telstra's OSP, but there is potential for further improvements to provide a higher degree of assurance of equivalence. For example, where a change is initiated by the network services business unit (rather than at the request of a Telstra retail unit), Telstra could commit to providing equivalent notifications to wholesale customers and Telstra's retail business units.

In this regard, the SSU and Telstra's supporting material do not make clear how the proposed network notifications in Schedule 4 compare to the information and notice period available to Telstra's retail business units.

#### **10.8.4 Time and cost of implementation**

The proposed information equivalence measures will be implemented at the commencement of the undertaking. This is appropriate because the proposed measures are comparatively simple and straightforward to implement. A functional separation involving an 'equivalence of inputs' is not proposed – for example, Telstra does not

undertake to ring-fence information on delivery or operational quality between its own business units.

### **10.8.5 Sufficiently documented and explained**

The content of proposed notification measures are documented in some detail in Schedule 4. However, the applicable timeframes for notification are not clear in the SSU or the supporting material. For example, major network incident notifications will be made “in accordance with the terms governing the supply of the relevant regulated service” and Operational Support System (OSS) announcements will be made “in accordance with [Telstra’s] procedures for making OSS announcements that exist from time to time”.

### **10.8.6 Public reporting framework**

Telstra will report against its compliance with clause 13 in its Annual Compliance Report<sup>225</sup> and may disclose the content of that report to wholesale customers except where that content is confidential or commercially sensitive.

### **10.8.7 Assessment against the Ministerial Criteria Instrument**

The Ministerial Criteria Instrument (at subparagraph 4(g)(v)) requires the ACCC to have regard to whether the SSU provides for:

equivalent notification to Telstra’s wholesale customers and Telstra’s retail business units of matters relating to Telstra’s networks which affect the delivery or operational quality of Regulated Services.

The Explanatory Statement to the Instrument explains that this provision is necessary to allow Telstra’s wholesale customers to compete with Telstra on a fair and equal basis when supplying services to their customers that make use of regulated services.<sup>226</sup>

While Telstra’s proposed undertakings improve the quality and timeliness of information to wholesale customers, it is unclear the extent to which this notification is *equivalent* to the quality and timeliness of information provided to Telstra’s retail business units.

39. Do the proposed information equivalence commitments, including notifications and wholesale customer engagement, provide appropriate and effective assurance of equivalence?

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<sup>225</sup> SSU, subclause 22.2(b)(ii).

<sup>226</sup> Explanatory Statement to the Ministerial Criteria Instrument, p.8.

## 10.9 Equivalence in relation to the Telstra Exchange Building Access Service (TEBA)

### 10.9.1 Introduction

The Regulated Services Instrument requires the SSU to provide for appropriate and effective equivalence and transparency measures during the interim period in relation to TEBA.

TEBA is defined in the Regulated Services Instrument as the use of an exchange building where such use is (i) in connection with the supply of an active declared service by Telstra, or (ii) for the purpose of enabling interconnection of facilities operated by an access seeker to enable the supply of an active declared service by Telstra. This definition refers to the supply of active declared services *by Telstra* and does not encompass interconnection for the purpose of the supply of declared services by access providers other than Telstra (e.g. by NBN Co).

Exchanges are bottleneck infrastructure and terms and conditions of access directly affect the ability of access seekers to compete, or provide a service at all. Telstra has strong incentives to engage in sabotage (non-price discrimination) and such conduct is difficult to detect. Hence, the inclusion of appropriate and effective measures on TEBA is important in promoting competition and economic efficiency during the interim period.

This section discusses interim equivalence and transparency measures in relation to TEBA as defined by the Regulated Services Instrument during the interim period (e.g. for the purpose of interconnecting for the supply of ULLS or LSS). Access to exchange facilities beyond the designated day, and in relation to NBN services, is discussed in section 7.3.

### 10.9.2 Overview of proposed commitments in relation to TEBA

Telstra has proposed the following interim measures relating to TEBA<sup>227</sup>:

#### 1) *Queue management procedures*

Telstra proposes to process requests for exchange space and external interconnection duct space from Wholesale Customers in an equivalent manner to Telstra's own requests.<sup>228</sup> Further, Telstra will manage queues on a non-discriminatory basis and using the same queue management principles.

The above queue management procedures do not apply to 'utilisation by Telstra of reserved exchange capacity.' Telstra may reserve exchange capacity in Telstra Exchange Buildings for the purpose of supplying its services where it has bona fide

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<sup>227</sup> SSU, clause 11.

<sup>228</sup> SSU, clauses 11.2(a) and 11.4(b).

documented plans to use the Exchange Capacity within 36 months from the date of the reservation.<sup>229</sup>

Telstra will provide information to Wholesale Customers on reasonable request on the progress of queues.<sup>230</sup> This is in addition to existing regulatory oversight mechanisms.<sup>231</sup>

The definition of “TEBA” includes external facilities to the exchange building (external interconnection cables, external interconnection ducts and pits that are used with an external interconnection duct). Telstra undertakes to queue requests for access to External Interconnect Facilities and Telstra reserved capacity in a single queue.<sup>232</sup>

## 2) *Exchange capping*

A capped exchange is an exchange with insufficient space (floor space or space on the main distribution frame) to allow access. In the SSU, a Capped Exchange must be determined to be unavailable for Wholesale Customers by the Governance Committee.

Prior to capping an exchange or rejecting an order on the basis of capping, Telstra proposes to conduct an on-site audit of the exchange building within the last 30 days and seek approval by the TEBA Governance Committee.

## 3) *Compliance mechanisms*

As a supporting compliance arrangement, Telstra proposes to maintain a TEBA Governance Committee of senior managers who will provide oversight of Telstra’s substantive undertakings.

### **10.9.3 Assessment against appropriate and effective requirement**

#### **Promotion of competition and economic efficiency**

A useful means to assess whether the proposed measures would in practice promote competition and economic efficiency is to consider how they would

- directly address particular equivalence concerns that have emerged, and/or
- would provide assurance that these or similar concerns will be remedied effectively through the operation of the various supporting mechanisms.

In this regard, the proposed measures can be assessed against concerns that have been previously expressed by access seekers involving:

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<sup>229</sup> SSU, clause 11.1.

<sup>230</sup> SSU, clause 11.2(b).

<sup>231</sup> In order to increase transparency to access seekers over exchange queues, the ACCC has introduced a record keeping rule in relation to access to Telstra’s exchange facilities.

<sup>232</sup> SSU, clause 11.4.

- that Telstra reserves space in exchanges for its reasonably anticipated requirements but an equivalent right is not available for Telstra’s wholesale customers to reserve space for their own bona fide documented plans;
- the terms and conditions upon which access seekers accessed the TEBA service, including delays associated with obtaining exchange access; and
- the lack of independent oversight of Telstra’s “exchange capping” processes.

The first concern stems from Telstra’s existing practice, reflected in the SSU, of reserving space for its “reasonably anticipated requirements”. Declaration of a service under Part XIC does not prevent an access provider from obtaining, in relation to declared services:

sufficient amount of the service to be able to meet the service provider’s reasonably anticipated requirements, measured at the time when the request was made.<sup>233</sup>

However, the proposed commitments in the SSU could provide a degree of assurance that Telstra will not use reservations for the purpose of frustrating access by others, as any such reservations must be bona fide and documented.

That said, no equivalent right is provided to Telstra’s wholesale customers. Allowing space to be reserved by access seekers prior to a confirmed order for facilities access could improve efficiency by providing access seekers with assurance of access which may facilitate their own network planning. However, such an approach could give rise to incentives for access seekers to inflate forecasts in order to minimise risk and/or frustrate other access seekers.

The second of these concerns stems from Telstra’s procedures for processing orders for TEBA access and Telstra’s queue management policies. Equivalence in queuing could incentivise Telstra to seek to minimise any delays and/or to ensure that delays in accessing exchange space do not only affect access seekers.

Telstra’s proposed measures do not appear to provide for any real degree of equivalence as Telstra’s utilisation of existing reserved exchange capacity is not subject to equivalent queuing procedures. As discussed above, an equivalent right to place an order to reserve exchange capacity for future use is not available to wholesale customers. Hence, it does not appear that Telstra’s commitments provide an assurance of equivalence as Telstra is able to access reserved capacity on an “as needs” basis and bypass any queue processes where it has reserved exchange capacity.

Telstra does not propose alternative measures to promote competition by ensuring that delays are reasonable. However, Telstra’s proposed measures to provide information to wholesale customers could provide access seekers with information about likely delay and promote efficiency by allowing access seekers to plan their operations accordingly. It could also prompt access seekers to identify any causes of delay and agitate Telstra to address queue delays.

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<sup>233</sup> CCA, section 152AR(4)(a).



The third concern relates to past conduct in which Telstra had erroneously capped exchanges and denied access seekers reasonable requests for access on the basis that there was no space available, in circumstances where there was in fact space available sufficient to fulfil the request.

In July 2010, the Federal Court held that Telstra had contravened conditions of its carrier licence regarding specific instances of capping conduct and imposed a penalty (after discount) of \$18.55 million (exchange capping litigation).<sup>234</sup>

Telstra's proposal to require an on-site audit prior to capping and governance arrangements to ensure senior management oversight of capping decisions would appear to promote competition by ensuring Telstra's wholesale customers are not unreasonably denied access to bottleneck exchange infrastructure. These processes are consistent with current practice, and the ACCC notes that it has received no substantiated complaints of erroneously capped exchanges since these processes were adopted.

#### **10.9.4 Time and cost of implementation**

The proposed measures should be able to be implemented relatively quickly and at a reasonable cost having regard to the competition and efficiency benefits potentially available.

In terms of the time and cost of implementation, the ACCC understands that the proposed measures draw heavily on existing processes implemented in response to previously identified concerns.

Telstra proposes implementing the measures the later of 2 months after the SSU Commencement Date and the DA Commencement date. As noted above, it is not certain when the DAs will commence. Given the undertakings largely reflect current practice, it is also unclear why this implementation period is required.

#### **10.9.5 Sufficiently documented and explained**

Telstra's public submission does not address the apparent non-equivalence between Telstra and wholesale customers with regard to reserving capacity for bona fide reasonably anticipated requirements. This documentation would assist in assessing the adequacy of the commitments.

Another matter which could be better explained is the effect of decisions by the Governance Committee to cap exchanges. The SSU defines a Capped Exchange as an exchange that has been determined unavailable for *Wholesale Customers* by the Governance Committee. This definition does not encompass Telstra's own use of the Capped Exchange, and it is unclear whether Telstra is equivalently affected by the capping decision.

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<sup>234</sup> *Australian Competition & Consumer Commission v Telstra Corporation Limited* [2010] FCA 790.

## 10.9.6 Public reporting framework

The transparency measures in the SSU are limited. The only equivalence metric established in relation to TEBA is the percentage of joint completion inspections completed on the Telstra Committed date. Telstra currently reports some information to the ACCC under the *Telstra Access to Exchange Facilities Record Keeping Rule* (RKR).

40. Are the proposed arrangements for TEBA (in relation to the supply of active declared services provided by Telstra) appropriate and effective in providing for equivalence and transparency?

## 10.10 Dispute Resolution

### 10.10.1 Introduction

The Ministerial Criteria Instrument requires the ACCC to have regard to whether the SSU provides:

effective mechanisms for the resolution of equivalence disputes between Telstra and its wholesale customers<sup>235</sup>

The SSU provides for two dispute resolution mechanisms:

- The Accelerated Investigation Process as an internal complaints-handling process
- The Independent Telecommunications Adjudicator.

Telstra is not required to establish an ITA. However, the Ministerial Criteria Instrument states that “if, as part of the mechanisms for the resolution of equivalence disputes” the SSU provides for an ITA, the ACCC must have regard to whether the undertaking requires the ITA to have the organisational and governance arrangements set out in Schedule 2 to the Instrument.

The Explanatory Statement to the Ministerial Criteria Instrument explains that it is:

[T]he government’s intention that, if the ITA is established by Telstra, it should, at a minimum, have the arrangements set out in Schedule 2, which are designed to ensure that the ITA operates effectively, efficiently and independently from Telstra in resolving equivalence disputes.<sup>236</sup>

### 10.10.2 Accelerated Investigation Process

The proposed Accelerated Investigation Process (AIP) is intended to be a fast-track internal complaints-handling process for Equivalence Complaints from wholesale customers. Equivalence Complaints are:

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<sup>235</sup> Ministerial Criteria Instrument, subparagraph 4 (g) (iv).

<sup>236</sup> Explanatory Statement, Ministerial Criteria Instrument, p 8.

- any non-price complaint or issue that relates to or is likely to have been caused by a system or process issue affecting Telstra’s compliance with the SSU; and
- any non-price complaint in connection with a TEBA order or process.<sup>237</sup>

Telstra will investigate an Equivalence Complaint seeking to resolve it as soon as reasonably practicable.<sup>238</sup> Telstra can issue a rectification plan including steps that Telstra will take to resolve issues giving rise to the Equivalence Complaint.<sup>239</sup> A wholesale customer can either accept or reject the rectification plan.<sup>240</sup>

The AIP could potentially provide an efficient, accessible, and low-cost method of resolving wholesale customer complaints and promoting compliance. However, the internal AIP *alone* is unlikely to provide appropriate assurance of an effective mechanism for resolving disputes.

If a complaint is not resolved through the AIP the wholesale customer could have recourse to the ITA in certain circumstances.<sup>241</sup> The wholesale customer would also have recourse to existing regulatory processes (Part XIB and/or XIC).<sup>242</sup> However, existing regulatory processes are resource intensive and may not be appropriate for all equivalence complaints.

### 10.10.3 Independent Telecommunications Adjudicator

Telstra has proposed the following framework in relation to the ITA:

#### 1) *Telstra will establish an ITA*

Telstra undertakes to establish the Office of the ITA as a company limited by guarantee (the ITA Company), as soon as reasonably practicable following the Commencement Date. Telstra proposes to be the sole member of the ITA Company and the directors of the ITA Company would be appointed by Telstra.

One of the organisational and governance arrangements specified in the Ministerial Criteria Instrument is whether the SSU requires the ITA to have certain organisational and governance arrangements, including the contents of the ITA company constitution and the making of a Charter of independence which guarantees the independence of the ITA.<sup>243</sup>

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<sup>237</sup> SSU, clause 18.

<sup>238</sup> SSU, subclause 18.3(a)(ii).

<sup>239</sup> SSU, subclause 18.3(a)(iv)(D).

<sup>240</sup> SSU, clause 18.3(d).

<sup>241</sup> SSU, clause 19.2.

<sup>242</sup> Note however that a party to the ITA Agreement (Schedule 6) must agree not to lodge a complaint with the ACCC under Part XIB or XIC regarding a matter which is currently the subject of an ITA Dispute

<sup>243</sup> Schedule 2, Ministerial Criteria Instrument.

The ITA Company's establishment, appointment of the ITA and the ITA process are set out in Schedule 5 of the SSU (which is enforceable by the ACCC).<sup>244</sup> In particular:

- Telstra commits to provide the ACCC with a draft ITA Company Constitution. The ACCC may either approve the ITA Company Constitution, or refuse to approve it and direct Telstra to provide another constitution which contains specified principles in the SSU.<sup>245</sup> The ITA Company Constitution must provide that the role of the Board and members of the ITA Company are limited (to the extent permitted by law) to the establishment, maintenance, and administration of the ITA Company as a corporate entity.<sup>246</sup>
- Once the ITA Company Constitution has been approved, Telstra undertakes to request the ITA to provide a Charter of Independence to the ACCC for approval. If the ACCC rejects the Charter of Independence, it can direct Telstra to give the ACCC a replacement draft Charter of Independence which contains specified principles in the SSU.<sup>247</sup> The Charter of Independence must provide for the Adjudicator to act independently from Telstra and that the Adjudicator cannot consult or seek guidance from the Board regarding a dispute.<sup>248</sup>

The ACCC – and not Telstra - appoints the Adjudicator.<sup>249</sup> If the ACCC accepts the proposed SSU, the ACCC will provide administrative and secretariat support to the office of the Adjudicator.<sup>250</sup> The ITA Company Constitution must provide for the ACCC to approve a probity advisor to advise the ITA Board on the operation and administration of the ITA process in accordance with the Charter of Independence.<sup>251</sup> The Adjudicator must comply with a direction from the ACCC to take or not take action which is necessary to ensure his or her independence.<sup>252</sup>

The Adjudicator's term will be terminated only in specified circumstances - which include breach of the Charter of Independence or with ACCC approval.<sup>253</sup>

## 2) *Participation in the ITA scheme*

To participate in the proposed ITA scheme wholesale customers must enter into a Deed (which is enforceable by the wholesale customer against Telstra and by Telstra against the wholesale customer).<sup>254</sup> The obligations under this Deed are documented in the SSU, with a copy of the ITA Agreement at Schedule 6.

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<sup>244</sup> SSU, subclause 19.4(b)(iii).

<sup>245</sup> SSU, Schedule 5, subparagraph 4.1(e)(ii)(B).

<sup>246</sup> SSU, Schedule 5, subparagraph 4(f)(x)

<sup>247</sup> SSU, Schedule 5, paragraphs 4.1(e) and (f)

<sup>248</sup> SSU, Schedule 5, paragraph 4.2(c)(i) and (v)

<sup>249</sup> SSU, Schedule 5, paragraph 5.1

<sup>250</sup> SSU, Schedule 5, paragraph 5.2(a)

<sup>251</sup> SSU, Schedule 5 subparagraph 4.1(f)(xiii)

<sup>252</sup> SSU, Schedule 5 subparagraph 4.2(c)(xiii)

<sup>253</sup> SSU, Schedule 5, subparagraph 4.2(c)(vi)

<sup>254</sup> SSU, Schedule 6.

Wholesale customers who enter into a Deed can enforce Telstra’s compliance with both the Deed and Schedule 5 of the SSU directly.

The Deed provides:

- The wholesale customer will comply with the terms of the ITA process set out in Schedule 5 of the Undertaking.<sup>255</sup>
- The wholesale customer must not commence court proceedings or any other dispute resolution process, or lodge a complaint with the ACCC under Part XIB and XIC of the CCA, in relation to an ITA dispute that has been referred to the AIP or the ITA.<sup>256</sup>
- Any final determination of the ITA is final and binding.<sup>257</sup>
- The wholesale customer must comply with any directions or orders to give effect to the ITA’s final determination.<sup>258</sup>
- Payment of the ITA referral fee relating to a particular dispute and compliance with cost orders for that dispute, and payment of the Annual ITA Process fee for administrative and incidental costs.<sup>259</sup>

### 3) *Jurisdiction of the ITA*

The ITA will consider ITA disputes (Clause 19) which include certain Equivalence Complaints escalated from the AIP and those disputes referred to the ITA under Clause 31 of the Migration Plan.

An Equivalence Complaint is a non-price complaint or issue that is caused by a system or process issue affecting Telstra’s compliance with its interim equivalence and transparency obligations, or a non-price complaint relating to a TEBA order or process.<sup>260</sup>

A wholesale customer may refer a complaint to the ITA if the complaint has been rejected from the AIP, a rectification plan has been issued under the AIP and the wholesale customer rejects that plan or its amendments, and where there has been a material failure by Telstra to comply with an accepted Rectification Plan.<sup>261</sup>

The ITA does not have jurisdiction to consider disputes relating to price equivalence.

### 4) *ITA process*

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<sup>255</sup> SSU, Schedule 6, paragraph 2.1(c)  
<sup>256</sup> SSU, Schedule 6, paragraph 2.1(d)  
<sup>257</sup> SSU, Schedule 6, subparagraph 2.3(a)(i)  
<sup>258</sup> SSU Schedule 6, subparagraph 2.3(a)(ii)  
<sup>259</sup> SSU, Schedule 6, paragraphs 2.5, 2.6, and 2.7.  
<sup>260</sup> SSU, clause 18.2(a).  
<sup>261</sup> SSU, clause 19.2.

The ITA process has various stages. It provides for a draft and final determination with an opportunity to agree to a mediated outcome after the draft determination is made (in which case the ITA will not issue a final determination).<sup>262</sup> Where a final determination is issued it will be final and binding on the parties.<sup>263</sup>

The ITA is intended to ensure ‘fast track’ dispute resolution and the ITA Process should generally take less than five weeks, although the proposed SSU makes provision for longer timeframes for more complex disputes.<sup>264</sup>

#### 10.10.4 Discussion of the ITA

The ACCC is required by the Ministerial Criteria Instrument to have regard to whether the measures for the resolution of equivalence disputes are “effective”.<sup>265</sup>

In this regard, the ACCC proposes to have regard to whether Telstra’s dispute resolution measures are likely to be appropriate and effective in resolving equivalence and transparency complaints.

In considering whether the ITA is an effective dispute resolution body it is relevant to consider:

- Will industry participate in the scheme?
- Is the ITA an independent body, such that wholesale customers have assurance that disputes will be handled impartially?
- Does the ITA have appropriate powers to ensure *resolution* of any disputes before it?

#### Industry participation

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.

Industry can choose to participate in the scheme by entering into a Deed. The nature of the Deed is sufficiently documented in the SSU as a schedule to the SSU itself. However, some of the terms of this Deed are not sufficiently explained in Telstra’s supporting material. For example:

- the ITA can make cost orders against the wholesale customer<sup>266</sup> but Telstra does not explain why this should be the case;

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<sup>262</sup> SSU Schedule 5, SSU clause 19.2.

<sup>263</sup> SSU, Schedule 5, paragraph 12(a).

<sup>264</sup> SSU, Schedule 5, paragraph 3(b).

<sup>265</sup> Ministerial Criteria Instrument, subparagraph 4(g)(vi).

<sup>266</sup> SSU, Schedule 5, paragraph 8.4(iv).

- it is unclear why industry should pay Annual ITA Process fees as well as an ITA referral fee relating to particular disputes, and agree to comply with costs orders.

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.

### **Independence of the ITA**

A potential limit on the effectiveness of the ITA scheme in resolving equivalence disputes is that if the ITA is not independent of Telstra it will not adjudicate disputes fairly. Related to this, wholesale customers are less likely to participate in the scheme if there is insufficient assurance that the ITA is independent.

A potential safeguard of independence is that the Constitution and Charter of Independence must both be approved by the ACCC. These documents provide important limits on the extent that Telstra can influence the ITA – for example, by limiting the role of the ITA Board (appointed by Telstra) in the day to day operation of the Adjudicator in resolving disputes. Although the SSU sets out the matters that each document must address, Telstra is yet to provide the ACCC with a Draft ITA Company Constitution and Charter of Independence. Certainty over the appropriateness of these instruments is necessary for the ACCC to assess whether the proposed ITA scheme is likely to be effective.

While there are a number of other proposed measures that go to safeguarding the independence of the ITA, it is unclear whether wholesale customers are likely to view the ITA as genuinely independent of Telstra and ultimately elect to participate in the ITA scheme.

### **Power to resolve ITA disputes**

To be appropriate and effective, the ITA must have adequate powers to resolve equivalence disputes and require remediation by Telstra whenever necessary to address any non-equivalence.

In addition, the Ministerial Criteria Instrument requires the ACCC to have regard to whether the ITA has the powers to fulfil the functions of the role for ITA disputes, “including the power to require reasonable remediation by Telstra of its wholesale processes”.<sup>267</sup>

The proposed measures providing that an ITA determination is final and binding on the parties<sup>268</sup> mean that the ITA has some scope to require Telstra to implement changes to achieve equivalence. That said, it is not clear that the ITA has sufficient powers to require “reasonable remediation” in order to ensure this standard is reached in all cases.

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<sup>267</sup> Ministerial Criteria Instrument, Schedule 2, item 4.

<sup>268</sup> SSU, Schedule 5, paragraph 12(a).

This is because, firstly, there is a lack of clarity about the powers conferred on the ITA and the degree of specificity that can be included in an ITA direction. The ITA's ability to resolve disputes is subject to a limitation that the ITA cannot make a direction prescribing or proscribing that Telstra implement a specific system or process, design or technology.<sup>269</sup> However, the ITA can make orders including a direction to Telstra to provide a proposal to modify non-compliant processes or systems to ensure future compliance and Telstra must provide the ITA with a proposal that complies with that direction.<sup>270</sup>

It may be efficient to leave some aspects of systems changes to Telstra. In this regard, Telstra states in its Submission that it is best placed to propose specific changes given the complexity of its systems and processes.<sup>271</sup> There is some assurance that Telstra will co-operate in responding to an ITA order in a genuine and timely way, as Telstra must provide a compliant proposal within the time specified.<sup>272</sup>

However, the SSU does not provide assurance that the ITA can specify the necessary changes or outcomes that the process modifications must achieve in order to deliver equivalence.

Secondly, the ITA's directions to require process/system modifications are subject to monetary caps. These are \$1 million for the same conduct (which can be exceeded in certain circumstances) and \$10 million in total for all conduct in any calendar year. These monetary caps may preclude the ITA from implementing necessary process/system modifications to ensure Telstra's future compliance with the non-price equivalence obligations in the SSU, or the Migration Plan.

Lastly, the ability of the ITA to require "reasonable remediation" is particularly important within the framework of Telstra's interim equivalence and transparency commitments as a whole. Telstra has noted that:

the Independent Telecommunications Adjudicator can refer any complaints which concern equivalence issues which are likely to exceed its caps, or which might warrant a more comprehensive investigation under the Competition and Consumer Act to the ACCC.<sup>273</sup>

However, the ACCC could not take enforcement action for failure to achieve equivalence, as the SSU does not contain an over-arching commitment to equivalence of outcomes (as discussed in section 10.3.1). The ACCC could consider the complaint under Part XIB and XIC of the CCA, but these regulatory processes may not be suited to resolving all equivalence complaints.

On balance, while the ITA has the potential to be an effective dispute resolution body its effectiveness is dependent on industry participation and on the ability of the ITA to

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<sup>269</sup> SSU, Schedule 5, paragraph 8.5.

<sup>270</sup> SSU, Schedule 5, subparagraph 8.4(c)(iii) and (d).

<sup>271</sup> Telstra supporting submission, p.15-16.

<sup>272</sup> SSU, Schedule 5, subparagraph 8.4(d)(i).

<sup>273</sup> Telstra supporting submission, p.3.



actually resolve any disputes. The ACCC therefore seeks industry views on whether Telstra's proposed ITA scheme would be an effective dispute resolution mechanism.

### **10.10.5 Price equivalence disputes**

As discussed in section 10.4, the SSU does not currently make provision for a dispute resolution process for price equivalence disputes.

Subparagraph 4(g)(vi) of the Ministerial Criteria Instrument provides that the ACCC is to have regard to whether the SSU provides for effective mechanisms for the resolution of equivalence disputes between Telstra and its wholesale customers. This is not limited to non-price equivalence disputes. Consequently, the ACCC considers that the lack of an effective dispute resolution process in relation to price equivalence disputes is a factor militating against acceptance of the SSU.

There are a range of ways that the SSU could provide for an appropriate and effective mechanism for resolution of price equivalence complaints. The ITA may not be the appropriate forum given the ITA nominee is to have practical and technical experience in telecommunications services, systems and processes<sup>274</sup> rather than pricing matters.

41. Is the AIP an effective mechanism for the resolution of equivalence disputes between Telstra and wholesale customers?
42. Is the proposed ITA process likely to be effective in resolving equivalence complaints and incentivising Telstra's compliance with the substantive equivalence obligations?
43. Is the ITA likely to be independent, such that wholesale customers have assurance that disputes will be handled impartially?
44. Does the ITA have the powers necessary to ensure resolution of any disputes before it, including the power to require reasonable remediation by Telstra of its wholesale processes/systems?
45. What is an appropriate and effective dispute resolution process for price equivalence disputes?
46. 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?

## **10.11 Monitoring of compliance during the interim period**

### **10.11.1 Statutory Framework for compliance monitoring**

Subsection 577A(5) of the Telco Act provides that the ACCC must not accept an SSU unless the ACCC is satisfied that it:

- provides for the ACCC to monitor Telstra's compliance with the SSU; and

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<sup>274</sup> SSU, Schedule 5, subparagraph 5.1(b)(i)

- provides for systems, procedures and processes that promote and facilitate the ACCC’s monitoring of Telstra’s compliance with the SSU; and
- does so in an appropriate and effective manner.

The Explanatory Memorandum to the CACS Bill notes that subsection 577A(5) was imposed as:

it will be necessary for the ACCC to have ongoing oversight of Telstra’s implementation of its structural separation undertaking, both in the lead-up to, and after, the designated day.<sup>275</sup>

To assist in forming a view as to whether particular measures are appropriate and effective, the ACCC will assess whether the measures provide the ACCC with visibility over non-compliance and emerging issues that may lead to future non-compliance with the SSU.

The Ministerial Criteria Instrument also prescribes a number of specific matters to which the ACCC is to have regard in respect to a governance framework.<sup>276</sup> These include whether the SSU:

- ensures appropriate oversight by Telstra of its compliance with the SSU;
- requires regular reporting by Telstra to the ACCC;
- provides that the ACCC may consult with wholesale customers and other stakeholders about Telstra’s compliance with the SSU; and
- provides assurance to wholesale customers that Telstra is meeting its obligations under the SSU.

The discussion below focuses on Telstra’s proposed compliance monitoring measures in respect of the interim transparency and equivalence measures.

### **10.11.2 Telstra’s governance framework and compliance monitoring procedures**

#### **Overview of Telstra’s proposed governance framework**

Telstra’s proposed governance framework is outlined in Part E of the SSU. Telstra proposes the following governance framework:

##### *1) Establish an Audit Committee and Director of Equivalence*

Telstra undertakes to establish an Audit Committee and appoint a Director of Equivalence:

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<sup>275</sup> EM to the CACS Bill, p. 91.

<sup>276</sup> Ministerial Criteria Instrument, paragraph 4(f).

- The Audit Committee will be constituted from the Telstra Board.
- The Director of Equivalence will be appointed by the Audit Committee. The Director of Equivalence reports directly to the CEO and the Audit Committee.
- The Director of Equivalence will be an executive, independent from the relevant parts of Telstra and sufficiently senior to carry out the Director of Equivalence duties.<sup>277</sup>

The Director of Equivalence - as chief compliance officer - will have a range of tasks specified in the SSU including:

- implementing mechanisms for monitoring compliance and increasing awareness within Telstra about its interim equivalence and transparency obligations<sup>278</sup>
- providing internal reports to the CEO from time to time<sup>279</sup> and an Annual Equivalence report to the Audit Committee<sup>280</sup>.
- overseeing the AIP and monitoring compliance with ITA orders.

### *2) Equivalence Compliance Statement*

Telstra undertakes to issue a policy statement outlining Telstra's commitment to compliance. The Equivalence Compliance Statement reiterates Telstra management's intent to adopt processes to assure compliance within the company and ensures management accountability. Telstra will also consult with the ACCC on the development of its Equivalence Compliance Statement, compliance training, and any other document forming part of its compliance program.<sup>281</sup>

Telstra undertakes that the Equivalence Compliance Statement will (in relation to the interim measures) contain:

- a statement of commitment of compliance;
- a strategic outline of how that commitment will be realised;
- a guarantee in relation to internal whistleblowers; and
- a clear statement that Telstra will take action internally against any persons who are knowingly or recklessly concerned in a contravention.

### *3) Yearly Compliance Training*

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<sup>277</sup> SSU, clause 21.1(b).

<sup>278</sup> SSU, clause 21.1(c).

<sup>279</sup> SSU, subclause 12.1(c)(ii).

<sup>280</sup> SSU, clause 21.5.

<sup>281</sup> SSU, clause 21.4.

Telstra proposes to provide at least yearly compliance training.<sup>282</sup> Compliance training is an important internal compliance procedure for promoting compliance at an organisational wide level.

### **Assessment of governance framework**

An appropriate internal governance framework – additional to external checks – can assist in promoting compliance by establishing systems, procedures, and processes to promote compliance. This is because Telstra is best placed to seek out and remedy any instances of non-compliance.

Telstra’s proposed compliance program is broadly consistent with the ACCC’s approach to compliance programs in trade practices contexts.<sup>283</sup> It contains many of the elements of an appropriate compliance program – such as regular compliance training.

This “Equivalence Compliance Statement” closely resembles the compliance policy statement often included in trade practices compliance programs for large corporations.<sup>284</sup> This statement is intended to promote a culture of compliance within Telstra and extends Telstra’s corporate commitments to staff – for example, by stating that Telstra will take action against staff knowingly or recklessly concerned in a contravention.

Telstra’s proposed commitments to establish an Audit Committee from the Telstra Board and a Director of Equivalence reporting direct to the Audit Committee and the CEO, are appropriate given the seriousness of Telstra’s commitments in the proposed SSU. This senior oversight may facilitate accurate reporting to the ACCC and ensures that senior management and the Board will have knowledge of emerging compliance issues.

### **10.11.3 ACCC monitoring of Telstra’s compliance with the SSU**

#### **Overview of ACCC monitoring**

Compliance monitoring measures facilitate the ACCC’s identification of potential non-compliance with the SSU and should enhance industry confidence that regulatory arrangements are operating effectively.

The Ministerial Criteria Instrument requires the ACCC to have regard to whether the SSU requires regular reporting by Telstra to the ACCC on Telstra’s compliance with

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<sup>282</sup> SSU, clause 21.3.

<sup>283</sup> ACCC, *Corporate Trade Practices Compliance Program*, <http://www.accc.gov.au/content/item.phtml?itemId=717078&nodeId=0de4ca0a69fe9dde037bf81391b2cdab&fn=Corporate+trade+practices+compliance+programs.pdf>.

<sup>284</sup> ACCC, *Corporate Trade Practices Compliance Program*, <http://www.accc.gov.au/content/item.phtml?itemId=717078&nodeId=0de4ca0a69fe9dde037bf81391b2cdab&fn=Corporate+trade+practices+compliance+programs.pdf>.

the SSU.<sup>285</sup> Additionally, measures which require Telstra to report on its compliance with the SSU could, of themselves, provide incentives for Telstra to comply.

Telstra undertakes to:

- Provide an Annual Compliance Report including a summary of compliance by Telstra with the provisions of the SSU during the Financial Year.<sup>286</sup>
- Provide specific reporting consists of a quarterly Operational Equivalence Report regarding equivalence and transparency metrics (see section 10.6) and the quarterly TEM Report (see section 10.1) only.
- Use all reasonable endeavours to respond in an effective, timely and complete manner to any information and document requests received from the ACCC.

The proposed SSU provides for the ACCC to consult with wholesale customers and other stakeholders regarding Telstra's compliance with the undertaking, and permits the ACCC to disclose information in regular reporting provided by Telstra.<sup>287</sup>

### **Assessment of ACCC monitoring**

The proposed commitment to report against Telstra's compliance with the SSU could facilitate the ACCC's regulatory oversight of Telstra's compliance with the SSU. The proposed SSU is not prescriptive as to how Telstra will report its compliance in the general Annual Compliance Report. That said, if the ACCC identifies any deficiencies in the report the ACCC can request further information from Telstra.<sup>288</sup> The Annual Compliance Report will also provide ACCC oversight of AIP and ITA dispute resolution processes.

The proposed frequency of reporting (annual) may not facilitate immediate investigation/enforcement by the ACCC. That said, compliance monitoring supplements the ACCC's general investigatory powers. The ACCC may detect non-compliance in other ways (e.g. wholesale customer complaints) and has access to its usual investigatory powers including its information gathering powers under section 155 of the CCA.

The proposed measures allowing the ACCC to consult with stakeholders on Telstra's compliance and disclose information from Telstra's reports allows the ACCC to provide information transparency to wholesale customers and is consistent with the Ministerial Criteria Instrument.<sup>289</sup>

### **Assurance to wholesale customers of a culture of compliance**

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<sup>285</sup> Ministerial Criteria Instrument, Paragraph 4(f).

<sup>286</sup> SSU, clause 22.2.

<sup>287</sup> SSU, clause 22.3.

<sup>288</sup> SSU, clause 22.4.

<sup>289</sup> Ministerial Criteria Instrument, subparagraph 4(f)(iii) and (iv).

The ACCC must consider whether the SSU requires Telstra to implement a governance framework that provides assurance to wholesale customers that Telstra is meeting its obligations under the SSU.<sup>290</sup> The ACCC seeks comments from interested parties on whether the SSU provides sufficient assurance through the governance framework with board oversight, the compliance program including compliance training, and reporting to the ACCC.

In relation to the interim period:

47. Does the SSU provide for appropriate and effective ACCC monitoring of Telstra's compliance with the SSU and for Telstra to have systems, procedures and processes which promote and facilitate that monitoring?
48. Does the SSU provide for a Governance Framework that ensures appropriate oversight by Telstra of its compliance with the SSU?
49. Does the SSU contain compliance and governance measures that provide assurance to wholesale customers of compliance with the SSU?

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<sup>290</sup>

Ministerial Criteria Instrument, subparagraph 4(f)(v).  
Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan – Discussion Paper

## 11 Monitoring of compliance with the obligation to structurally separate

As noted above, subsection 577A(5) of the Telco Act provides that the ACCC must not accept an SSU unless the ACCC is satisfied that it:

- provides for the ACCC to monitor Telstra’s compliance with the SSU; and
- provides for systems, procedures and processes that promote and facilitate the ACCC’s monitoring of Telstra’s compliance with the SSU; and
- does so in an appropriate and effective manner.

The SSU does not currently make provision for ACCC oversight of Telstra’s implementation of its structural separation undertaking after the designated day (e.g. compliance with Part C of the SSU). The Explanatory Memorandum to the CACS Bill makes clear that subsection 577A(5) applies “both in the lead-up to, and after, the designated day.”<sup>291</sup>

The SSU does not include provision for ACCC oversight over Telstra’s primary commitment to be structurally separated from the designated day. This omission would appear to preclude the ACCC accepting the undertaking in its current form.

The Ministerial Criteria Instrument also proscribes specific matters for the ACCC to have regard to in respect of a governance framework. The governance framework provided in Part E of the SSU appears to be limited to the interim period.

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<sup>291</sup> EM to the CACS Bill, p. 91.

# PART B: MIGRATION PLAN

## 12 Background

### 12.1 Overview

- To give effect to its chosen form of structural separation, Telstra has developed a draft migration plan that explains how it will disconnect customers from its copper and HFC networks and commence supply of services using the NBN.
- The requirements for a migration plan are set out in the Telco Act, the Telecommunications (Migration Plan Principles) Determination 2011 and the Telecommunications (Migration Plan – Specified Matters) Instrument 2011.
- If the draft migration plan complies with the migration plan principles and related instruments, the ACCC must approve the draft plan. Provisions of a final migration plan are incorporated into an SSU accepted by the ACCC.
- Additional materials relevant to understanding and assessing the draft migration plan are referenced in this Part.

### 12.2 Migration and structural separation

As discussed in Part A, the Government has introduced measures to reform the structure of the telecommunications industry. Following reforms to the CCA and the Telco Act, Telstra has the option to either structurally separate or be subject to a functional separation regime.

Telstra has elected to structurally separate, and will give effect to this decision by migrating its fixed-line customers from its copper and HFC networks to the NBN. The migration will occur progressively as the NBN is deployed, and will involve two distinct but inter-related processes – the progressive disconnection of services from Telstra’s networks, and the connection of services to the NBN Co fibre network.

It is the Government’s objective that the NBN Co fibre footprint will extend to 93 per cent of Australian premises. The remaining premises will be served by fixed wireless or satellite networks. Telstra's obligations to disconnect copper and HFC networks only apply to premises within the NBN Co fibre footprint.

The progressive migration of Telstra’s fixed-line customer base to the NBN is unprecedented in terms of scale and impact. For this reason, the regulatory reforms introduced to facilitate structural separation include provision for Telstra to submit a migration plan for approval by the ACCC. The migration plan is intended to:

[D]eal with matters concerning processes involved in the migration of Telstra’s customers from its own fixed-line network to the national broadband network. It will also



deal with the timing of those processes, by either setting out a timetable for action or setting out a method for determining such a timetable.<sup>292</sup>

This part of the paper will discuss Telstra's draft migration plan (the **draft Plan**) which was submitted to the ACCC for approval on 24 August 2011.<sup>293</sup>

## 12.3 Overview of the migration process

Migration to the NBN fibre network involves two different networks and two network operators. Telstra is responsible for the disconnection of services from its fixed-line access networks, and NBN Co has primary responsibility for the process of connecting services to its fibre network. Retail Service Providers (**RSPs**) including Telstra will need to manage their own customer bases to ensure that services are appropriately migrated.

NBN Co has published a detailed guide titled "Migrating to the National Broadband Network—An information guide" (**NBN Co Migration Guide**). The NBN Co Migration Guide discusses NBN Co's network rollout plans, the RSP accreditation and on-boarding process, how connection to the NBN will occur in practice and other issues including NBN product development.

Briefly, the migration process will occur in the following manner:

- NBN Co commences the laying of fibre in a particular fibre rollout region.
- Once the NBN Co fibre network has been constructed to the point that it has passed at least 90 per cent of premises within the fibre rollout region, NBN Co declares the region to be "ready for service".
- Once a region is declared "ready for service", NBN Co will commence processing orders from RSPs (including Telstra) for wholesale services to facilitate supply to retail customers in that region.
- Generally speaking, RSPs will have to separately arrange with Telstra for disconnection of their retail customers' copper services.
- Telstra is required (subject to certain exceptions) to disconnect any remaining copper and HFC services in a fibre rollout region 18 months after that region was declared to be "ready for service".

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<sup>292</sup> Explanatory Memorandum, CACS Bill, p.105.

<sup>293</sup> Telstra initially lodged its draft Plan with the ACCC on 29 July 2011, but provided a revised version on 24 August 2011 in response to certain concerns raised by the ACCC.

## 12.4 Migration plan framework

The migration plan is a document that is prepared by Telstra and lodged with the ACCC for assessment and approval. The Telco Act creates the framework for assessment of a draft migration plan—this is discussed below.

### 12.4.1 Legislative Framework

Subsection 577BC(2) of the Telco Act requires that a migration plan specify the action that Telstra will take to:

- cease to supply fixed-line carriage services to customers using a telecommunications network over which Telstra is in a position to exercise control; and
- commence to supply fixed-line carriage services to customers using the national broadband network.

The migration plan must also set out a timetable for the taking of that action, or a method for determining such a timetable.

The Telco Act also requires that a migration plan complies with any Migration Plan Principles issued by the Minister pursuant to section 577BB.<sup>294</sup> The principles define the scope of a migration plan, and prescribe the way in which a plan must deal with certain issues.

On 23 June 2011, after public consultation, the Minister made the *Telecommunications (Migration Plan Principles) Determination 2011 (the Determination)* and the accompanying *Telecommunications (Migration Plan – Specified Matters) Instrument 2011 (the Specified Matters Instrument)*—which deals with matters that a migration plan “may” and “must not” contain.

The Determination and the Specified Matters Instrument and further detail on the consultation process, including stakeholder submissions, is available at [http://www.dbcde.gov.au/broadband/national\\_broadband\\_network/telecommunications\\_regulatory\\_reform](http://www.dbcde.gov.au/broadband/national_broadband_network/telecommunications_regulatory_reform).

When assessing Telstra’s draft Plan, the ACCC must consider whether it complies with the principles. The ACCC’s mandate is to:

- approve the draft Plan, if it complies with the principles; or
- if it does not comply with the principles, request that Telstra provide a replacement plan which does comply.

Importantly, while the ACCC will conduct a critical assessment of the draft Plan, it does not have the discretion to seek changes merely based on a preference for a

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<sup>294</sup> Telco Act, subsection 577BD(2) and subsection 577BDA(2).

particular approach to an issue. The ACCC *must* approve the draft Plan if it complies with the principles.

Before making a decision, the ACCC must publish the draft Plan on its website and conduct a 28 day consultation process. If the draft Plan is approved by the ACCC, its provisions will be treated as provisions of a structural separation undertaking that is in force under subsection 577BE(5) of the Telco Act. This means that a breach of the final migration plan becomes enforceable as a breach of the SSU.

If the draft Plan is approved, this may have implications for the ACCC's ability to regulate access to services under Part XIC of the CCA. If a final migration plan is in force, section 152AR(3)(a) of the CCA no longer imposes a standard access obligation on Telstra:

...to the extent to which the imposition of such an obligation would have the effect of requiring Telstra to engage in conduct in connection with matters covered by the final migration plan.<sup>295</sup>

The Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 states that the rationale for this limitation is:

...to provide Telstra with a high level of certainty that once its migration plan has been accepted by the ACCC, the standard access obligations will not subsequently operate so as to impose additional obligations on Telstra in relation to matters related to migration.<sup>296</sup>

The ACCC encourages interested parties to carefully consider the implications of the provisions of the draft Plan with this limitation in mind.

#### 12.4.2 Migration plan reference materials

The following materials will likely assist interested parties in providing informed feedback on Telstra's draft Plan:

- Telstra's draft Plan, lodged with the ACCC on 24 August 2011.
- Telstra's supporting submission for the SSU and draft Plan, lodged with the ACCC on 29 July 2011 (**Telstra supporting submission**).
- Telstra's SSU, lodged with the ACCC on 29 July 2011. Relevant to the draft Plan, the SSU sets out a process for establishing the Independent Telecommunications Adjudicator (ITA).
- NBN Co Migration Guide (available on NBN Co's website).

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<sup>295</sup> CCA, subsection 152AR(4)(f).

<sup>296</sup> Explanatory Memorandum, CACS Bill, p.141.

- The Disconnection Protocols agreed between Telstra and NBN Co (redacted to remove certain commercially sensitive information).
- The Determination made by the Minister on 23 June 2011.
- The Specified Matters Instrument made by the Minister on 23 June 2011.

## 13 The migration plan principles

### 13.1 Overview

This section examines in greater detail the regulatory framework established by the Determination and the Specified Matters Instrument. The purpose of this section is to provide interested parties with a greater understanding of the framework under which the ACCC must assess Telstra's draft Plan.

The Determination consists of 38 sections which are set out in four parts. Part 1 (Preliminary – sections 1 to 4) outlines, among other matters, the object of the Determination, which is to set out principles that:

- provide for the efficient and timely disconnection of wholesale and retail carriage services from a separating network as the NBN Co fibre network is deployed; and
- provide for equivalence in the disconnection processes that Telstra will implement for its wholesale customers and retail business units.<sup>297</sup>

The Explanatory Statement accompanying the Determination provides some further context in this regard, noting that:

The Government is aware that the actions which will be required to complete the migration of Telstra's fixed-line carriage services to the NBN are unprecedented in the Australian telecommunications sector. In developing the migration plan principles, the Government's objectives are to provide for efficient and timely disconnection of services so that the migration process occurs with minimal customer disruption and to provide for equivalence in disconnection processes so that there is no disadvantage to retail service providers.<sup>298</sup>

Part 2 of the Determination (sections 5 to 7) includes information on the types of principles in the Determination and the manner in which the ACCC is to conduct its assessment of Telstra's draft Plan against these principles. There are three different types of principles set out under section 8 to 38 of the Determination. These are:

- General principles, which describe the overarching principles that must be met by the migration plan;
- Specific principles, which provide further specificity regarding how some of the general principles are to be given effect in the migration plan; and

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<sup>297</sup> The Determination, section 3.

<sup>298</sup> Explanatory Statement to the Determination, p.3.

- Procedural principles, which set out the procedural provisions that must be included in the migration plan.<sup>299</sup>

As a matter of interpretation:

- the specific principles do not limit or otherwise affect the generality of the general principles
- the fact that a provision of the Determination refers to a general principle, specific principle or procedural principle does not limit or otherwise affect the application and interaction of the other principles to or with that provision.<sup>300</sup>

Part 3 of the Determination (sections 8 to 30) sets out the general principles and the specific principles and is separated into 8 divisions; one for each of the general principles. Part 4 of the Determination (sections 31 to 38) lists the procedural principles.

Before the ACCC can approve Telstra's draft Plan, the ACCC must be satisfied that it complies with the general, specific and procedural principles in the Determination, as well as the requirements of the Specified Matters Instrument.

## 13.2 Discussion of principles

Many of the principles, especially the specific and procedural principles, are clear on their face. The Explanatory Statement accompanying the Determination helps explain the intention and scope of some of the principles.

This section provides additional context for some of the principles, and sets out the ACCC's views as to what the principles require in a practical sense. To this end, reference is made to relevant sections of the Definitive Agreements concluded between Telstra and NBN Co where the ACCC considers that those elements of the Definitive Agreements add valuable context to consideration of the issues.

### Section 8 – Division 1 – General principle – disconnection of carriage services

Section 8 establishes a general principle around the requirements of the migration plan in relation to how Telstra must disconnect fixed-line carriage services from its copper and HFC networks. The Explanatory Statement summarises this principle as requiring the migration plan to provide for the disconnection of fixed-line carriage services in a fibre rollout region to occur in a way that:

- ensures the efficient and timely disconnection of Telstra's wholesale and retail services;
- minimises disruption to end-user services;

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<sup>299</sup> The Determination, section 6(1).

<sup>300</sup> The Determination, section 6(2).

- 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>301</sup>

Section 8 provides that the migration plan must require Telstra to have in place “reasonable policies and business practices” relating to disconnection from a separating network.<sup>302</sup> These policies and practices must provide for Telstra 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” and “the time taken to complete local number portability (LNP) processes and any ancillary procedures”.<sup>303</sup>

The drafting of section 8 reflects the fact that Telstra’s principal responsibilities under the migration plan will concern the disconnection “half” of migration. The connection “half” of migration will ultimately be the responsibility of NBN Co and RSPs (of which Telstra will be one). This division of responsibility is recognised for example in limitations on Telstra’s obligation to minimise disruption of service “to the extent it is in Telstra’s control”.<sup>304</sup>

In relation to wholesale customer autonomy over the disconnection process, the scope of wholesale customer control will be limited by the fact that there will be operational and business support systems to facilitate disconnection which only Telstra will be in a position to control. Section 8(1)(c) recognises this fact by requiring Telstra, to the greatest extent practicable, to give wholesale customers autonomy over decisions about the “timing of disconnection...and sequencing of that disconnection with connection”.

Section 8 also recognises the unique position that Telstra occupies with respect to its control over both retail and wholesale customer disconnection. The ACCC will need to be satisfied that Telstra will not discriminate against its wholesale customers by conducting disconnections in a way which disadvantages them compared with Telstra’s retail customers.

The qualification that the migration plan provide for disconnection to be undertaken in an equivalent manner “to the greatest extent practicable” recognises that while a very high degree of equivalence is required, there will be processes and systems relating to disconnection that, for practical purposes, are different as between wholesale customers and the relevant Telstra business unit.

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<sup>301</sup> Explanatory Statement to the Determination, p.4.

<sup>302</sup> The Determination, subsection 8(2).

<sup>303</sup> The Determination, subsection 8(3).

<sup>304</sup> The Determination, subsection 8(1)(b).

## **Section 9 – Specific principle – disconnection of carriage services using copper networks**

As part of the Definitive Agreements, Telstra and NBN Co have agreed upon a set of Disconnection Protocols. These set out the process which Telstra will follow for disconnection of premises from its copper and HFC network. An understanding of the Disconnection Protocols will provide useful context for the public consideration of Telstra’s draft Plan. This is because the circumstances in which, and the processes by which, Telstra will disconnect premises pursuant to its regulatory obligations under the migration plan will often reflect those commercially agreed upon. In this respect, transparency of the relevant provisions is likely to assist parties in reaching a view on whether Telstra’s draft Plan complies with a number of the principles.

A copy of the Disconnection Protocols, with any commercial-in-confidence information redacted, is available on the ACCC’s website. This includes Annexures, one relating to the “Upfront Disconnection Triggers” that are commercial and technical prerequisites NBN Co must fulfil before Telstra can commence disconnecting a “Rollout region” (see paragraph below). Further useful information is also available in the NBN Co Migration Guide and in Telstra’s supporting submission.

As noted above, Telstra’s obligation to disconnect is triggered as the NBN fibre network is rolled out to different regions.<sup>305</sup> When 90per cent of premises in a rollout region have been “passed” by NBN fibre, NBN Co will declare a region “ready for service”. This triggers Telstra’s obligation to disconnect all premises (with some exceptions – discussed below) in that rollout region within 18 months. After this date, Telstra is prohibited, except in certain circumstances (see sections 12 and 15 below), from reconnecting or reactivating any premise that is “serviceable by the NBN Co fibre network”. Ultimately Telstra’s obligation to disconnect is designed to facilitate Telstra’s structural separation by “the designated day” (currently 1 July 2018).<sup>306</sup>

For the sake of clarity, it is helpful to note some definitions. A premise is “passed by the NBN Co fibre network” if it is included in a list published by NBN Co on its website from time to time of premises that have been passed by the NBN Co fibre network and are capable of being physically connected to the NBN Co fibre network. A premise is “serviceable by the NBN Co fibre network” if it is in the Fibre Footprint and is shown in the NBN Co service qualification system as serviceable by the NBN Co Fibre Network.<sup>307</sup> NBN Co has stated that after the ready for service date, “Access Seekers will...be able to check whether a particular premises in that Rollout Region is serviceable by the NBN by performing a service qualification check using NBN Co’s B2B and online service portal.”<sup>308</sup>

NBN Co notes that there may be instances in which a premise is passed, but not “serviceable by the NBN Co fibre network”. An example of this might be “where a

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<sup>305</sup> Disconnection Protocols, clause 3.1 and Annexure 1A “Upfront Disconnection Triggers”

<sup>306</sup> The Determination, subsections 9(8) and (9) stipulate that the migration plan must detail any circumstances in which Telstra will not disconnect premises by the designated day.

<sup>307</sup> NBN Co Migration Guide, p.19

<sup>308</sup> NBN Co Migration Guide, p.12



body corporate in a residential apartment building does not permit NBN Co to install equipment in the common areas of the apartment building which is necessary to enable the connection of apartments within the building to the NBN”.<sup>309</sup> As these premises will still form part of the fibre footprint, Telstra will be required to disconnect them. These premises will be serviced by NBN wireless or satellite services.<sup>310</sup>

Under the Disconnection Protocols, Telstra is only allowed to continue to provide services to “late premises” for up to 10 business days after the disconnection date.<sup>311</sup> However, there are some exceptions to this requirement that allow for the continued provision of services to, among others, premises that NBN Co has added to the fibre footprint after the ready for service date, “in-train order premises” and premises that receive special services from either Telstra or a Telstra wholesale customer (see section 13 discussion).

“In-train order premises” are premises for which NBN Co has received a connection order and scheduled installation work, but that NBN Co believes will not be connected by the disconnection date.<sup>312</sup> Under the Disconnection Protocols, NBN Co is obliged to provide Telstra with a list of “in-train order premises” at the disconnection date and to continue to update Telstra as these premises either become connected or the connection order is cancelled.<sup>313</sup> Telstra is allowed to continue to provide services (either over its copper or HFC network) to these “in-train order” premises until the earlier of 30 business days after being notified of connection or 90 business days after the disconnection date.<sup>314</sup>

“Premises added to the fibre footprint after the ready for service date” are premises that NBN Co has passed at least six months prior to the disconnection date but that were not on the “Proposed Fibre Footprint List” at the ready for service date.<sup>315</sup> Telstra can continue to provide services to these premises beyond the disconnection date where:

- Telstra has a contractual obligation to provide notice to the subscriber that is longer than the time between the date that Telstra is notified of the addition of the premises to the fibre footprint and the disconnection date; and<sup>316</sup>
- the subscriber objects in writing to Telstra disconnecting the premises on the disconnection date.<sup>317</sup>

Telstra can provide services to these premises until the earlier of the end of the notice period or 18 months after the date that Telstra is notified of the addition of premises to

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<sup>309</sup> NBN Co Migration Guide, p.19

<sup>310</sup> NBN Co Migration Guide, p.19.

<sup>311</sup> Disconnection Protocols, subclause 3.2(d)(i).

<sup>312</sup> Disconnection Protocols, subclause 3.2(a). The requirement for in-train orders is that the installation work for these premises must be scheduled to commence before 30 business days after the Disconnection Date.

<sup>313</sup> Disconnection Protocols, subclause 3.2(b)

<sup>314</sup> Disconnection Protocols, subclause 3.2(c).

<sup>315</sup> Disconnection Protocols, clause 3.3(a)(i).

<sup>316</sup> Disconnection Protocols, clause 3.3(a)(ii).

<sup>317</sup> Disconnection Protocols, subclauses 3.3 (a)(iii).

the fibre footprint.<sup>318</sup> Another instance in which the Definitive Agreements permit Telstra to continue to provide services beyond the disconnection date is where Telstra is prevented by law from disconnecting a premise.<sup>319</sup>

It should be noted that the time periods in which Telstra is obliged to disconnect all premises to which it is allowed to continue to provide services after the disconnection date also apply in relation to the time in which Telstra must “Special Service Enable” the premise, where so required (see section 13 discussion below).

Finally, the Definitive Agreements provide that in circumstances of “material adverse customer impact”, the parties may decide to extend the disconnection date.<sup>320</sup> Material adverse customer impact may arise where Telstra or the Telecommunications Industry Ombudsman have received a certain number of complaints from subscribers in a particular rollout region about migration to the NBN. Where the requisite complaint threshold is reached, the parties may meet to determine the root cause of the problem and to decide whether to extend the disconnection date by two months.<sup>321</sup> The parties may extend the disconnection date for a further two months in the event that the material adverse customer impact continues to have effect.<sup>322</sup>

### *Discussion of the requirements of section 9*

Section 9 requires that the migration plan set out the processes that Telstra will use to disconnect fixed line carriage services supplied to premises in a fixed roll out region from a copper network (to the extent that the copper network is a separating network) following the region ready for service date. These processes 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”.<sup>323</sup> The processes and systems used for disconnection will often be “business as usual”, which refers to those systems and processes that are currently in use. However, business as usual disconnection systems and processes can only be used to the extent that they comply with the general principles in sections 8 and 21.<sup>324</sup>

Section 9(3) requires that the processes set out in the migration plan must not contain requirements that are inconsistent with industry arrangements for LNP that would apply to migration to the NBN Co fibre network. NBN migration may require robust porting arrangements due to the fact that migration to the NBN is likely to involve migration

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<sup>318</sup> Disconnection Protocols, subclause 3.3(a)(iv)(A) stipulates that the notice period is taken to commence 20 business days after Telstra is notified of the addition of the premises to the fibre footprint.

<sup>319</sup> Disconnection Protocols, clause 6.5.

<sup>320</sup> Disconnection Protocols, clause 3.7(a).

<sup>321</sup> This process is repeated where the material adverse customer impact continues to have effect at the end of the period of extension of the disconnection date. Clause 3.7(e) of the Disconnection Protocols provides that the parties may undertake dispute resolution if the Operational Review Committee cannot reach agreement on whether to extend the disconnection date.

<sup>322</sup> Disconnection Protocols, subclause 3.7(d).

<sup>323</sup> The Determination, subsection 9(2).

<sup>324</sup> Where a new process or system is required to facilitate disconnection, then Telstra is obliged to develop it in accordance with the principles – see section 23 of the Determination.

between networks on a significant scale. This is particularly important as LNP limitations may otherwise impede intense retail competition during the migration to the NBN.

As LNP arrangements can involve industry wide consultation processes through forums such as Communications Alliance, section 9(3) is subject to the requirements of section 23, under which the migration plan must require Telstra to work in good faith with other industry participants to ensure that the LNP arrangements satisfy the requirements of section 8 and 21. That said, the LNP Code provides the minimum acceptable practices and does not prevent industry participants from agreeing to different arrangements as long as other parties are not prevented from participating in LNP.

Subsections 9(4) to 9(7) set out the requirements for the migration plan in respect of premises for which no disconnection order has been received by the disconnection date (“no-order disconnection premises”). The Disconnection Protocols concerning Telstra’s obligations with respect to “late premises” and “in-train order premises” will be relevant to a consideration of Telstra’s commitments to deal with “no-order disconnection premises” under the migration plan. The Determination obliges the migration plan to require Telstra to seek NBN Co’s advice about the order status of these premises before disconnection.<sup>325</sup> The migration plan must also oblige Telstra to notify its wholesale customers prior to disconnection of wholesale carriage services at a no-order disconnection premises.<sup>326</sup>

### **Section 10 – Specific principle - Disconnection of carriage services using HFC network**

The requirements relating to the processes for the disconnection (deactivation) of HFC services from premises in a fibre rollout region are largely a reiteration of the section 9 requirements for copper services. However, as Telstra does not supply voice or wholesale telecommunications services over its HFC network, there are no comparable equivalence and LNP requirements under section 10 to those specified under subsections 9(2) and (3).

The Disconnection Protocols provide for Telstra to continue to provide services to premises over its HFC network in the same circumstances as allowed for in relation to its copper network. In other words the extension of the disconnection (deactivation) date for copper services provided to, among others, “late premises”, “in-train order premises” and “premises added to the fibre footprint after the ready for service date” also apply in relation to HFC services.<sup>327</sup> It should also be noted that Telstra is permitted to provide FOXTEL and non-broadband related services over its HFC

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<sup>325</sup> Note: any information so collected must be subject to information security requirements – see section 29 discussion. The information security arrangements that will govern the handling of any wholesale customer confidential information relating to migration are currently subject to a “required measure development process” under section 36(2) of the Determination.

<sup>326</sup> The Determination, subsection 9(5).

<sup>327</sup> Disconnection Protocols, subclauses 5.1(c)(i) and (ii) which refers to clauses 2.2 and 2.3 of the Disconnection Protocols.

network indefinitely.<sup>328</sup> These are referred to as “Permitted Services” under the Disconnection Protocols.<sup>329</sup>

### **Section 11 – Specific principle - Coordination of connection and disconnection**

During the 18 month “disconnection window” Telstra wholesale customers will be responsible for placing disconnection orders with Telstra and also for placing connection orders with NBN Co. The Explanatory Statement indicates that the purpose of section 11 is to give RSPs “the responsibility for managing their own migration processes, with Telstra acting on their disconnection instructions.”<sup>330</sup> Section 11 relates to the following elements of the general principles in sections 8 and 21:

- continuity of service for end-users by minimising periods of service outage (section 8)
- equivalence by limiting any competitive advantage Telstra may accrue by virtue of its unique position in controlling the disconnection processes (section 8 and 21)
- autonomy of wholesale customers over decisions about the timing of disconnection to better enable the coordination of that disconnection with connection to the NBN (section 8 and 19).

The extent of wholesale customer control will be limited by the fact that it is efficient for Telstra to control the systems and processes that will facilitate disconnection. However, those disconnection systems and processes that do allow for the exercise of some discretion by a service provider must be specified by Telstra in sufficient detail to ensure that the ACCC can assess their consistency with the general principles. The requirements of section 19 of the Determination are relevant in this regard.

Further, the migration plan is to detail those circumstances in which RSPs will not have any control over the timing and manner in which disconnection may be conducted. For example, current industry practice is that the cancellation of a voice service automatically terminates any broadband or other fixed line carriage service provided over the same line. A further example in which wholesale customers may not have control over disconnection is provided by “late premises”, which, under the Disconnection Protocols, Telstra is obliged to disconnect 10 business days after the disconnection date. Section 9(5)(e) of the Determination ameliorates this by requiring that Telstra notify wholesale customers that provide services to “late premises” before Telstra disconnects those premises.

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<sup>328</sup> Clause 5.2(a) of the Disconnection Protocols states that Telstra will meet its obligation to deactivate an HFC premises where the RF Spectrum previously provided over that HFC cable is removed or physically disabled.

<sup>329</sup> Disconnection Protocols, clause 6.3.

<sup>330</sup> Explanatory Statement to the Determination, p. 6.

## **Section 12 – Specific principle - restrictions on the supply of carriage services prior to and after the disconnection date**

Telstra has stated in its supporting submission to the SSU and draft Plan that:

Telstra is concerned that, in the lead-up to the Disconnection Date, Telstra’s ability to handle and process retail and wholesale disconnection requests could be jeopardised if Telstra also simultaneously receives other kinds of order requests within the fibre footprint in the same Rollout region (for example, new orders to move or add new features to existing services).<sup>331</sup>

Section 12 recognises that there could be times during migration, otherwise referred to as “order stability periods”, which may necessitate Telstra imposing restrictions on the processing of orders relating to the supply of fixed line carriage services to premises in particular roll out regions. Section 12 requires that the migration plan specify any “reasonable” circumstances in which Telstra proposes to restrict the processing of transactions for retail or wholesale customers (including the rejection of, or failure to process, requests from such customers). Further, section 12 requires that any such restrictions proposed in the migration plan be:

- in accordance with the general principles at sections 8 and 21
- imposed for the shortest period reasonably required.

Section 12(3) states that the migration plan must require Telstra to review any such restrictions imposed with a view to determining whether the restrictions require adjustment with the benefit of operational experience in the migration process when requested to do so by the ACCC, the ITA or a wholesale customer, and that request by the wholesale customer is reasonable.<sup>332</sup> The migration plan must require Telstra, in conducting a review, to consult with NBN Co.

Such restrictions will only satisfy the principles where the arrangements for order stability periods outlined in the migration plan are capable of being applied in an equivalent manner between retail and wholesale services. Further, the migration plan must set out the actions that Telstra will take if, as a result of a review it is requested to undertake, Telstra determines that the restrictions imposed require adjustment.<sup>333</sup>

Under the Disconnection Protocols, where premises are serviceable by the NBN Co fibre network Telstra is prevented (with certain exceptions) from reconnecting or reactivating services to those premises once they have been disconnected. In other words, if a premise is disconnected during the 18 month migration window, preference is given to connecting it to the NBN over reconnecting it to the copper or HFC network. Section 12(6) requires the migration plan to specify the circumstances in which Telstra will refuse, or agree, to supply fixed line carriage services over a separating network to a premises in a fibre rollout region where the request to supply has been received after the relevant premises has been disconnected. An example of the

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<sup>331</sup> Telstra supporting submission, p.26.

<sup>332</sup> The Determination, subsection 12(3).

<sup>333</sup> The Determination, subsection 12(5).

latter circumstance is where a subscriber has requested the supply of “special services” (see section 13 discussion).

### **Section 13 – Specific principle – Special Services**

The requirements of section 9 will largely apply to the processes Telstra will use for the disconnection of standard voice and broadband fixed-line carriage services currently provided over Telstra’s copper network. However, the copper network is used to supply a range of other telecommunications services. These “special services” may not yet have fibre based products that RSPs can use to provide comparable services over the NBN fibre network.

Section 13 of the Determination provides that the migration plan must set out when Telstra intends to disconnect special services from a separating network in accordance with the general principles at sections 8 and 17. Telstra and its wholesale customers that currently provide special services to customers in fibre roll out regions may continue to do so beyond the disconnection date for that region. This will allow NBN Co and industry to develop “go-to” fibre based products to which these copper based special services can be migrated in the future.

Telstra has provided some examples of the special services that it provides over its copper network, some of which are also provided by wholesale customers by means of ULLS and LSS<sup>334</sup>:

- high speed broadband links used by businesses to establish “virtual private networks”;
- dedicated EFTPOS networks that are used to handle and transmit in-store debit and credit card transactions;
- communications between networks and public utility equipment or other automatic equipment such as traffic lights, metering equipment, automatic teller machines, alarm systems and medical equipment; and
- ISDN services that allow a single copper line to be used to support two digital channels (e.g. voice and fax or multiple voice lines).<sup>335</sup>

#### ***Temporary Special Services***

The steps and timing for disconnection of special services will largely reflect Telstra’s obligations to disconnect special services under the Definitive Agreements. The above listed services are considered to be “Temporary Special Services” for the purposes of the Definitive Agreements.<sup>336</sup> They constitute some of the special service classes listed under item 1 of the Schedule to the Determination. The migration plan must set out

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<sup>334</sup> Clause 6.1(a) of the Disconnection Protocols establishes that Temporary Special Services comprise of Direct Special Services and ULLS/LSS Based Special Services.

<sup>335</sup> Telstra supporting submission, p.22.

<sup>336</sup> Disconnection Protocols, clause 6.1.

when Telstra intends to disconnect the special services listed in Item 1 of the Schedule.<sup>337</sup>

The special services listed in Schedule 1 to the Determination comprise direct special services (those special services provided by Telstra) and special service inputs which are those direct special service equivalents provided by wholesale customers over ULLS or LSS. To comply with the principles, the migration plan will need to give wholesale customers the right to nominate carriage services as special service inputs. It will also need to specify equivalent requirements concerning disconnection processes and timing, including in relation to relevant notifications. Further, the processes and timing for the reconnection of copper to allow for the provision of special services must be equivalent as between Telstra and its wholesale customers.

Telstra has provided a summary of special services disconnection arrangements noting “Special Services will have their own disconnection timeline and process, triggered either by NBN Co’s development of fibre-based product which can support a particular class of Special Service or by Telstra’s own product exit arrangements.”<sup>338</sup>

The Definitive Agreements make provision for NBN Co to undertake development of NBN products to which RSPs will be able to migrate copper based special services. This involves NBN Co undertaking consultation on appropriate functionality for a particular type of Temporary Special Service in order to publish a white paper outlining how the NBN can be used to support that special service.<sup>339</sup> The Definitive Agreements provide that unless the product functionality is objected to by Telstra, the disconnection date for that class of special service will (generally) be 36 months from the date the white paper was published by NBN Co.<sup>340</sup>

Where Telstra notifies NBN Co that the additional functionality proposed would not enable the special service to be migrated to the NBN fibre network, the matter will be referred to an independent assessor for determination. The outcome of the determination will affect the disconnection date for the relevant special services class.<sup>341</sup> Further information on these arrangements is provided on pages 28 and 29 of the NBN Co Migration Guide.

Beyond the disconnection date, “any Special Services within that class must be disconnected at the Disconnection Date in the same way as standard services in any future Rollout Regions that are migrated (including disconnection of ULLS and LSS used to supply services which are equivalent to Special Services of that class).”<sup>342</sup> If NBN Co does not publish a white paper on a particular special services class before 5 years after the commencement of the Definitive Agreements, then the disconnection date for that class will be subject to Telstra’s business as usual product exit processes.

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<sup>337</sup> The Determination, subsections 13(1) and 13(2).

<sup>338</sup> Telstra supporting submission, p.22.

<sup>339</sup> NBN Co Migration Guide, p.29.

<sup>340</sup> NBN Co Migration Guide, p.29

<sup>341</sup> NBN Co Migration Guide, p.29

<sup>342</sup> Telstra supporting submission, p.22.

### ***Contracted Special Services***

The Disconnection Protocols also set out Telstra’s disconnection obligations with respect to “Contracted Special Services”.<sup>343</sup> Contracted special services, referred to under item 2 of the Schedule to the Determination, consist of a group of existing retail contracts (comprising not more than 100,000 services) for which Telstra states that it could “face significant liability for disconnection.”<sup>344</sup> Neither the Determination nor the Definitive Agreements provide a similar exemption for the retail contracts of wholesale customers.

However, the Disconnection Protocols require that Telstra not renew a contract for the provision of contracted special services without the consent of NBN Co.<sup>345</sup> To this end, Telstra is obliged to notify NBN Co upon the expiry of the contracted special services contract. The qualification to this requirement is where the customer exercises a contractual right to extend or renew the contract without Telstra’s consent. Otherwise it is at NBN Co’s discretion whether the contract may be renewed.<sup>346</sup>

### **Section 14 – Specific principle – maintaining a soft dial tone**

This specific principle relates to no-order disconnection premises to which Telstra has been providing a WLR or standard telephone service prior to the disconnection date. Telstra must continue to provide, as far as practicable, a soft dial tone to any such no-order disconnection premises where no NBN service has been connected.<sup>347</sup> This soft dial tone must be maintained until the earlier of 20 business days after the disconnection date for the fibre rollout region or until the premise is connected to the NBN.<sup>348</sup> Telstra states that soft dial tone “allows an end user to contact emergency services, the ‘1100 Dial before you Dig’ service, Telstra customer service, and fault reporting phone numbers, but prevents the service from being used to make any chargeable outbound calls or receive any inbound calls”.<sup>349</sup>

Access seekers should note that section 14 does not require Telstra to maintain a soft dial tone for customers supplied using ULLS or LSS.

### **Section 15 – Specific principle – reactivation of carriage services**

Telstra is required, with certain exceptions, to disconnect all premises that are serviceable by the NBN Co fibre network. For example, if a retail or wholesale special service is requested at the premises (see section 13 above) or if there is a mass outage on the NBN that affects a whole roll out region (for up to 5 days), Telstra can reactivate previously disconnected fixed-line carriage services provided over its HFC or copper

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<sup>343</sup> Disconnection Protocols, clause 6.2.

<sup>344</sup> Telstra supporting submission, p.37.

<sup>345</sup> Disconnection Protocols, clause 6.2(c).

<sup>346</sup> Disconnection Protocols, clause 6.2(c).

<sup>347</sup> Soft dial tone is not a fixed line carriage service for the purposes of the Determination; as per Explanatory Statement to the Determination, p.8.

<sup>348</sup> The Determination, subsections 14(1)(e) and 14(2)(e).

<sup>349</sup> Telstra supporting submission, p.24.



networks.<sup>350</sup> This circumstance is referred to under the Definitive Agreements as one of “Material Unavailability of the NBN Fibre Network”.<sup>351</sup> Another exception to the requirement that Telstra permanently disconnect is where there is a “Permanent Cessation of Operations/Insolvency Event” in relation to the NBN.<sup>352</sup>

### **Section 16 – Specific principle – equipment of wholesale customers**

This specific principle requires the migration plan to set out a “fair and practicable” process to be used by a wholesale customer to access Telstra’s facilities to remove any equipment belonging to that wholesale customer. The phrase “fair and practicable” can be interpreted as reflecting the need to ensure that access seekers have sufficient time and opportunity to remove their equipment from Telstra exchanges and other facilities.

### **Division 2 – General principle (Section 17 to 20) – timetable for disconnecting fixed line carriage services**

Division 2 comprises general principle 17 and specific principles 18 to 20. It is a requirement of section 577BC(2)(b) of the Telco Act that the migration plan set out a timetable or method for determining a timetable for the disconnection of fixed-line carriage services from separating networks.<sup>353</sup> It is against the principles of Division 2 that the adequacy of the migration plan provisions concerning the timing of disconnection must be assessed.

Section 17(4) requires the migration plan to set out a timetable or method for determining a timetable for Telstra to cease to supply any special services and any special service inputs that are not disconnected from a separating network in a fibre rollout region at the disconnection date for that fibre rollout region. The Telco Act imposes the same requirement in relation to the timing of the action that Telstra will take to commence supply of services over the NBN.<sup>354</sup> Section 30 of the Determination requires the migration plan to set out the action that Telstra will take to commence supply of services over the NBN.

Consistent with paragraph 8(1)(c) and subsection 11(1), section 19 provides that the migration plan must set out reasonable steps that a wholesale customer may take in order to control the timing of the disconnection by Telstra of wholesale carriage services. The migration plan must also set out any known circumstances where a wholesale customer may not be able to take those steps.<sup>355</sup> To this end, the migration plan will need to set out in sufficient detail how a wholesale customer can control the timing of disconnection of services as well as (any known) circumstances where a wholesale customer cannot control the timing of disconnection. An example of the latter circumstance is the automatic disconnection of DSL services as a result of the

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<sup>350</sup> NBN Co Migration Guide, p.26.

<sup>351</sup> Disconnection Protocols, clauses 8.1 and 8.2.

<sup>352</sup> Disconnection Protocols, clause 8.3.

<sup>353</sup> Telco Act, paragraph 577BC(2)(b).

<sup>354</sup> Telco Act, paragraph 577BC(2)(b).

<sup>355</sup> Control of disconnection timing and processes, section 19, the Determination.

disconnection of voice services on the same copper (and the interaction between LNP requests).

### **Division 3 – General principle – equivalence regarding disconnecting Telstra retail business units and wholesale customers**

#### **Section 21 – General principle**

Section 21 provides that “the migration plan must provide for the equivalent treatment of wholesale customers and retail business units in the implementation of processes for disconnecting carriage services from a separating network at premises in each fibre rollout region”. The Explanatory Statement states that section 21 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.<sup>356</sup>

This general principle complements the general principle in section 8, in particular, the requirement in paragraph 8(1)(d). In combination these principles establish the equivalence requirements with which the steps and timing of disconnection processes set out in the migration plan must comply, and continue to comply. For example, it is against the general principles in section 8 and 21 that the adequacy of disconnection processes must be assessed initially and on an ongoing basis, as provided for under section 23 of the Determination.<sup>357</sup>

#### **Section 22 – Specific principle – prohibition of marketing activity**

Over the course of the migration process, Telstra employees may have to attend a premise in an NBN rollout region for a variety of reasons associated with either disconnection or connection (if contracted to perform work on behalf of NBN Co). The migration plan must specify that an employee or agent of Telstra is prohibited from undertaking any marketing activities when attending premises in a fibre rollout region for the purpose of:

- connecting a retail customer to a non-Telstra carriage service provided over the NBN Co fibre network
- disconnecting a retail customer of wholesale customer from a separating network.

### **Division 4 General principle – use of adequate processes**

#### **Section 23 – General principle**

The Determination allows for Telstra to use existing processes and systems to facilitate disconnection. This position is supported by the Explanatory Statement which notes, in relation to section 23, that:

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<sup>356</sup> Explanatory Statement to the Determination, p.10.

<sup>357</sup> The Determination, section 23.

In order to minimise industry costs and disruption, it is proposed to use existing processes, as far as practicable, for implementing and managing the process for disconnecting services at premises in fibre rollout regions and the porting of local telephone numbers to another network.<sup>358</sup>

However, the extent to which business as usual processes can be used to implement or manage disconnection depends on whether they are adequate to facilitate the migration of customers in a manner consistent with the general principles in sections 8 and 21.<sup>359</sup> The migration plan must require Telstra to amend or vary an existing process (to the extent that it is Telstra's control) where the ACCC or the ITA makes a determination, in accordance with section 23(2), that the process is inconsistent with either of those provisions. To this end, the migration plan must:

- require Telstra to work in good faith with other industry participants to ensure that disconnection processes and LNP processes are consistent with sections 8 and 21
- provide sufficient detail about existing processes for implementing and managing disconnection to allow the ACCC or the ITA to determine whether the existing processes are consistent with sections 8 and 21;
- establish a clear and straightforward process for the ACCC or the ITA to require Telstra to vary existing processes where they are not consistent with sections 8 and 21.

#### **Section 24 – Specific principle – specification of disconnection processes**

To satisfy section 24, the migration plan will need to be sufficiently detailed to enable the ACCC to determine whether the processes used to disconnect wholesale customers are consistent with sections 8 and 21. Specifically, the migration plan must set out the processes that will be required for a wholesale customer to lodge, and for Telstra to accept, process and execute, an order from that wholesale customer for disconnection from a separating network of wholesale carriage services supplied to that wholesale customer at premises in a fibre rollout region.

Further, the migration plan must specify which disconnection processes will be used by Telstra to disconnect wholesale customers in the various types of disconnection scenarios that may arise, including, but without limitation, each of the circumstances specified in section 24(2). These disconnection scenarios relate to:

- the disconnection of copper lines resulting from NBN Co's use of a pull through connection process
- the disconnection of copper lines used by multiple service providers and
- the disconnection of standard telephone service lines.

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<sup>358</sup> Explanatory Statement to the Determination, p.10.

<sup>359</sup> The Determination, section 23(1).

The migration plan could potentially satisfy this requirement by providing detailed information about the above disconnection scenarios to the extent that these scenarios are not covered by the standard processes for disconnection. However, this requires that the migration plan is clear about the applicability of standard processes to the specific scenarios.

### ***Pull Through***

Pull through is a connection process that may be used by NBN Co, whereby the existing copper line is used to “pull” the NBN fibre through the lead-in conduit to connect a premises to the NBN. NBN Co has stated that the pull through process “enables NBN Co to use existing infrastructure already in place, and minimise the need to install new underground infrastructure when installing NBN fibre cables.”<sup>360</sup> Further detail on the process and NBN Co, Telstra and wholesale customer responsibilities in relation to pull through is provided in the NBN Co Migration Guide and the Telstra supporting submission<sup>361</sup>

As Telstra notes, pull through is, in the main, an NBN responsibility as it is a process “associated with the connection of premises to the NBN”.<sup>362</sup> It is important to note that the copper or HFC line used to complete pull through will be reconnected if the end-user has not yet cancelled the carriage services supplied over that line.<sup>363</sup> In these circumstances it is appropriate to characterise pull through as resulting in a “temporary outage” in Telstra’s systems. Telstra notes that as pull through will not cause a cancellation of a copper service, “the service provider for the current Telstra service will still need to lodge a disconnection request to cancel the Telstra wholesale service.”<sup>364</sup>

NBN Co may undertake pull-through at its discretion.<sup>365</sup> However, there are a number of matters that NBN Co (or more specifically, the NBN Co contractor) must be satisfied of before it can exercise this discretion. Namely, NBN Co must:

- Form a reasonable view that “pull through” can be completed that day.<sup>366</sup>
- Establish that there is a cable that can be used to pull the fibre through the lead in conduit.<sup>367</sup> The NBN Co Migration Guide lists a number of circumstances in which copper or HFC lines will not be used for pull through. These include where an end-user or Telstra wholesale customer has not provided the requisite consent to use pull through (see discussion of “required consents” below).<sup>368</sup>

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<sup>360</sup> NBN Co Migration Guide, p.22.

<sup>361</sup> NBN Co Migration Guide, p.22-27 and Telstra supporting submission, p.21, 25-26.

<sup>362</sup> Telstra supporting submission, p.21.

<sup>363</sup> NBN Co Migration Guide, p.22.

<sup>364</sup> Telstra supporting submission, p.21.

<sup>365</sup> NBN Co Migration Guide, p.22.

<sup>366</sup> NBN Co Migration Guide, p.23.

<sup>367</sup> NBN Co Migration Guide, p.23.

<sup>368</sup> NBN Co Migration Guide, p.23-24.

- Depending on the circumstances, ensure that the copper or HFC line is reinstated or that a temporary line is installed at the premises.<sup>369</sup>

The arrangements for pull-through contemplate some involvement from Telstra’s wholesale customers. NBN Co will need to be sure that wholesale customers have consented to pull-through being undertaken at a premise to which they supply services. These “required consents” can be obtained by either NBN Co or Telstra.<sup>370</sup> The ACCC understands that NBN Co intends to seek consents by way of its Wholesale Broadband Agreement.<sup>371</sup> The ACCC also understands that Access Seekers will be able to add notes to orders on a case-by-case basis that moderate NBN Co’s decision as to whether to employ pull-through. NBN Co notes that responsibility for obtaining end-user consents will depend on whether the end-user is churning between service providers in migrating to the NBN.<sup>372</sup>

The pull through arrangements also require that Telstra wholesale customers are responsible for carrying out certain tests to ensure the connectivity of reinstated or temporary lines to premises at which pull through has been used. “Reinstatement tests” are to be used to ensure the connectivity of reinstated copper or HFC lines and “remote tests” to ensure the connectivity of temporary lines. Telstra has already undertaken to conduct these tests for its own retail customers. Telstra wholesale customers may expressly indicate that it does not require the performance of these tests if it so wishes.<sup>373</sup>

It is worth noting that, where an RSP agrees to conduct these tests but do not perform them within a certain time after NBN Co’s request or NBN Co cannot contact the RSP to carry out the test, then NBN Co may leave the premise without having confirmed successful connection.<sup>374</sup> Having said that, NBN Co must itself be satisfied that reconnection has been successful before leaving the premises.

NBN Co will not complete pull through where there is a “Pull Through Exception Event” which refers to, among other things, events such as natural disasters or safety or property damage risks.<sup>375</sup> Finally, NBN Co has noted that “in relation to information concerning pull through activities Telstra is...prohibited from using that information to market, promote or sell carriage services to a person that is not an existing customer of Telstra for those carriage services.”<sup>376</sup>

## **Section 25 – Specific principle – development of disconnection measures**

This principle complements the general principle in section 23 which allows for the ACCC or ITA to determine that Telstra must develop a new disconnection measure

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<sup>369</sup> NBN Co Migration Guide, p.26.

<sup>370</sup> NBN Co Migration Guide, p.24.

<sup>371</sup> NBN Co Migration Guide, p.24-25.

<sup>372</sup> NBN Co Migration Guide, p.25.

<sup>373</sup> NBN Co Migration Guide, p.25.

<sup>374</sup> NBN Co Migration Guide, p.26.

<sup>375</sup> NBN Co Migration Guide, p.23.

<sup>376</sup> NBN Co Migration Guide, p.35.

where existing processes are inconsistent with sections 8 and 21. Section 25 states that where disconnection measures must be developed by Telstra in accordance with paragraph 23(3)(b), the migration plan must require such disconnection measures to be consistent with the general principles at sections 8 and 21 and approved by the ACCC or ITA.

### **Section 26 – Specific principle – modifications to existing processes and disconnection measures**

This principle fits under general principle 23 which requires Telstra to use processes that are consistent with the principles of equivalence and efficient and timely disconnection. The migration plan must set out how a wholesale customer of Telstra may propose a modification to an existing process set out in the migration plan or a modification to any disconnection measures developed in accordance with specific principle at section 25. The migration plan must also require Telstra, where it receives such a proposal, to consider and consult in good faith with the wholesale customer about the proposal. These processes must be subject to dispute resolution in accordance with the requirements of section 33.<sup>377</sup>

### **Division 5 General principle – using standard Telstra operating systems, interfaces and processes**

#### **Section 27 – General principle**

The general principle in section 27 requires the migration plan to specify that Telstra must use standard operating systems, interfaces and processes to receive and process orders for disconnection. As noted in the Explanatory Statement, “this is intended to minimise costs for both Telstra and other industry participants”.<sup>378</sup> However, where the ACCC or the ITA determines, in accordance with the process set out in section 27(1), that a standard operating system, interface or process is inconsistent with the general principles at sections 8 and 21, then the migration plan must require Telstra to amend, vary or modify it.

The Explanatory Statement provides some clarity in this regard, stating that “a system, interface or process is inconsistent with the general principles at section 8 and 21 if it is inefficient, does not minimise disruption to service supply, does not allow wholesale customers to retain autonomy regarding the migration of their customer services, or is not equivalent to the way in which Telstra disconnects its own services.”<sup>379</sup> The migration plan must establish an effective and efficient process, without undue limits on the ACCC or the ITA’s capacity to require Telstra to vary existing processes where they are not consistent with sections 8 and 21.

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<sup>377</sup> See note to subsection 26(3).

<sup>378</sup> Explanatory Statement to the Determination, p.12.

<sup>379</sup> Explanatory Statement to the Determination, p.12.

## **Division 6 – General principle – supply of information by Telstra to NBN Co**

### **Section 28 – General principle**

Section 28 aligns with the overall objectives of equivalence in sections 8 and 21 in that it is intended to “assist the ACCC in preventing Telstra from gaining an unfair competitive advantage over its wholesale customers as a consequence of supplying particular types of information to NBN Co to aid the rollout of the NBN.”<sup>380</sup> The Definitive Agreements make provision for the exchange of information between Telstra and NBN Co that will be relevant to a consideration of this section.

For example, Telstra is to provide NBN Co with information for the purposes of “required consents” for pull through obtained from its wholesale customers (see section 24 discussion). The migration plan must specify that Telstra will notify the ACCC in writing, from time to time, of the kinds of information that it will supply to NBN Co for the purpose of either the commencement of supply of fibre services or disconnecting fixed line carriage services from a separating network at premises in a fibre rollout region; and the circumstances in which it will supply those kinds of information to NBN Co.<sup>381</sup>

### **Section 29 – General principle – Protection of information**

Telstra will be provided with information by NBN Co (for example in relation to the “in train order” status of a premise) or by wholesale customers (for example in relation to special services) that is of potential commercial value. Section 29 requires the migration plan to set out effective measures that Telstra will take 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 migration plan must also provide for the protection of confidential information disclosed to Telstra in accordance with its migration activities.

There are two primary ways to address concerns about potential commercial advantage accruing to Telstra through its access to information. First, Telstra can implement robust and effective information handling and ring fencing rules to ensure that wholesale customer information is not made available to Telstra’s retail business unit. Second, in relation to information provided by NBN Co, any unfair commercial advantage could be alleviated by requiring the disclosure of relevant information to access seekers at the same time as Telstra.

As Telstra has noted, it is possible that “most of the information which [Telstra] receives from NBN Co under the Definitive Agreements will be the same information which NBN Co makes available to all service providers.” If so, this would “operate to substantially reduce the risks associated with information provided to Telstra by NBN Co”.<sup>382</sup>

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<sup>380</sup> Explanatory Statement to the Determination, p12.

<sup>381</sup> The Determination, section 28(a).

<sup>382</sup> Telstra supporting submission, p.27.

The NBN Co Migration Guide provides a useful summary of the information provided by NBN Co to Telstra under the Definitive Agreements.<sup>383</sup> Telstra may receive a variety of information from NBN Co for the purposes of commencement of supply of fibre services or the disconnection of fixed-line carriage services, including information relating to NBN Co’s Rollout Plan, the Region Ready for Service date and Proposed Fibre Footprint.<sup>384</sup> NBN Co has stated that all of the information is to be provided by NBN Co to all RSPs at the same time. The “Rollout Plan” will include details of infrastructure relating to the infrastructure ordering process under the Definitive Agreements, some of which may be commercial in confidence. However, the ACCC understands that most of the information contained therein will be provided by NBN Co to other RSPs by way of the published 3 year, 1 year and 3 month Rollout Plans.<sup>385</sup>

NBN Co has noted that the Definitive Agreements do provide for instances in which “NBN Co will provide Telstra with certain information which will not be provided to all Access Seekers.”<sup>386</sup> This information will include information relevant to a determination of the amount payable to Telstra for disconnection of premises in a rollout region as well as disconnection and connection information to “enable Telstra to safely disconnect the correct premises at the correct time; and to assist NBN Co to perform pull through activities”.<sup>387</sup>

### **Section 30 – General principle – commencing to supply fixed line carriage services using the national broadband network**

The Determination requires Telstra to set out the action it will take to commence supply of services over the NBN. Under paragraph 577BC(2)(b) of the Telco Act, Telstra is also required to set out a timetable for the commencement of supply or a method by which a timetable can be determined.

### **Section 31 – Procedural principle – reporting framework**

An effective reporting framework is necessary to ensure Telstra’s ongoing compliance with the migration plan as well as to ensure the ongoing consistency of the processes, systems and interfaces Telstra is to use for disconnection with the general principles in sections 8 and 21. To this end, the migration plan must provide for a reporting framework that requires Telstra to report on matters that would enable the ACCC to assess whether the general principles are being complied with. These matters could include, for example:

- The period of any service outage, and the time taken for it to be rectified.
- The time taken to complete LNP process and any ancillary procedures.

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<sup>383</sup> NBN Co Migration Guide, p.41-44

<sup>384</sup> NBN Co Migration Guide, p.41-44

<sup>385</sup> NBN Co Migration Guide, p.43

<sup>386</sup> NBN Co Migration Guide, p.35

<sup>387</sup> NBN Co Migration Guide, p.35



- Any circumstances in which services were not cancelled, or LNP was not available, as the wholesale customer had sought.

### **Section 32 – Procedural principle – rectification**

This rectification principle follows on from the principles that cover the reporting framework, and requires the migration plan to set out a process for rectification to apply in the event that the planned reporting framework identifies that the provisions of the migration plan do not comply with the general principles. The rectification process will need to be robust, effective and timely.

### **Section 33 – Procedural principle – dispute resolution**

The Determination refers to the need for review processes, and systems and process modification measures to be subject to dispute resolution, including by an ITA. For example, the following sections provide that an ITA is to have oversight of:

- Matters concerning “order stability periods” (section 12).
- Modifications to existing processes and existing processes and disconnection measures (section 26).

Section 7(2) of the Determination states that any role an ITA may have as a dispute resolution body in relation to the migration plan is dependant on the establishment of the ITA under Telstra’s SSU.<sup>388</sup> Should the ITA be established under the SSU, it could be provided with jurisdiction to resolve disputes in relation to the above matters. The requirement that the dispute resolution process be adequate requires that it be timely and the ITA has authority to effectively resolve disputes.

In the event that the ITA is not established, the migration plan will need to provide for adequate dispute resolution by another means.

### **Section 34 – Procedural principle – scope of modifications to processes**

Section 34 requires that the migration plan places certain limits on the types of process modifications that Telstra can be required to undertake. The Explanatory Statement notes that “In line with the Government’s policy of structural reform for the telecommunications sector, these provisions give certainty to Telstra that it will not be prevented from disconnecting its copper and HFC networks in accordance with the migration plan and the definitive agreements as the NBN Co fibre network is deployed”.<sup>389</sup>

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<sup>388</sup> The independent telecommunications adjudicator is provided for under section 152EQ of the *Competition and Consumer Act 2010*.

<sup>389</sup> Explanatory Statement to the Determination, p.14.

## **Section 35 – consultation with NBN Co**

Telstra’s disconnection obligations will have an effect on the timeliness and efficiency with which RSPs and end-users can migrate to the NBN. As a result, this section requires Telstra to consult with NBN Co in specified circumstances.

## **Section 36 – Procedural Principle – Required measure development processes.**

This section recognises that Telstra might not have developed some of the processes, business practices or measures required to disconnect services as part of a migration of Telstra’s fixed-line carriage services to the NBN Co fibre network. The Explanatory Statement recognises that “it may take Telstra some time to develop these required measures” and as a result, Telstra “may instead outline a process for the development of a required measure after it has submitted the migration plan to the ACCC”.<sup>390</sup> The required measure development process will have to be sufficiently robust and detailed to give the ACCC confidence that the resulting processes will comply with the principles. Any required measures will need to comply with the principles and be approved by the ACCC.

## **13.3 Specified Matters Instrument**

The Specified Matters Instrument covers matters that a migration plan “may” and “must not” contain. Section 4 sets out a table listing the matters that the migration plan “may contain” while section 5 lists the matters that the migration plan “must not” contain. The ACCC will consider this instrument when assessing Telstra’s migration plan.

The Explanatory Statement to the Specified Matters Instrument states, in relation to the matters that the migration plan “may contain” that, “the effect of the Instrument is to clarify the scope of the migration plan to ensure that it is able to include provisions implementing all the migration plan principles set out in the *Telecommunications (Migration Plan Principles) Determination 2011*”.<sup>391</sup> The Explanatory Statement adds, in relation to the matters that the migration plan “must not” contain that “in setting out matters that provisions in a migration plan must not deal with, the Instrument ensures that some measures that are not appropriate for inclusion in the migration plan but which could otherwise be argued to come within its potential scope, such as terms and conditions of access to the NBN, will not be addressed by the migration plan”.<sup>392</sup>

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<sup>390</sup> Explanatory Statement to the Determination, p.14.

<sup>391</sup> Explanatory Statement to the Specified Matters Instrument, p.1.

<sup>392</sup> Explanatory Statement to the Specified Matters Instrument, p.1.

## 14 Discussion of issues

- Where the migration plan principles are highly prescriptive, assessment of the draft Plan is a relatively straightforward exercise. However, where the principles are more general in nature, assessment of the draft Plan will involve matters of interpretation and degree as to whether the proposed measures meet the standards required by the principles.
- The ACCC’s preliminary view—subject to submissions from interested parties—is that the draft Plan is likely to comply with the migration plan principles.
- This section highlights specific issues which the ACCC is interested in examining in detail through the consultation process. However, submissions are welcome on any aspect of the draft Plan.

### 14.1 Introduction

The ACCC’s mandate is to assess Telstra’s draft Plan against the requirements of the Determination. The Determination is made up of general principles, specific principles and procedural principles. Sections 6 and 7 of the Determination require the ACCC to consider the draft Plan against all the principles.

General principles are the overarching policy principles, while the specific and procedural principles set out additional detail regarding the matters that must be addressed in the Plan.<sup>393</sup> Section 6 also clearly states that one category of principles does not limit or otherwise affect the application of another.

The ACCC notes that a number of principles are very prescriptive in nature. Where this is the case, the question of compliance with the principles is more straightforward.

Other principles are broader in scope and incorporate potentially less clear-cut elements such as reasonableness and appropriateness. They may also specify a particular standard which the migration plan must meet to comply with the principles, such as “to the greatest extent practicable”. In these instances, the question of compliance with the principles will involve interpretation and matters of degree, and will necessarily require more detailed consideration.

This section seeks the views of interested parties regarding whether the draft Plan adequately satisfies some of the principles. It also highlights for comment some specific issues which the ACCC considers may be contentious.

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<sup>393</sup> Explanatory Statement to the Determination, p.4.

## 14.2 Overall compliance with the principles

**Attachment B** maps the provisions of Telstra’s draft Plan against the principles in the Determination. In addition, Telstra has submitted a high level table to explain how it considers each of the general principles is addressed in the draft Plan.<sup>394</sup>

The ACCC’s preliminary view—subject to submissions from interested parties—is that the draft Plan is likely to comply with the principles.

This section discusses a number of specific issues which the ACCC is interested in examining through the consultation process, to assist in determining whether the draft Plan in fact satisfies all of the principles to the requisite standard.

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

## 14.3 Disconnection of copper services

Section 9 of the Determination requires a migration plan to set out the disconnection processes that will be used to disconnect copper services in sufficient detail for the ACCC to determine compliance with sections 8 and 21.

In Schedule 1 of the draft Plan, Telstra has set out the disconnection processes for both its retail and wholesale customers in the following scenarios:

- disconnection of voice services where the number is not being ported
- disconnection of broadband services (retail copper broadband or Wholesale ADSL Layer 2) or LSS due to the disconnection of voice services using the same copper path, where the number is not being ported
- disconnection of a voice service and/or a broadband service (retail copper broadband, Wholesale ADSL Layer 2 or LSS) where the number is being ported;
- disconnection of broadband services (retail copper broadband, Wholesale ADSL Layer 2 or LSS) where the voice service on the same copper line is not disconnected
- disconnection of ULLS services
- disconnection of wholesale LSS.

The draft Plan sets out the various stages of processing disconnection orders in a simplified and high level manner rather than, for example, referring to the technical specifications of the Telstra systems and processes used for every stage of disconnection, as might be included in an operations manual.

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<sup>394</sup> Telstra supporting submission, p.31.

Section 9 does not specify the precise form in which disconnection processes must be set out. On its face, Schedule 1 would appear to satisfy the requirements of the Determination. However, the ACCC queries whether the level of detail in Schedule 1 of the draft Plan is sufficient to enable an assessment of the relevant disconnection processes against the general principles in sections 8 and 21.

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?

## 14.4 Specific disconnection scenarios

Section 24 of the Determination requires a migration plan to set out the processes that will be required for a wholesale customer to lodge, and for Telstra to accept, process and execute disconnection orders. In addition, section 24 requires a migration plan to specify the processes to be used by Telstra to disconnect premises in certain specific scenarios, including but not limited to disconnection where:

- multiple service providers are providing services on a single copper line
- only a standard telephone service is provided over the relevant line
- the disconnection occurs in the course of connection to the NBN via pull through.

Clause 6.1 of the draft Plan states that Telstra will use the disconnection processes in Schedule 1 for managing and implementing the disconnection of Premises. Schedule 1 expressly states that it includes the scenarios where multiple service providers are providing services on a single copper line and where there is only a standard telephone service.

Clause 10 of the draft Plan states that pull through may be required in the course of connecting to the NBN and that this will be the responsibility of NBN Co. Clause 10 also includes information about Telstra's role in:

- informing NBN Co about the suitability of a lead-in conduit for pull through
- obtaining consent from wholesale customers to undertake pull through
- notifying wholesale customers of a "Pull Through Exception Event".

However, clause 10 of the draft Plan does not specify the processes that Telstra will use to disconnect premises where pull through is involved. In this regard, Telstra states in its supporting submission:

Pull through is not a 'deemed disconnection'. NBN Co is required, except in very limited circumstances, to reconnect the Telstra copper line. This means that the

service provider for the current Telstra service will still need to lodge a disconnection request to cancel the Telstra wholesale service.<sup>395</sup>

The ACCC therefore understands that Telstra intends for the standard disconnection processes specified in Schedule 1 to satisfy the requirements of section 24 of the Determination in relation to pull through. While this approach is acceptable on its face, it is not clear whether Schedule 1 deals with all relevant matters that could arise when pull through is used.

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

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?

## 14.5 Required Measures

Section 36 of the Determination allows for certain measures or processes that have not been developed at the time the draft Plan is submitted to be developed after the migration plan comes into force. Schedule 7 of Telstra's draft Plan lists the matters which Telstra has deferred for development as Required Measures.

The draft Plan includes some information about the process for future development of certain Required Measures. In Schedule 6 of the draft Plan Telstra has outlined the principles that will guide the development of the NBN Co Migration Information Security Plan. In addition, clause 24.4 provides for the operation of a notification regime prior to the development of the NBN Information Security Plan.

Schedule 3 also sets out an indicative process that Telstra anticipates it will take when undertaking Managed Disconnections.

As part of developing the Required Measures, section 36 requires Telstra to consult with wholesale customers and publish a work plan on its website setting out the target date for completion and key milestones.

While this consultation will take place in due course if the draft Plan comes into force, the ACCC invites any comments from interested parties about key issues that need to be addressed in the development of the Required Measures after acceptance of the Plan.

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

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?

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<sup>395</sup> Telstra supporting submission, p.21.

## 14.6 Dispute resolution process

Section 33 of the Determination requires the migration plan to provide for an adequate dispute resolution process, which must be overseen by the ITA (provided that it is established under the SSU).

Clause 31 of Telstra's draft Plan nominates the ITA Process set out in Schedule 5 of the SSU for the resolution of disputes under the migration plan. The draft Plan would therefore appear to satisfy the requirement for a dispute resolution process that is overseen by the ITA. The substantive issue that the ACCC must assess is whether the ITA Process nominated by Telstra is capable of "adequate" dispute resolution.

The ITA is intended to be an independent body responsible for the resolution of disputes between Telstra and its wholesale customers.<sup>396</sup> Section 6 of Part A to this consultation paper discusses the structure and framework of the ITA with regard to the criteria set out in the Ministerial Criteria Instrument. The draft Plan relies upon the ITA Process coming into effect through the SSU. In the event that the ITA Process is not established, the draft Plan will need to provide for an alternative dispute resolution process before the Plan can be approved.

The ITA Process as set out in the SSU appears to be capable of resolving disputes that arise between wholesale customers and Telstra under the provisions of the draft Plan. However, the ACCC seeks the views of interested parties in relation to the adequacy of the ITA Process given certain strengths and limitations.

Schedule 5 of the SSU gives the ITA jurisdiction to resolve disputes arising under the Plan. Clause 31 states that disputes under the Plan can be directly referred to the ITA Process without first being considered internally by Telstra. However, the draft Plan does provide wholesale customers with the opportunity to raise proposals for modifications to processes and review of the Order Stability Period directly with Telstra.<sup>397</sup>

Clause 8 of Schedule 5 of the SSU specifies the investigation process and timeframe for the resolution of disputes under the ITA Process. The ITA Process is intended to resolve disputes rapidly, with a standard indicative timeframe of five weeks for resolution.<sup>398</sup> Complex disputes or disputes involving a number of wholesale customers will take longer to resolve.<sup>399</sup>

As discussed, as part of the ITA Process there are certain prerequisites that must be addressed before the Adjudicator can accept an application, including:

- an ITA agreement between the wholesale customer and Telstra<sup>400</sup>

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<sup>396</sup> Explanatory Statement to the Ministerial Criteria Instrument, p. 8-9.

<sup>397</sup> Draft Plan, clauses 13.2 and 28.3.

<sup>398</sup> SSU, clause 3(b), Schedule 5.

<sup>399</sup> SSU, clause 3, Schedule 5.

<sup>400</sup> SSU, clause 19.4(a) and Schedule 6.

- payment of the annual ITA fee and the appropriate ITA referral fee<sup>401</sup>
- detail about how the applicant has been materially and detrimentally affected by the issue that is subject of the complaint.<sup>402</sup>

As discussed in section 6, there are also particular limitations on the final determinations that the ITA can make. In particular the ACCC notes that the ITA is prevented from making decisions which are likely to have the effect, whether direct or indirect, of:<sup>403</sup>

- prescribing that Telstra or a Wholesale Customer implement a specific system or process design or technology
- requiring Telstra to develop or supply any product or service
- requiring any system or process of Telstra or a Wholesale Customer to have particular design features.

The ACCC understands that these limitations are directed so that the ITA can specify required outcomes for system process modifications, rather than allowing it to dictate precisely how Telstra or wholesale customers must resolve problems. However, the drafting of these clauses may be interpreted as preventing the ITA from requiring meaningful change.

In light of the above, the ACCC seeks comments from interested parties in relation to the ITA's ability to effectively resolve disputes arising under the draft Plan.

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?

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?

## 14.7 Other matters

### 14.7.1 Supply of interim services to minimise disruptions

Section 8 of the Determination requires the migration plan to provide for disconnection to occur in a way that, to the extent it is in Telstra's control, minimises disruption to the supply end-user services. Application of this principle is particularly relevant to situations involving the use of pull through.

<sup>401</sup> SSU, clause 7.2(a)(iv) and (v), Schedule 5.

<sup>402</sup> SSU, clause 7.2(a)(ii), Schedule 5.

<sup>403</sup> SSU, clause 8.5(b)(i)-(iii), Schedule 5..



Clause 10.3 and 10.4 of the draft plan are directed towards assuring end-user service continuity. Clause 10.3 notes the availability of interim call diversion services to the end-users of wholesale customers providing WLR services. In addition, clause 10.4 states that temporary disconnections or outages arising from Pull Through Activities will not affect call diversion services or the ability of end-users to port their number.

Telstra has also acknowledged that the provision of interim services can be important for the continuity of end-user services. Telstra states in its Guide to the Migration Rollout as part of the South Brisbane Network Upgrade, that it will minimise outages by offering temporary solutions such call redirection and in parallel copper services at the time of appointment.<sup>404</sup>

The call diversion that is proposed under the draft Plan will be established from the end-user premise without Telstra's assistance. This can be contrasted to migration to ULLS, where call diversions can be established directly through Telstra's operational support systems.

It is important to note that under the draft Plan Telstra would not supply any interim carriage services other than call diversion "except at its discretion and where it occurs on commercially agreed terms" (see clause 6.4).

As noted previously, in certain circumstances section 152AR(4)(f) of the CCA limits the application of the standard access obligations (and consequently, the ACCC's ability to regulate access to services) where a final migration plan is in force.

The draft Plan clearly states that the ACCC is not limited from setting charges with respect to the provision of access to declared services supplied by Telstra.<sup>405</sup> However, Telstra asserts that "the effect of clause 6.4 would be that the ACCC would not in fact be able to declare an 'interim carriage service'."<sup>406</sup>

Consequently, the ACCC is interested in ascertaining whether industry is satisfied that the proposed approach to the establishment of interim call diversions is sufficient to minimise service disruption to end-users.

The draft Plan provides that wholesale customers on ULLS would be responsible for developing interim service solutions for their end-users. This would appear consistent with the view that establishing interim solutions for those end-users is not a matter that is in Telstra's control.

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

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<sup>404</sup> Telstra, *South Brisbane Network Upgrade – Guide to the Migration Rollout*, 4 August 2011, p.12 (see <http://telstrawholesale.com/download/document/rollout-deployment-2861-1.pdf>).

<sup>405</sup> Draft Plan, clause 6.4(b).

<sup>406</sup> Letter from Telstra regarding revisions to draft migration plan and SSU, 24 August 2011, p.2.

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

### 14.7.2 Monetary caps

Sections 23, 25 and 27 of the Determination require a migration plan to oblige Telstra to use adequate processes and standard operating systems for disconnection and related activities. Further, the ACCC or the ITA must be empowered to require amendments or modifications if processes are inconsistent with sections 8 and 21 of the Determination. In determining that changes are required, the ACCC or ITA must have regard to the costs that Telstra will incur if it is directed to modify existing processes or develop disconnection measures.

In clause 28.2(c) of the draft Plan, Telstra establishes monetary caps of \$1 million in a single determination and \$10 million in a calendar year, to apply to the determinations of the ACCC and the ITA.<sup>407</sup>

The per-determination monetary cap of \$1 million can be exceeded where:

- the direction reflects the least cost solution to resolve the concern;
- the benefits outweigh the costs of the solution; and
- the consequences of continuing to rely on Existing Processes or systems has been considered.

However, the draft Plan provides that the annual monetary cap of \$10 million cannot be exceeded. Given that the monetary caps relate to modifications to specific processes or the development of discrete processes rather than fundamental system overhauls, an annual cap of \$10 million covering determinations of both the ACCC and ITA and a "soft" per-determination cap of \$1 million do not seem unreasonable. However, the ACCC invites comments from interested parties on this issue.

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

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<sup>407</sup> Note that the \$10 million "pool" is separate to the "IET Process Development Pool": see Telstra's supporting submission p.28.

# ATTACHMENT A1 - RELEVANT TELECOMMUNICATIONS MARKETS

The ACCC proposes to assess the likely impact of structural reform upon a number of telecommunications markets, as outlined in section 5.5.3. These markets, and the current state of competition in these markets, are described below.

## Fixed-line access networks

There are currently three major fixed-line access networks that service premises in Australia—Telstra’s copper and HFC networks and Optus’ HFC network. Telstra also has some fibre access networks. TransACT is the next most significant owner of access networks, with a presence in the ACT and regional Victoria, supplying services over a mix of networks including fibre-to-the-premises, HFC and copper. Telstra’s copper network is the only one of those networks over which wholesale services are currently provided.<sup>408</sup>

There is significant overlap between the footprints of the Optus and Telstra networks in Melbourne, Sydney and Brisbane, with approximately 2.2 million premises being passed by both HFC networks.<sup>409</sup> Combined, the two HFC networks pass approximately 2.9 million premises in total, with Telstra’s HFC network passing 2.7 million premises (with approximately 400,000 subscribers) and Optus’ HFC network passing 2.4 million premises (with approximately 500,000 subscribers).<sup>410</sup> As Optus does not serve multi dwelling units and some hard to reach single dwelling units, the number of premises serviceable by the Optus HFC network is approximately 1.4 million.<sup>411</sup>

The ownership, by a retail service provider, of its own access network affects competition in downstream retail markets and, in the case of Telstra’s copper network, competition in downstream network and wholesale markets.

## Retail fixed voice and broadband markets

The ACCC’s *telecommunications reports 2008-09* notes the high levels of concentration in retail fixed voice and broadband services and that Telstra continues to dominate these markets.<sup>412</sup>

The ACCC notes that in both fixed voice and broadband, Telstra’s market share is high, and that there is a wide gap between it and its nearest rivals. Telstra has been able to sustain its dominance in the face of open competition although the fixed broadband

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<sup>408</sup> NBN Co Corporate Plan, p 34.

<sup>409</sup> NBN Co Corporate Plan, p 42.

<sup>410</sup> NBN Co Corporate Plan, p 42.

<sup>411</sup> NBN Co Corporate Plan, p 42.

<sup>412</sup> *ACCC telecommunications reports 2008–09*, p.18. p 1. The Herfindahl-Hirschman Index was noted in that report at 5559 and 3341 for fixed voice and fixed broadband services respectively (p 11).

market has seen some competitive progress in terms of market concentration and number of participants in recent years.

This improvement in competition in the supply of fixed broadband services has primarily come from the entry of competitors in the supply of DSL services over the copper network, through DSLAM investment in local exchanges in recent years.<sup>413</sup> DSLAM rollout has predominantly occurred in metropolitan areas and the ACCC has previously noted that access seekers are generally focused on increasing capacity at exchanges where they already have a presence, rather than expanding into new areas.<sup>414</sup>

The lack of investment in more remote areas goes to the inherent difficulty in providing telecommunications services in these areas. This includes difficulties where infrastructure is not readily available and access seekers are unable to capture the benefits of economies of scale.

Telstra and Optus also currently supply fixed broadband services over their respective HFC networks.

The ability of a service provider to provide content services may affect its ability to compete in retail voice and broadband markets. Bundling voice and broadband services with pay TV content, in a 'triple-play' package is becoming a more common feature in the provision of telecommunications services.

The provision of pay TV services is dominated by FOXTEL, which is Australia's largest pay TV provider with over 1.63 million subscribers.<sup>415</sup> Austar is the second largest pay TV operator with over 760,000 subscribers.<sup>416</sup> The ACCC notes that on 26 May 2011, a proposed acquisition of Austar by FOXTEL was announced. The ACCC is currently conducting an informal review of the proposed acquisition.<sup>417</sup>

Market inquiries in the context of the proposed FOXTEL-Austar transaction have highlighted the likely importance in the future of telecommunications and broadband competitors being able to provide a bundle of three or four services to consumers. Such a bundle includes fixed voice, broadband internet, television and in some cases, mobile telephony services.

The ACCC notes that the NBN may provide content owners and content service providers, such as pay TV providers and channel aggregators, the ability to provide a triple-play package in competition with other telecommunications providers or, alternatively, to partner with telecommunications providers and ISPs to provide such a bundle.

Telstra currently owns a 50 per cent interest in FOXTEL. It is likely that Telstra's ownership of FOXTEL may act as a disincentive for Telstra to actively compete with

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<sup>413</sup> ACCC, *ACCC telecommunications reports 2008-09*, p.42.

<sup>414</sup> ACCC, *ACCC telecommunications reports 2008-09*, p.14

<sup>415</sup> FOXTEL-Austar Statement of Issues, p.2.

<sup>416</sup> FOXTEL-Austar Statement of Issues, p.3.

<sup>417</sup> See: FOXTEL-Austar Statement of Issues.

FOXTEL in the provision of content services. However, other suppliers of retail content services are emerging, although these currently offer a more limited range of content than a full pay TV service.<sup>418</sup>

The ACCC recently noted that emerging content delivery mechanisms, including IPTV, have “the potential to become increasingly important in the future”<sup>419</sup> in competing with traditional subscription television platforms such as FOXTEL. However, the ACCC noted that the ability of these platforms to compete effectively is dependent on a number of factors, including but not limited to the ability to source suitable content.

Content acquisition was identified as an emerging issue for the DBCDE’s Convergence Review,<sup>420</sup> which is expected to submit a final report to the Government in March 2012.<sup>421</sup>

### **Wireless voice and broadband markets**

Wireless broadband is offered over fixed and mobile wireless. For the purpose of this paper, the ACCC is considering the broad scope of wireless services to include mobile voice, fixed wireless broadband<sup>422</sup> and mobile wireless broadband.<sup>423</sup>

The provision of wireless voice and broadband services is fairly concentrated across three main providers—Telstra, Optus and Vodafone Hutchison Australia (VHA) all of which own their own mobile networks. The ACCC *telecommunications report 2008-09* shows that while Telstra maintained the largest share of mobile customers in 2008-09, Optus’ share and the shares of VHA (accounted for separately as Vodafone and Hutchison prior to the VHA merger) there appears to be a greater balance across the three major providers and that Telstra is not as dominant as in other markets.<sup>424</sup> A small share of the retail market is served by resellers which purchase wholesale services from the three network operators.

### **Wholesale markets**

Wholesale markets in telecommunications generally facilitate downstream competition by service providers either acquiring:

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<sup>418</sup> For example, FetchTV, via various ISPs, currently offers a basic subscription television package which includes around 24 channels and access to a variety of on-demand services.

<sup>419</sup> FOXTEL-Austar Statement of Issues p 8-9.

<sup>420</sup> Convergence review emerging issues paper, pp 30-31.

<sup>421</sup> Convergence review emerging issues paper, p 41.

<sup>422</sup> Fixed wireless has evolved out of extensions of fixed services (such as internet). The access network is provided by means of a radio channel (air interface) using point-to-point or point-to-multipoint technology. This technology usually requires a fixed antenna at the receiving point. (*ACCC telecommunications report 2008-09*, p 31).

<sup>423</sup> Mobile wireless has evolved from mobile phone technology. The access network is provided by means of a radio channel (air interface) using cellular topology which offers roaming from interconnected regions of service. Users can access this network either via a 3G voice handset or via non-voice service equipment such as a universal serial bus (USB) modem or datacard (*ACCC telecommunications report 2008-09*, p 32).

<sup>424</sup> *ACCC telecommunications report 2008-09*, p 26.

- wholesale service inputs, such as ULLS, which a retail service provider would combine with other self-supplied components of the end-to-end retail service; or
- managed wholesale services, such as wholesale DSL, where the retail service provider does not need to acquire or supply any other infrastructure services in order to deliver an end-to-end service.

Currently the market for the provision of wholesale fixed-line telecommunications services is dominated by Telstra, which supplies both wholesale service inputs and managed wholesale services over its copper network, that are utilised by service providers to provide retail voice and broadband services.

Some other providers are able to participate in wholesale markets to a limited extent, where they acquire certain wholesale service inputs from Telstra and using their own infrastructure to sell managed wholesale services, or reselling Telstra's managed wholesale services.

### **Transmission capacity market**

Transmission capacity broadly refers to links (or 'backhaul') which are used to connect service providers' core networks with points of service delivery (such as exchanges). Transmission capacity is an important input into the ability of service providers to provide downstream retail and wholesale services.

The domestic transmission capacity service (DTCS) is a type of transmission capacity and a declared service. Where there is evidence of competition on transmission routes such that the routes are sufficiently competitive for the removal of regulation, the ACCC has exempted those routes from the DTCS declaration.

The transmission capacity market is characterised by a dominant incumbent (Telstra) with two second tier transmission capability providers (Optus and Nextgen). Telstra's transmission network is the only ubiquitous carrier grade network and has the most extensive geographic coverage. There are a number of smaller providers of transmission capacity and competition has emerged in CBD and some metropolitan areas, as well as on inter-capital and some capital-regional routes. However, there are still many areas which are characterised by ineffective competition.

The ACCC considered the state of competition in transmission markets in detail in its 2010 advice to the Government on the number and location of the initial POIs for the NBN.<sup>425</sup>

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<sup>425</sup> ACCC, *Advice to Government: National Broadband Network Points of Interconnect*, Public version, November 2010, pp 21-34.

# ATTACHMENT A2 - KEY FEATURES OF THE NBN

## Background

On 7 April 2009, the Government announced that it intended to establish a company, NBN Co, to build and operate a wholesale-only, open access NBN.<sup>426</sup>

The Government commissioned an independent study, the NBN Implementation Study by McKinsey and Company and KPMG, which was released in May 2010 and which made a number of recommendations to the Government relating to the technology, financing, ownership, policy framework and market structure of the NBN project. This report informed a number of the decisions made by the Government in relation to the NBN.

In December 2010, the Government released its SOE, which outlined the Government's expectations in relation to a number of matters relating to the NBN including the coverage of the NBN, the location of points of interconnect, uniform national pricing, NBN Co's compliance with the proposed regulatory framework as well as service offerings, pricing, funding and privatisation.

At that time, NBN Co released its Corporate Plan, which provided information in relation to products and pricing, network rollout and connections, financial forecasts and funding arrangements and key assumptions relating to issues such as its contractual agreements with Telstra and legislative arrangements.

In March 2011, Parliament passed the NBN Companies Act and the NBN Access Act. The NBN Companies Act provides a regulatory framework for the operation of the NBN including the wholesale-only structure of NBN corporations. The NBN Access Act amended the CCA and the Telco Act to introduce new access, transparency and non-discrimination obligations relating to the supply of wholesale services by an NBN corporation.

The Government will retain full ownership of NBN Co until all of the following have occurred:

- the Minister declares that the NBN is fully built and operational (this has to be declared by 31 December 2020);
- a Productivity Commission report on the NBN has been tabled into Parliament;<sup>427</sup> and

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<sup>426</sup> Prime Minister, Treasurer, Minister for Finance, Minister for Broadband, 'New National Broadband Network,' (joint media release, 7 April 2009).

<sup>427</sup> The Productivity Commission Inquiry must consider a wide range of issues, including the regulatory framework for NBN Co, the impact on future Commonwealth budgets of the sale of

- the Finance Minister has declared conditions suitable to carry out the sale of NBN Co.

Once privatised, to prevent retail service providers from investing in NBN Co and gaining control over it, the Governor General can make regulations in relation to unacceptable private ownership/control situations.<sup>428</sup> The Communications and Finance Ministers can require an NBN corporation to functionally separate (for example, its Layer 1 and Layer 2 businesses) in line with specified principles.<sup>429</sup>

## Government policy and objectives

The Government has stated that its objective is for NBN Co to build a fibre-to-the-premises access network that connects at least 93 per cent of Australian premises, with a minimum fibre coverage obligation of 90 per cent of premises. The remainder of premises will be served via NBN Co's fixed wireless and satellite services as well as by Telstra's existing copper network.

Relevantly, the SOE states the following:

The Government notes and agrees with the assumption inherent in the business plan that NBN is to be planned as a monopoly national fixed-line network (with the exception of existing fixed-line infrastructure) as far as practical from the points of interconnect to premises.<sup>430</sup>

The Government's broad NBN policy objectives are summarised in the Revised Explanatory Memorandum to the NBN Companies Bill and NBN Access Bill as follows:<sup>431</sup>

In broad terms these policy objectives can be summarised as ensuring:

- consumers have access to high-quality superfast broadband services, preferably delivered by fibre-to-the-premises (FTTP) (the 'speed and quality objective');
- superfast broadband services are available nationally (the 'coverage objective');
- there is national uniform wholesale pricing for such services (the 'pricing objective'); and
- there is efficient and effective competition in the provision of superfast broadband infrastructure and services, that supports, by open and equivalent access to wholesale services on that infrastructure, a vibrant and competitive retail market (the 'competition objective').

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NBN Co, the impact of the sale on the equitable supply of broadband services and the impact on competition in telecommunications markets.

<sup>428</sup> NBN Companies Act, section 69.

<sup>429</sup> NBN Companies Act, sections 24-30. Principles include but are not limited to maintaining two or more specified business units, arms length functional separation between the business units, systems, procedures and practices that relate to compliance monitoring. Separation arrangements could include full functional separation of all business units, or more light touch separation. The ACCC has 44 days to provide advice on the functional separation undertaking and proposed variations to the final undertaking.

<sup>430</sup> SOE, p 4.

<sup>431</sup> Explanatory Memorandum, NBN Companies Bill and NBN Access Bill, p.48.



By ensuring these four objectives are delivered nationally, the Government is also aiming to provide, as far as possible, equitable access to superfast broadband services to all Australians, whether in metropolitan, regional, rural or remote Australia (the 'equity' objective').

As the key vehicle for delivering these objectives is NBN Co, the Commonwealth also has an objective of ensuring that NBN Co can operate on a commercially sustainable basis (the 'sustainability' objective).

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Clearly, these objectives are inter-related. For example, if the pricing objective is to be delivered through NBN Co being required to implement an internal cross-subsidy, other fibre providers could select to roll-out fibre in low-cost, high-revenue markets and offer potentially cheaper wholesale prices – effectively cherry-picking NBN Co's revenue streams. While such an outcome would be consistent with the Government's competition objective, it would impact on NBN Co's ability to deliver the coverage, equity and sustainability objectives.

(footnotes removed)

The Government has prescribed that NBN Co should offer uniform national wholesale pricing over the network from a POI to a premises. The NBN Access Act introduced amendments to the CCA which supports this objective.<sup>432</sup> NBN Co has confirmed that it will offer a uniform product construct across fibre, wireless and satellite at 12Mbps downstream and a 1 Mbps upstream entry-level offer across all three access technologies for the same price.<sup>433</sup>

The Government has stated that it expects NBN Co's approach to pricing will recognise the importance of maintaining affordability to drive take up rates.<sup>434</sup>

## **NBN Co's network**

The Government has stated that its intention is that NBN Co will be planned as a monopoly national fixed-line network as far as practical from the POIs to premises.<sup>435</sup>

The Government has prescribed that the technologies utilised in the NBN should be fibre to 93 per cent of premises (including Greenfields developments) with a minimum fibre coverage obligation of 90 per cent of premises, delivering speeds of up to 100Mbps, fixed wireless to 4 per cent of premises delivering at least 12 Mbps and satellite to 3 per cent of premises.<sup>436</sup>

NBN Co must not refuse to allow interconnection to its network at the locations identified in a list developed by the ACCC in consultation with NBN Co.<sup>437</sup> The locations on that list reflect the Government's direction to NBN Co that its network should extend to meet with but not overbuild competitive backhaul routes.<sup>438</sup>

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<sup>432</sup> CCA, section 151DA.

<sup>433</sup> NBN Corporate Plan, p.91.

<sup>434</sup> SOE, p.10.

<sup>435</sup> SOE, p.7.

<sup>436</sup> SOE, p 3-4.

<sup>437</sup> CCA sections 152AXB and 151DB.

<sup>438</sup> SOE, p 7.

On the assumption that the Definitive Agreements proceed, NBN Co has estimated that the construction of the NBN will take approximately 9.5 years and will be completed in 2021.<sup>439</sup>

### **Regulation of NBN based services**

NBN Co is not able to supply an eligible service unless the service is declared. This is both a condition of NBN Co's carrier licence and a service provider rule.<sup>440</sup> Declaration of NBN services only occurs if either (i) NBN Co publishes a Standard Form Access Agreement on its website; (ii) an SAU has been accepted by the ACCC for the service; or (iii) the service has been declared by the ACCC.<sup>441</sup>

NBN Co is subject to open access, wholesale-only, transparency and non-discrimination obligations relating to the supply of its services. The same obligations have also been extended to owners of new (as of January 2011) 'superfast' fixed-line networks (outlined in more detail below).<sup>442</sup>

Failure to comply with non discrimination obligations is a breach of carrier licence condition and service provider rule.<sup>443</sup>

### **Other relevant features of the regulatory regime**

The NBN Access Act introduced amendments to the Telco Act and CCA<sup>444</sup> which introduce special requirements for operators of fixed-line 'superfast networks' (referred to by the Government as the level regulatory playing field arrangements).

Broadly, supplying services over new and upgraded superfast fixed-line networks will be prohibited unless a Layer 2 bitstream service is also offered. This service can only be supplied to carriers or service providers (that is, on a wholesale-only basis). This applies to superfast networks built or upgraded after 1 January 2011.

The ACCC is required to declare access to the Layer 2 bitstream services supplied over these networks. Once the ACCC has made that declaration, the standard access obligations (SAOs) will apply. In supplying the service, providers will be subject to similar non-discrimination obligations and transparency reporting arrangements as those applying to NBN Co.

The services supplied over these networks are expected to be required to comply with the same technical standards as NBN Co's services.

Other relevant features of the regulatory regime include:

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<sup>439</sup> NBN Co Corporate Plan, p 79 (Exhibit 6.4).

<sup>440</sup> CCA, section 152 AL (8A).

<sup>441</sup> CCA, sections 152AL (8A)-(8D).

<sup>442</sup> CCA sections 152AXB (2), 152CJB.

<sup>443</sup> CCA sections 152AZ-BA.

<sup>444</sup> These amendments are to commence on 12 April 2012 unless proclaimed earlier.

- An NBN corporation must not supply an eligible service to another person unless that person is a carrier or service provider (that is, it is “wholesale-only”).<sup>445</sup> Exemptions to this rule are made for certain services.<sup>446</sup> A breach of these provisions would be a breach of NBN Co’s carrier licence (in addition to being a contravention of the Act).<sup>447</sup>
- The Minister may impose conditions on NBN Co’s carrier licence that have the effect of prohibiting it from supplying a specified service (prohibited service) or requiring it to supply a specified service (mandatory service).<sup>448</sup> This mechanism is aimed at enabling the Minister to provide certainty as to the level of services that NBN Co will and will not provide. NBN Co is also prohibited from supplying a non-communications service or supply goods not in connection with the supply of an eligible service. An NBN Corporation must not supply a content service.<sup>449</sup>
- The Government has stated that its expectation is that NBN Co will offer open and equivalent access to wholesale services at the lowest levels in the network stack necessary to promote efficient and effective retail level competition via Layer 2 bitstream services in the fibre footprint.<sup>450</sup>
- The Government expects that NBN Co will upgrade services over time and demonstrate that the functionality and performance of its services is meeting demand and supporting innovation across all technology platforms. The government expects NBN Co to regularly advise it of its upgrade plans.<sup>451</sup>

## Competition over the NBN

The majority of existing competitors in telecommunications markets currently compete using a combination of access to Telstra’s copper network and their own network assets. This form of competition can be characterised as ‘partial-facilities based competition’.

Partial-facilities based competition has previously been defined by the ACCC as being where:

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<sup>445</sup> NBN Companies Act, section 9.

<sup>446</sup> The exemptions provide for NBN Co to supply network management services to a number of utilities which would otherwise not be able to receive a service from NBN Co. Exemptions relate to Air Services Australia or State public transport authorities, electricity supply bodies, the managing/charging of natural gas transmission or distribution, the managing/charging of water distribution, sewerage or storm water, and used by State or Territory road authorities for the managing or control of road traffic. There is a requirement that these exemptions will only apply if these bodies do not on-supply the service.

<sup>447</sup> NBN Companies Act, section 37

<sup>448</sup> NBN Companies Act, section 41. Before giving NBN Co a notice in relation to such a condition, the Communications Minister must consult the ACCC.

<sup>449</sup> NBN Companies Act, sections 17-19

<sup>450</sup> SOE, p.2.

<sup>451</sup> SOE, p.4.

[E]ntrants use a combination of access to a third party's infrastructure in combination with investment in their own infrastructure to provide services to end-users (e.g. the provision of broadband services to end-users using the ULLS or LSS combined with investment in DSLAM technology in local exchange areas)<sup>452</sup>

There is a broad spectrum of business models for providing retail telecommunications services that may be captured by this definition. However, fundamentally the term is intended to differentiate between retail service providers who operate on a pure resale basis and those that are able to better differentiate their service offerings through their control of the relevant infrastructure components that make up the service.

This can be compared with a pure reseller which acquires an end-to-end service without needing to own or acquire any telecommunications infrastructure. Pure resellers are usually only responsible for retailing activities, such as selling activities, billing for the service and handling customer inquiries in relation to the service.

Thus, facilities based competitors (either partial-facilities based or full-facilities based) have a greater ability to:

- control their own costs and supply chain;
- differentiate service offerings; and
- improve service quality.

Efficient facilities based competition is more likely to lead to sustainable competition, spur dynamic innovation and encourage the diffusion of new technologies over time.

In general terms, the lower the 'Layer' in the network at which a service provider can gain access (see description below), the greater its ability to differentiate its retail service, both in price and non-price terms. The ACCC has previously considered that an approach to regulation that encourages competitors to invest in their own infrastructure, where it is economically efficient, is likely to promote the LTIE.<sup>453</sup>

While the structural reform, as outlined above, will result in a likely reduction of full-facilities based competition, the ACCC considers that it could stimulate competition in wholesale and retail markets and enable service providers to differentiate their services and innovate in a number of ways.

In broad terms, service providers will be able to provide retail services based upon the NBN fibre network in two separate ways:

1. Directly acquiring a Layer 2 bitstream service from NBN Co and self-supplying other components that are required in order to provide an end-to-end retail service (including by acquiring either access or use rights to third party infrastructure or services). The service provider is 'directly connected' to the NBN).

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<sup>452</sup> FSR 2<sup>nd</sup> Position Paper, p 19.

<sup>453</sup> FSR 2<sup>nd</sup> Position Paper, p 21.

2. Acquiring a wholesale service from a service provider who is directly connected to the NBN. There is a broad range of potential wholesale services including access to the NBN that may be provided by wholesale service providers, including:
  - Wholesale service inputs, such as aggregation or routing services bundled with NBN Co's Layer 2 bitstream service. In addition to that wholesale service input the retail service provider would also need to self-supply key components of the end-to-end retail service; and
  - Managed wholesale services that would facilitate a 'pure reseller' model. That is, the retail service provider would not need to acquire or supply any other infrastructure services in order to deliver an end-to-end service.

### **Retail competition and differentiation**

The ACCC expects that retail and wholesale service providers will be able to differentiate their services and innovate in a number of ways using the NBN. This could include:

- Differentiation in relation to how each service provider dimensions its networks. This would include decisions regarding what combination of services it will acquire from NBN Co, including capacity and quality of service, and decisions relating to the capacity and quality of service for the relevant domestic and international transmission. Service providers, especially those who are directly connected to the NBN, will also be able to differentiate the quality of their retail product through the design of and investment in their core network capability.<sup>454</sup>
- Differentiation in relation to the available bundled services that the service provider is able to offer in conjunction with the NBN-based telephony service. This would include the ability of the service provider to provide 'triple play' (voice, broadband and TV) or even 'quadruple play' (voice, broadband, TV and mobile) service offerings.
- Differentiation through the level of customer service and support provided to customers.
- Differentiation on price, based upon the cost of other inputs that are required in order to provide an end-to-end service (as the NBN Co access price comprises only a part of service providers' costs of providing a retail or wholesale service).

### **Future investment in the NBN**

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<sup>454</sup> The scope for innovation and differentiation in relation to how each service provider dimensions its network may be further increased if service providers were able to acquire a Layer 1 service from NBN Co in the future.

One of the key risks regarding the creation of a monopoly infrastructure owner, even if it is wholesale only, is that in the absence of competition that monopolist will have less incentive to minimise costs or to innovate. The regulatory regime can seek to reduce that risk, by creating incentives for investment through regulatory mechanisms.

The ACCC and the Australian Energy Regulator regulate access to a range of network services where there is not effective infrastructure based competition, including in the energy, water and transport sectors. The regulatory frameworks for these industries are generally designed so that the regulated firms are provided with regulatory incentives to invest in an efficient manner.

The ACCC considers that NBN Co is likely to be required to invest in infrastructure absent incentives that would be likely to arise from infrastructure based competition from other fixed-line access networks. These requirements arise as a result of:

- the regulation of NBN Co's supply of services under the access regime under Part XIC of the CCA;
- the Government's expectations that NBN Co will upgrade its services and the mechanisms that are in place to support this objective; and
- the Minister's ability to mandate that NBN Co provide certain services.

NBN Co has stated its intention to submit a special access undertaking (SAU) that will, among other things, include the principles and processes that NBN Co will follow when it undertakes capital investments.<sup>455</sup>

The ACCC will be required to assess the SAU in accordance with the 'reasonableness' criteria, as specified in the CCA, an important aspect of which is the extent to which the SAU promotes efficient investment in infrastructure.<sup>456</sup> The ACCC would be unlikely to be able to accept an SAU from NBN Co that did not promote efficient investment in infrastructure.

In addition, the SOE states that the Government expects that "NBN Co will upgrade services over time and demonstrate that the functionality and performance of its services is meeting demand and supporting innovation across all technology platforms".<sup>457</sup> In order to ensure that these expectations are met, the Government is subjecting NBN Co to various reporting requirements.<sup>458</sup>

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<sup>455</sup> NBN Co, *Discussion Paper: Introducing NBN Co's Special Access Undertaking*, July 2011.

<sup>456</sup> Section 152AH of the CCA.

<sup>457</sup> SOE, p 4.

<sup>458</sup> For example, the SOE provides that NBN Co will be required to regularly advise the Government of its upgrade plans (p 4), develop key performance indicators that will be used to report on and monitor progress against the Corporate Plan and Business Plan and include information in its annual reports such as details regarding the quality of its services. The NBN Companies Act also notes that NBN Co must include specific matters in its annual corporate plan including quality control strategies for services supplied by the company under a monopoly (see NBN Companies Act, Part 4).

In addition to these reporting requirements, the Minister may impose a condition on NBN Co's carrier licence that would have the effect of requiring it to supply a specified telecommunications service (a 'mandatory service').<sup>459</sup>

## Network layers and the NBN

Telecommunications networks are constructed as a number of independent 'layers' of communication. Services are provided at a particular layer. Figure 1 below is a common example of the structure of a layered model of communication.

**Figure 1 Layered model structure**

Layers		
5	Application	The application the end user is using
4	Transport	Ensure the data is not lost and is in order
3	Network	Get the data across a network of links
2	Data Link	Ensuring that the data gets from point to point
1	Physical	The electronics that puts the signals on the medium
0	Medium	The copper wire, optical fibre or radio channel

Each layer provides a defined and well-specified 'service' to the layer above and expects a defined and well-specified service to be provided by the layer below. The layer at each end of a link communicates with the matching layer at the other end of the link using a 'protocol stack' (software in each layer that communicates with the other layer). Services are provided between layers, not within a layer.

Different services can be provided by a layer depending upon what the layer above requires, and for that reason a set of protocols may be available for use within the layer. Several protocols and services might be in operation within the one layer simultaneously and independently (for example, one for voice services and another for data services).

The nature of the communications model is that each layer operates independently and each layer can potentially be provided by a different operator. That is, one party can take a service provided by a lower layer in the stack, which is perhaps operated by a different party and used to provide a service to a higher level in the stack. This process culminates in a service being provided to the application layer in the stack which is used by a customer in the form of a communications product such as an internet or telephone service. Further, as each layer of the protocol (except for layer 0) is a logical rather than a physical connection, more than one party can operate a protocol at any layer (other than at layers 0 and 1) simultaneously.

<sup>459</sup> *NBN Companies Act*, Division 6 (41); *Tel Act*, section 63; *CCA*, s152CJB.

NBN Co will offer products in the Layer 2 (active) layer. Layer 1 and Layer 3 (or higher) products will not be offered although some Layer 3 awareness (such as for multicasting) will be included.<sup>460</sup> Development of applications and Layer 3 services are beyond NBN Co's remit.<sup>461</sup> Therefore, this is the "Layer" at which retail service providers will be able to differentiate their service in order to compete.

## Layer 1 and the NBN

Layer 1 unbundling over a fibre-to-the-premises network, such as the NBN, involves the network operator providing a form of physical access to the network so that an access seeker can install its own optical network equipment to provide services to end-users, as opposed to purchasing a higher Layer access service from the network operator such as a Layer 2 bitstream service. Layer 1 unbundling, especially physical unbundling, requires the ability of the access seeker to interconnect at the local exchange level, as it requires direct access to the fibre line of a premises so that the access seeker can terminate the line on its own equipment. This is analogous to the arrangements over legacy networks where an access seeker installs its own DSLAM equipment in a Telstra exchange and purchases a ULLS service to supply retail or wholesale voice and/or DSL services.

From a competition perspective, there are two main ways that an optical access network could be unbundled at Layer 1:

- Physical fibre unbundling: Providing a separate fibre from the exchange to each premises. Physical unbundling would only be viable where home-run topology has been deployed, so that an access seeker can gain access to a dedicated fibre from the exchange to each premises.; and
- Wavelength unbundling – providing access to individual wavelengths on the one fibre. It is not yet clear how wavelength unbundling might be implemented in the future on a wide scale over an optical access network, as there are no agreed international standards. The technology is, however, very well understood and is used for most major transmission links within the core network.

## Layer 2 and the NBN

The NBN will offer products at the Layer 2 (active) layer.<sup>462</sup> An example of a Layer 2 service is a bitstream service.<sup>463</sup>

NBN Co will own all active equipment in fibre exchanges and at the customer premises served to 'light' the fibre. However retailers will also need to install some equipment to move data around the network and translate the Layer 2 bitstream service into

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<sup>460</sup> NBN Co Corporate Plan p 49.

<sup>461</sup> NBN Co Corporate Plan p 129.

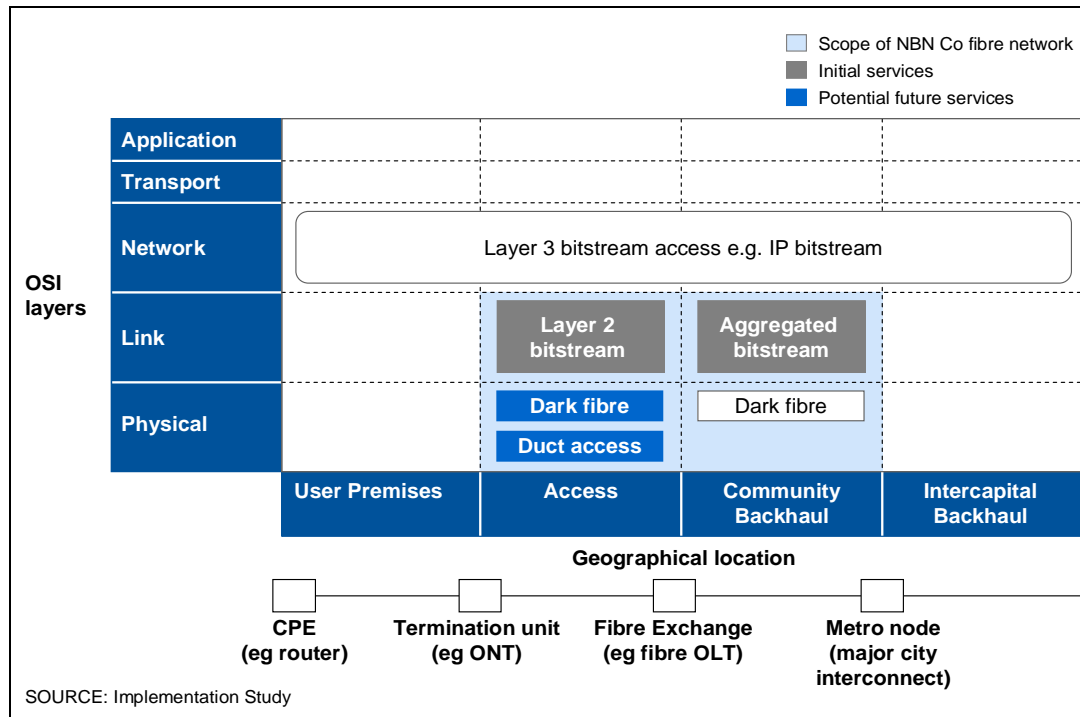
<sup>462</sup> NBN Co Corporate Plan p 49.

<sup>463</sup> A 'bitstream service' is not defined by an international standard. However it is commonly accepted to be at Layer 2.



meaningful end user applications such as broadband internet, voice and video.<sup>464</sup> The preferred form of communication signalling ‘active’ technology in the NBN Layer 2 is Ethernet bitstream which is a widely deployed/scalable technology for providing digital communications.<sup>465</sup>

**Figure 2 Options for NBN products/services in stack layers and network locations.**



### Future Layer 1 unbundling

In the NBN Co Corporate Plan, NBN Co states that it has proceeded with its network and system design on the basis that it would provide a Layer 2 bitstream service only, using predominantly a GPON architecture.<sup>466</sup> The NBN Co Corporate Plan notes that NBN Co is not preparing for the provision of Layer 1 services, Layer 1 unbundling, functional or structural separation.<sup>467</sup>

It is relevant to note that the Implementation Study recommended that although a Layer 2 fibre monopoly for the NBN could be appropriate in the short term, it should not endure as a monopoly in the long term.<sup>468</sup> The Implementation Study noted that a Layer 2 service is provided at an active layer where more innovation is possible and also where effective regulation may be difficult.<sup>469</sup>

<sup>464</sup> Implementation Study, p 29.

<sup>465</sup> Implementation Study p 62.

<sup>466</sup> NBN Co Corporate Plan, p 14.

<sup>467</sup> NBN Co Corporate Plan, p 14.

<sup>468</sup> Implementation Study, p 49.

<sup>469</sup> Implementation Study, p 49.

In the SOE, the Government stated that it wished to preserve flexibility, in a cost effective manner, for NBN Co to respond to future trends in market demand for future unbundling.<sup>470</sup> Reflecting this, the SOE notes that:

- NBN Co should design its corporate systems to achieve appropriate internal accounting separation arrangements between its active and passive activities.<sup>471</sup>
- Whilst the Government accepts GPON will be the most practical solution in areas which are currently served by existing telecommunications infrastructure, NBN Co is expected to conduct a home-run fibre trial in a new development by early 2012.<sup>472</sup> NBN Co confirmed its intention in this regard in the NBN Co Corporate Plan where it noted that a trial of 'Home Run' architecture will take place in a Greenfields site in 2012 and that it will establish an asset register and cost allocation methodology for asset and cost accounting.<sup>473</sup>
- Once the trial is completed, NBN Co, in consultation with the ACCC, is required to provide a report to Government encompassing the implications of home run topology, including for points of interconnect, costs, network design, and rollout timing.<sup>474</sup>

The prospect of future Layer 1 unbundling was also envisaged by amendments to the CCA and the Telco Act by the NBN Access Act, and the NBN Companies Act. Together, this legislation established a legislative framework by which NBN Co could at a future date be required by the Government to supply an unbundled Layer 1 service.

In particular, the Minister may impose a condition on NBN Co's carrier licence that would have the effect of requiring it to supply a specified telecommunications service (a 'mandatory service')<sup>475</sup> or prohibiting it from supplying a specified carriage service (a 'prohibited service').<sup>476</sup> The Explanatory Memorandum to the NBN Companies Bill and the NBN Access Bill states that these provisions could be used to provide stakeholders with certainty as to the level of services that NBN Co will and will not provide, and that the Minister can use this mechanism to specify the Layer at which NBN Co operates.<sup>477</sup>

Therefore, while it appears to be the case that services over the NBN would only be offered at the Layer 2 level initially, there are mechanisms for Layer 1 unbundling to be introduced should that be feasible in the longer term.

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<sup>470</sup> SOE, p 9.

<sup>471</sup> NBN Co is expected to consult with the ACCC in the design and implementation of such accounting separation arrangements. SOE, p 10.

<sup>472</sup> SOE, p 10.

<sup>473</sup> NBN Co Corporate Plan, p 14.

<sup>474</sup> SOE, p 10.

<sup>475</sup> Division 6 (41) of the NBN Companies Act; section 63 of the Telco Act; section 152 CJB of the CCA.

<sup>476</sup> Division 6 (41) of the NBN Companies Act; section 63 of the Telco Act.

<sup>477</sup> Explanatory Memorandum, NBN Companies Bill and NBN Access Bill, p 6.

# ATTACHMENT A3 - SUMMARY OF RELEVANT PROVISIONS IN DEFINITIVE AGREEMENTS

## Subscriber Agreement

The Subscriber Agreement contains a number of restrictions on Telstra’s ability to compete with the NBN in the NBN Fibre Footprint<sup>478</sup>. These restrictions only apply within the NBN Fibre Footprint.

There is also scope for the future commercial activities of NBN Co to be restrained by the provisions in the Subscriber Agreement.

## Disconnection of premises from Telstra’s copper and HFC networks

On or before the Disconnection Date for a particular region,<sup>479</sup> Telstra must permanently disconnect premises in the NBN Fibre Footprint from the Telstra copper network and HFC network, subject to limited exceptions. These exceptions include the continued provision of specified ‘Special Services’<sup>480</sup> over the copper network and services for delivering certain pay TV services over the HFC network.

After disconnecting premises within the NBN Fibre Footprint from Telstra's copper network and HFC network and deactivating its HFC network within the NBN Fibre Footprint, Telstra will not reconnect premises to the copper network or HFC network or reactivate the HFC network within the Fibre Footprint except in limited circumstances including where the NBN is materially unavailable.<sup>481</sup>

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<sup>478</sup> Broadly, the NBN Fibre Footprint is defined as: (a) the geographic areas in which NBN Co intends to rollout its fibre network, excluding the parts of those geographic areas that are in Rollout Regions in respect of which the disconnection commencement date or region ready for service date has occurred; and (b) for each Rollout Region in respect of which the Disconnection Commencement Date or Region Ready for Service Date has occurred, the set of premises notified from time to time by NBN Co to Telstra under the Subscriber Agreement as the premises in that Rollout Region which are “passed” by the NBN Co fibre network and which NBN Co intends will be “passed” in that Rollout Region.

<sup>479</sup> Broadly, the Disconnection Date for a Rollout Region is the date which is 18 months after the Ready For Service Date for that Rollout Region, or such later date as determined under the Disconnection Protocols.

<sup>480</sup> There are two categories of special services: “Temporary Special Services” and “Contracted Special Services”. “Temporary Special Services” are certain services identified in the Definitive Agreements which are unable to be provided over the NBN for technical or operational reasons and includes both retail and wholesale special services offered by Telstra and also ULLS and LSS used by access seekers to offer special services of their own which are equivalent. “Contracted Special Services” are services which Telstra is contractually required to provide using the Copper Network pursuant to a limited number of retail contracts that were entered into by Telstra before 23 June 2011.

<sup>481</sup> Material unavailability of the NBN is defined in the Definitive Agreements as occurring where, in respect of a Rollout Region, the NBN Co Fibre Network is unable to be used to provide any NBN based services in the entirety of that Rollout Region for at least five consecutive days.

Broadly, Telstra will receive a payment from NBN Co for each active premises that it disconnects from its copper and HFC networks (irrespective of whether Telstra provides a wholesale or retail service to that premises, provided that it must have been providing “commercial service” of some kind). Telstra is not entitled to this payment for a disconnected premises where that premises does not connect to the NBN by a specified date and a relevant person at that premises is in receipt of a Telstra wireless service at that date, however Telstra will become entitled to the payment for that premises if it subsequently connects to the NBN within three years of disconnection.

### **Network Preference**

For a period of 20 years from the Commencement Date<sup>482</sup>, Telstra has committed to exclusively use the NBN Co fibre network as the fixed-line connection to premises in the NBN Fibre Footprint to provide fixed-line carriage services to those premises.

This is subject to several limited exceptions, as set out below. In general terms, it also does not prevent Telstra from providing fixed-line carriage services to those premises using its copper and HFC networks prior to the Disconnection Date for the Rollout Region in which the premises are located (or after that date in the case of Special Services provided over the copper network).

#### *Pay TV services over the HFC*

After the Disconnection Date in a Rollout Region, Telstra is able to continue to supply the following services using the HFC network to premises in that Rollout Region:

- FOXTEL television services;<sup>483</sup> and
- services that Telstra is obliged to provide to enable the provision of certain other pay TV services under specified contracts that were in existence as at 20 June 2010.<sup>484</sup>

This means that Telstra is not able to provide any services over the HFC network to premises in the NBN Fibre Footprint in a Rollout Region after the Disconnection Date for the Rollout Region other than certain pay TV services (not including internet protocol based services).

Note that Telstra is prohibited under the Subscriber Agreement from providing services that enable the provision of internet protocol based services, voice services, broadband

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<sup>482</sup> The Definitive Agreements define Commencement Date as the date that all of the Conditions Precedent to the Definitive Agreements are either waived or satisfied.

<sup>483</sup> These are the carriage services which are required and are used only to enable the broadcast by FOXTEL, using the HFC network, of any or all of subscription television or audio broadcasting services or on-demand analogue or digital cable television or audio services, but which must not include internet protocol based services

<sup>484</sup> Excludes services that enable the provision of internet protocol based services, voice services, broadband services or services requiring a return path transmission over the HFC network from the end user.

services or services requiring a return path transmission over the HFC network to premises in a Rollout Region after the Disconnection Date for that Rollout Region.

In respect of carriage services required by current and potential future access seekers to FOXTEL's set top box under the FOXTEL Special Access Undertaking (FOXTEL SAU), Telstra is able to provide those services to a premises in a Rollout Region using the HFC network prior to the Disconnection Date for that region. After the Disconnection Date, potential future access seekers who seek access to the FOXTEL digital set-top box would only be able to obtain access to that set top box other than by use of the HFC network (for example, by getting access to satellite carriage services).

#### *Point-to-point (P2P) Services*

Telstra may provide P2P Services over Telstra P2P fibre which is in operation or installed as at the Commencement Date.

Telstra may install new P2P fibre where:

- the P2P fibre is installed to provide P2P Services in response to a bona fide customer request received by Telstra on or before the Commencement Date; or
- the P2P fibre is installed to provide P2P services to premises that, as at the Commencement Date, Telstra is required to provide to those premises under an existing contract with a Telstra customer; or
- it is otherwise permitted to do so, having complied with the requirements in the Subscriber Agreement giving NBN Co a right of first refusal to install such new P2P fibre.

Where Telstra installs new P2P fibre, it may only do so:

- if, at the time it the P2P fibre is installed there is not sufficient existing unused Telstra P2P fibre available to fulfil the relevant customer requirements; and
- if the new P2P fibre meets specific capacity limits in the Subscriber Agreement or NBN Co is satisfied as to the capacity requirements of the new fibre.

After the Commencement Date, Telstra is generally not permitted to supply P2P services to 'demand aggregators' without NBN Co's consent.<sup>485</sup> The parties have advised that the intention of this provision is to ensure that Telstra won't be able to supply P2P services to a person who acquires those services for the purposes of aggregating demand from multiple sub-addresses at a single location which is residential in nature (such as apartment blocks), which would circumvent the intention of the network preference provision.

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<sup>485</sup> "Demand Aggregator" is defined in the Definitive Agreements as "an entity that acquires or intends to acquire P2P Services from Telstra ... for use in conjunction with other equipment, for the purposes of aggregating demand from multiple subaddresses at a single location which is predominantly residential in nature."

### *Passive Optical Network (PON) Fibre*

For 20 years from the Commencement Date, Telstra must not own, operate or use PON infrastructure (other than the NBN) or install PON infrastructure for operation or use by Telstra as the fixed line connection to premises in the NBN Fibre Footprint for the provision of fixed line services other than:

- as required for Telstra's existing PON projects that are specifically listed in the Definitive Agreements;<sup>486</sup>
- as required for an optical fibre interim network to meet Telstra's USO obligations and its obligations under the Commonwealth's greenfields policy; or
- pursuant to a written contract between Telstra and NBN Co for the ownership, operation, use or installation by Telstra of fibre network components.

Telstra is also permitted to install new PON fibre networks in limited circumstances in the interim period before NBN Co has rolled out to an area to provide services within a business or government MDU or business park in that area, provided Telstra does so in accordance with the requirements of the Subscriber Agreement including giving NBN Co a right of first refusal to install the new PON fibre. Ownership of these PON fibre networks will be transferred to NBN Co once NBN Co has rolled out to the relevant region.

Telstra is restricted from disposing of its PON networks or granting a third party a right to operate its PON networks, or any part thereof, without NBN Co's prior written consent, subject to some limited exceptions. From the date which is 20 years after the Commencement Date, Telstra can dispose of PON networks that are outside of the set of premises that are passed by NBN Fibre as at the date which is 20 years after the Commencement Date without requiring NBN Co's consent.

Generally, where, pursuant to these exceptions, Telstra is permitted to install, own, operate and/or use PON infrastructure (other than the NBN) as the fixed-line connection to premises in the NBN Fibre Footprint for the provision of fixed-line services, it is subject to the same disconnection obligations as apply to Telstra's copper and HFC networks.

The PON restrictions do not apply to the PON network Telstra is building in the South Brisbane Exchange Area.

### *Acquisitions by Telstra*

If Telstra acquires control over an entity that operates a fibre network and provides fixed-line carriage services over that network to premises within the NBN Fibre

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<sup>486</sup> This encompasses Telstra's Fibre-to-the-premises Velocity network which Telstra has established as the customer access network in a number of new housing estates around Australia. In its 2009 Submission to the DBCDE's Consultation paper: *National Broadband Network: Fibre-to-the-premises in Greenfield estates*, Telstra estimated that there are approximately 170,000 currently contracted for FTTP deployment and approximately 2,800 active services.

Footprint, Telstra must ensure that the entity ceases to provide those services within 12 months. Similar provisions apply in relation to any acquisition by Telstra of a reseller of non-NBN fixed-line services to premises within the NBN Fibre Footprint.

### **Restrictions on sale of copper and HFC networks**

Telstra is restricted from selling its copper and HFC networks to third parties (other than for scrap or for use overseas if the acquirer is prohibited from using the networks for the provision of services in Australia) unless NBN Co agrees to the sale. Telstra is also restricted from the granting rights to third parties to use the copper and HFC networks.

From the date which is 20 years after the Commencement Date, Telstra will be able to sell the parts of the copper and HFC networks that are located outside the set of premises that are passed by NBN Fibre Footprint as at the date which is 20 years after the Commencement Date without NBN Co's consent.

### **Telstra wireless services**

#### *Restrictions on marketing wireless services*

For a period of 20 years from the Commencement Date (or until any earlier date on which the operation of the entire NBN Co Fibre Network is permanently terminated) Telstra has agreed that it will not promote wireless services as substitutable for fibre services.

#### *Other wireless provisions*

Telstra is not entitled to any fee for disconnecting a premises if the following wireless substitution occurs:

- that premises has not connected to the NBN at any time up until the date which is six months after the Disconnection Date (defined above) for that Rollout Region; and
- as at the date which is six months after the Disconnection Date the Relevant Account Holder (i.e. the subscriber to the Telstra copper or HFC service at that premises) for that premises is party to an agreement, arrangement or understanding with Telstra or a Telstra reseller for the acquisition of a Telstra wireless service (which could be a voice only service and not a wireless data service).

Telstra can earn back the fee if the premises connects to the NBN on or before the date which is 3 years after the Disconnection Date for the applicable Rollout Region.

There are also anti-avoidance provisions which could extend the application of wireless substitution to other members of the Relevant Account Holder's household in certain circumstances.

## **Restrictions regarding Optus' HFC network**

In reaching their agreement Telstra and NBN Co agreed that the Definitive Agreements would be conditional upon NBN Co entering into an agreement with Optus which provided for the Optus' HFC network to be removed or rendered permanently inoperable progressively as the NBN is rolled out. That Optus Agreement has been entered into and the condition does not apply.

Furthermore, provisions within the Definitive Agreements prohibit NBN Co from incorporating Optus' HFC network into the NBN.

## **Substantial Adverse Events**

The Subscriber Agreement provides for a mechanism for variation of the Subscriber Agreement if a "substantial adverse event" (SAE) occurs in relation to either NBN Co or Telstra within 20 years from the Commencement Date. The party who is affected by the SAE may initiate the variation procedure.

### *Where an SAE will occur in relation to NBN Co*

An SAE will occur in relation to NBN Co where Telstra engages in competition with NBN Co in the market for the provision of carriage services to premises which has the effect, or would be highly likely to have the effect, of substantially adversely affecting the business of NBN Co in operating its fibre network.

An SAE will not occur to the extent that the conduct engaged in by Telstra is a bona fide proportionate competitive activity in mobile markets – either to meet the competition in that market or to maintain proportionate competitive advantage.

Specific examples of an SAE in relation to NBN Co would include (but is not limited to):

- Telstra establishing a mobile network with picocell density that would supply services that are substitutable for comparable NBN services (other than for use in public places with high demand); or
- Telstra systematically using its rights under the Definitive Agreements to materially increase the quantity and extent of P2P fibre in rollout regions in advance of the NBN Rollout over and above the quantity and extent of P2P fibre that would be implemented by Telstra based on market trends and bona fide demand at the time.

### *Where an SAE will occur in relation to Telstra*

An SAE will occur in relation to Telstra where NBN Co engages in competition with Telstra in:

- the market for the supply of retail carriage services to consumer, business or government in Australia; and
- the market for the supply of mobile carriage services,



with the effect, or which would be highly likely to have the effect, of substantially adversely affecting the business of Telstra in those markets.

An SAE will not occur in relation to Telstra to the extent that the conduct engaged in by NBN Co is the provision of:

- services that facilitate the supply of carriage services by NBN Co (other than prohibited routing or switching services) to persons whom NBN Co is permitted to supply under the NBN Companies Act (as at 23 June 2011);
- satellite or fixed wireless services to premises that are not in the NBN Fibre Footprint or which are in the Fibre Footprint but are not serviceable by the NBN Co Fibre network;
- facilities access to non-Telstra mobile base stations and facilities access to Telstra mobile base station where Telstra has consented to the provision of that facilities access;
- backhaul to mobile base stations or wireless base station devices; or
- the supply of permitted services (such as services between a location that is NBN connected and a point of interconnect).

Specific examples of an SAE in relation to Telstra will include (but is not limited to):

- NBN Co providing services on a non-wholesale basis by directly providing services to parties who are not persons to whom NBN Co is permitted to supply under the NBN Companies Act (as at 23 June 2011);
- NBN Co supplying a routing or switching service between two locations which are NBN connected (or one location and a public network such as the internet) (excluding certain permitted services such as routing or switching between a premises and a Point of Interconnect); or
- NBN Co supplying mobile services.

#### *Consequences of an SAE*

If an SAE has occurred and the affected party has initiated the relevant procedure, the parties are required to negotiate a variation to the Subscriber Agreement. Such variation could:

- modify or delete specified clauses of the Subscriber Agreement to an extent which is proportionate to the competitive activities that gave rise to the SAE;
- modify or delete any other provisions of the Subscriber Agreement in a way which puts the affected party in a position to more effectively compete with the other party, to an extent which is proportionate to the competitive activities that gave rise to the SAE; and/or

- impose restrictions on the party engaging in conduct in competition with the affected party to an extent which is proportionate to the competitive activities that gave rise to the SAE and which, to the extent practicable, have the effect of putting each party in the same position in which it would have been had that SAE not occurred.

For example, if NBN Co decided to provide mobile services and that had or was likely to have a substantial adverse effect on Telstra in the agreed markets, then two possible outcomes could be that NBN Co could be restrained from providing those services, or that Telstra's restrictions on promoting wireless as a substitute for fibre could be relaxed to enable Telstra to more efficiently compete with NBN Co.

## **Infrastructure Services Agreement**

The Infrastructure Services Agreement contains the terms on which Telstra will provide long term key access infrastructure and services required by NBN Co.

### **NBN Co acquisition of infrastructure/licences to use infrastructure**

NBN Co will incrementally acquire ownership of Telstra's lead in conduits when NBN Co installs fibre into the lead in conduit to connect a premises to the NBN fibre network. Under this agreement, NBN Co will also acquire long term rights to access and use Telstra's infrastructure including ducts, rack spaces in Telstra's exchanges and dark fibre links.

### **Restrictions on NBN Co's ability to resupply Telstra's dark fibre**

Telstra agrees to supply its dark fibre to NBN Co on the condition that NBN Co will not permit third party use without Telstra's consent, other than by way of carriage service supplied over the NBN.

## **Access Deed**

The Access Deed documents the high-level commitments made by NBN Co to Telstra in respect of the proposed supply of NBN Co's Basic Service Offering (BSO)<sup>487</sup> and the charging for certain wholesale supply services.

There is a restraint in relation to NBN Co's submissions to the ACCC regarding the price of its BSO (BSO Restraint). It provides that NBN Co must not make any submissions to the ACCC seeking a price for the supply of the BSO that is more than the BSO price (being \$24 per service, per month) for the period from 5 years from the Commencement Date.

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<sup>487</sup> NBN Co's Basic Service Offering essentially comprises an entry level broadband service (12 Mbps downlink/ 1 Mbps uplink) and a voice telephony service.

# ATTACHMENT B - Mapping of Telstra's draft Plan against the migration plan principles

SECTION OF DETERMINATION	PROVISION IN TELSTRA'S DRAFT PLAN
<p><b>Section 8</b></p> <p><b>Disconnection of carriage services</b></p>	<p>Clause 2 – Objective and scope of this Plan</p> <p>Clause 6– Telstra to use existing processes</p> <p>Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services during the Migration Window</p> <p>Clause 12 – Telstra activities in the lead up to the Disconnection Date for each Rollout Region</p> <p>Clause 13 – Order Stability Period prior to the Disconnection Date</p> <p>Clause 21 – Special Services</p> <p>Clause 22 – Removal of Wholesale Customer equipment from Telstra facilities</p> <p>Schedule 1 – Telstra existing standard processes for disconnection of copper services (other than special services)</p> <p>Schedule 2 – Telstra existing standard processes for disconnection of HFC services</p> <p>Schedule 4 – Special Services</p>
<p><b>Section 9</b></p> <p><b>Disconnection of carriage services using copper networks</b></p>	<p>Clause 6 – Telstra to use existing processes</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services during the Migration Window</p> <p>Clause 14 – Managed disconnection commencing at the Disconnection Date (NB – Required Measure under Schedule 7)</p> <p>Clause 15 – Types of premises and related disconnection windows (in-train orders and premises prevented by law from disconnection)</p> <p>Clause 16 – Disconnection of all Premises to be completed by the Designated Day</p> <p>Clause 17 – No supply of new Copper Services and HFC services after a Premises becomes NBN Serviceable</p>

SECTION OF DETERMINATION	PROVISION IN TELSTRA'S DRAFT PLAN
	<p>Schedule 1 – Telstra existing standard processes for disconnection of copper services (other than special services)</p> <p>Schedule 3 – Principles for managed Disconnection immediately following the Disconnection Date (for use in development of the relevant Required Measure)</p> <p>Schedule 5 – Technical Conditions constituting permanent disconnection</p>
<p><b>Section 10</b></p> <p><b>Disconnection of carriage services using HFC networks</b></p>	<p>As above</p> <p>Schedule 2 – Telstra existing standard processes for disconnection of HFC services</p>
<p><b>Section 11</b></p> <p><b>Coordination of connection and disconnection</b></p>	<p>Clause 6.4 – Telstra not responsible for management or coordination of the connection process</p> <p>Clause 7 – Telstra's timetable for disconnection of Premises will be determined by reference to NBN Co's Rollout schedule</p> <p>Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates</p> <p>Clause 9 – disconnection of Copper Services and HFC Services during the Migration Window</p> <p>Clause 12 – Telstra activities in the lead up to the Disconnection Date for each Rollout Region (notifications re automatic disconnection)</p> <p>Schedule 1 – Disconnection of a copper broadband service or LSS due to disconnection of a voice service using same copper path</p>
<p><b>Section 12</b></p> <p><b>Restrictions on the supply of carriage services prior to and after the disconnection date</b></p>	<p>Clause 4.3 – Telstra's existing non-Migration related activities and rights are unaffected by the Plan</p> <p>Clause 13 – Order Stability Period prior to the Disconnection Date</p> <p>Clause 17 – No supply of new Copper Services after a Premises becomes NBN Serviceable</p> <p>Clause 18 – Temporary Reconnection</p> <p>Clause 31- Dispute resolution process</p>
<p><b>Section 13</b></p> <p><b>Special Services</b></p>	<p>Clause 4.3 – Telstra's existing non-Migration related activities and rights are unaffected by the Plan</p> <p>Clause 21 – Special Services</p>

<b>SECTION OF DETERMINATION</b>	<b>PROVISION IN TELSTRA'S DRAFT PLAN</b>
	Schedule 4 – Special Services Schedule 7 – Required Measures
<b>Section 14</b> <b>Maintaining a soft dial tone</b>	Clause 20 – Soft Dial Tone
<b>Section 15</b> <b>Reactivation of carriage services</b>	Clause 17 – No supply of new Copper Services and HFC Services after a Premises becomes NBN Serviceable Clause 18 – Temporary Reconnection
<b>Section 16</b> <b>Equipment of wholesale customers</b>	Clause 22 – Removal of Wholesale Customer equipment from Telstra facilities
<b>Section 17</b> <b>Timetable for disconnecting fixed-line carriage services</b>	Clause 7 – Telstra's timetable for disconnection of Premises will be determined by reference to NBN Co's rollout schedule Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates Clause 21 – Special Services
<b>Section 18</b> <b>Timing of disconnection orders</b>	Clause 7 – Telstra's timetable for disconnection of Premises will be determined by reference to NBN Co's rollout schedule (including clause 7.4 – First and last date on which orders for disconnection can be lodged) Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates Clause 21 – Special Services
<b>Section 19</b> <b>Control of disconnection timing and processes</b>	Clause 6 – Telstra to use Existing Processes Clause 9.3 – Wholesale customers to retain autonomy over disconnection decisions, including control over the timing of disconnection Clause 10 – Pull Through Activities Clause 12 – Telstra activities in the lead up to the Disconnection Date for each Rollout Region (notification of automatic disconnections) Clause 21 – Special Services (including certification of Special Service Inputs) Schedule 1 – Disconnection of a copper broadband service or

SECTION OF DETERMINATION	PROVISION IN TELSTRA'S DRAFT PLAN
	LSS due to disconnection of a voice service using same copper
<p><b>Section 20</b></p> <p><b>Provision of information regarding disconnection</b></p>	<p>Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates</p> <p>Clause 12 – Telstra activities in the lead up to the Disconnection Date for each Roll out region</p> <p>Clause 14.4 – Telstra to notify wholesale customers before final decision</p>
<p><b>Section 21</b></p> <p><b>Equivalence regarding disconnecting Telstra retail business units and wholesale customers</b></p>	<p>Clause 5 – Required measures</p> <p>Clause 6 – Telstra to use existing processes</p> <p>Clause 7 – Telstra's timetable for disconnection of Premises will be determined by reference to NBN Co's rollout schedule</p> <p>Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services during the Migration Window</p> <p>Clause 12 – Telstra activities in the lead up to the Disconnection Date for each Rollout Regions</p> <p>Clause 13 – Order Stability Period prior to the Disconnection Date</p> <p>Clause 15 – Types of Premises and related Disconnection Windows</p> <p>Clause 21 – Special Services (notifications about product exits)</p> <p>Schedule 1 – Telstra existing standard processes for disconnection of Copper Services (other than special services)</p> <p>Schedule 3 – Principles for Managed Disconnection immediately following the Disconnection Date</p> <p>Schedule 7 – Required Measures</p>
<p><b>Section 22</b></p> <p><b>Prohibition of marketing activity</b></p>	<p>Clause 11 – Telstra staff and contractors attending on site</p>
<p><b>Section 23</b></p> <p><b>Use of adequate processes</b></p>	<p>Clause 5 – Required Measures (for disconnection processes in relation to special services and managed disconnection)</p> <p>Clause 6 – Telstra to use Existing Processes</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services</p>

<b>SECTION OF DETERMINATION</b>	<b>PROVISION IN TELSTRA'S DRAFT PLAN</b>
	<p>during Migration Window</p> <p>Clause 10 – Pull-Through Activities</p> <p>Clause 28 – Variation of an existing process or development of new or modified disconnection measures</p> <p>Clause 29 – Testing of new or modified Disconnection processes</p> <p>Schedule 1 – Telstra existing standard processes for disconnection of copper services (other than special services)</p> <p>Schedule 2 – Telstra existing standard processes for disconnection of HFC services</p>
<p><b>Section 24</b></p> <p><b>Specification of disconnection processes</b></p>	<p>Clause 6 – Telstra to use Existing Processes</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services during Migration Window</p> <p>Clause 10 – Pull Through Activities</p> <p>Clause 12.2 – Notification to Wholesale Customers when Wholesale Services are automatically disconnected</p> <p>Schedule 1 – Telstra existing standard processes for disconnection of copper services (other than special services)</p>
<p><b>Section 25</b></p> <p><b>Development of disconnection processes</b></p>	<p>Clause 28 – Variation of an existing process or development of new or modified disconnection measure</p>
<p><b>Section 26</b></p> <p><b>Modifications to existing processes and disconnection measures</b></p>	<p>Clause 28 – Variation of an existing process or development of new or modified disconnection measure</p> <p>Clause 31- Dispute resolution process</p>
<p><b>Section 27</b></p> <p><b>Using standard Telstra operating systems, interfaces and processes</b></p>	<p>Clause 6 – Telstra to use Existing Processes</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services during the Migration Window</p> <p>Clause 28 – Variation of an existing process or development of a new or modified disconnection measure</p> <p>Schedule 1 – Telstra existing standard processes for disconnection of copper services (other than special services)</p>

<b>SECTION OF DETERMINATION</b>	<b>PROVISION IN TELSTRA'S DRAFT PLAN</b>
<p><b>Section 28</b></p> <p><b>Supply of information by Telstra to NBN Co</b></p>	<p>Clause 23 – Information supplied to NBN Co</p> <p>Clause 24.4 – notification regime prior to establishment of NBN information Security Plan</p> <p>Schedule 8 – Information to be provided by Telstra to NBN Co under the Definitive Agreements</p>
<p><b>Section 29</b></p> <p><b>Protection of information</b></p>	<p>Clause 5 – Required Measures</p> <p>Clause 24 – Information Security</p> <p>Schedule 6 – Information Security principles for the development of NBN Co Migration Information security measures</p> <p>Schedule 7 – Required Measures</p> <p>Structural Separation Undertaking – Part D and Schedule 2 (organisational structure, information security and related measures)</p>
<p><b>Section 30</b></p> <p><b>Commencing to supply fixed-line carriage services using the NBN</b></p>	<p>Clause 19 – Telstra commencing to provide services using the NBN</p>
<p><b>Section 31</b></p> <p><b>Reporting framework</b></p>	<p>Clause 25 – Reporting Framework</p> <p>Clause 27 – Compliance</p>
<p><b>Section 32</b></p> <p><b>Rectification</b></p>	<p>Clause 26 – Rectification of the Plan</p>
<p><b>Section 33</b></p> <p><b>Dispute Resolution</b></p>	<p>Clause 31 – Dispute Resolution process</p> <p>Structural Separation Undertaking – Schedule 5 (Independent Telecommunications Adjudicator)</p>
<p><b>Section 34</b></p> <p><b>Scope of modifications to processes</b></p>	<p>Clause 28 – Variation of an existing process or development of a new or modified disconnection measures</p> <p>Clause 29 – Testing of new or modified disconnection processes</p>
<p><b>Section 35</b></p> <p><b>Consultation with NBN Co</b></p>	<p>Clause 30 – Telstra will consult with NBN Co about relevant matters under this Plan</p>



<b>SECTION OF DETERMINATION</b>	<b>PROVISION IN TELSTRA'S DRAFT PLAN</b>
<p><b>Section 36</b></p> <p><b>Required measure development process</b></p>	<p>Clause 5 – Required Measures</p> <p>Schedule 3 – Principles for Managed Disconnection immediately following the Disconnection Date</p> <p>Schedule 6 – Information security principles for development of NBN Co Migration Information Security measures</p> <p>Schedule 7 – Required Measures</p>
<p><b>Section 37</b></p> <p><b>Test procedure processes</b></p>	<p>Clause 29 – Testing of new or modified Disconnection processes</p>
<p><b>Section 38</b></p> <p><b>Cessation of migration plan</b></p>	<p>Clause 4 - Commencement and Term</p> <p>Clause 17 – No supply of new Copper Services after a Premises becomes NBN Serviceable</p> <p>Clause 18 – Temporary reconnection</p> <p>Clause 24 – Information security</p>

# ATTACHMENT C - QUESTIONS FOR DISCUSSION

## Part A: Structural Separation Undertaking

### *Assessing the impact of the SSU*

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.

### *Promotion of a competitively neutral environment*

2. Do you consider that Telstra's ongoing ownership and control of passive infrastructure required by other access seekers to interconnect with the NBN is likely to impede the realisation of any of the expected benefits to competition from the structural reform? Please provide evidence that supports your reasoning.
3. Do you consider that Telstra's ongoing ownership of FOXTEL is likely to impede the realisation of any of the expected benefits to competition from the structural reform? Please provide evidence that supports your reasoning.

### *Impact on competition in downstream markets*

4. What do you think will be the likely impact of the SSU coming into force for competition in:
  - (a) fixed access markets;
  - (b) transmission capacity markets;
  - (c) downstream (wholesale or retail) fixed voice and broadband markets; and
  - (d) any other relevant telecommunications markets.
5. To what extent would the SSU coming into force provide greater assurance that the wholesale-only open access NBN would meet its coverage and timing objectives?
6. What greater product differentiation would be likely to emerge in the presence of upstream competition as compared to the situation where network consolidation occurs?
7. To what extent would competition at the access and transmission layer be efficient in a productive sense? Could this form of competition stop significant economies of scale and scope being realised?

8. What other factors should be considered in assessing the likely impact of the SSU coming into effect, and the network consolidation occurring, on competition in downstream markets?

For industry:

9. Do you expect to provide retail or wholesale services based upon the wholesale-only open access NBN? Would this change if the SSU did or did not come into force?
10. What investments have you undertaken to date in anticipation of the proposed structural reform and the creation of a wholesale-only open access network?
11. Are you likely to invest in your own infrastructure, such as transmission facilities or core network elements, if the SSU and the network consolidation were to come into effect? If the SSU did not come into effect, would that have an impact on those plans?
12. Do you intend to invest in new 'superfast' access networks (in established locations or greenfields), irrespective of the 'level playing field' provisions? Would this decision change depending upon whether the SSU comes into force?

*Impact on consumers*

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

For industry:

15. What are your expected broadband offerings for customers over the NBN? How do you think that those offerings will compare in relation to price and service quality to services provided over existing networks? Are there any product features or applications you do not anticipate supporting?

*Improving accessibility and quality of broadband services, including those in regional rural and remote areas*

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

For industry:

17. Do you expect to be able to expand the geographic areas in which you offer services, or better be able to compete in certain areas, as a result of the SSU coming into effect?

*Expected distribution of long-term economic benefits*

18. What long-term economic benefits could be expected to flow to consumers from the SSU coming into effect? How would these benefits likely be distributed amongst different types of consumers in different geographic areas? Please provide reasons for your view.

*Other matters relating to the Definitive Agreements*

19. Are there any other matters set out in the Definitive Agreements that are likely to receive the benefit of the legislative authorisation that may have detrimental impacts upon competition in telecommunications markets or consumers, or when viewed against other of the mandatory considerations? Please provide reasons and evidence for your view.

20. Could the operation of the substantial adverse events clause have a detrimental impact upon competition in telecommunications markets or consumers, or when viewed against other of the mandatory considerations? Please provide reasons and evidence for your view.

21. Are there any detrimental impacts to competition or consumers that are likely to arise directly as a result of the condition precedent (noting that the substance of the Optus-NBN Co transaction will be subject to separate consideration by the ACCC)? Would other of the mandatory considerations either support or militate against the proposed restrictions coming into effect? Please provide reasons and evidence for your view.

22. Are there any detrimental impacts to competition or consumers, or for other of the mandatory considerations, that are likely to arise as a result of the restraint upon NBN incorporating elements of Optus' HFC into its network? Would other of the mandatory considerations either support or militate against the proposed restrictions coming into effect? Please provide reasons and evidence for your view.

23. Is this provision likely to impact adversely upon competition in relevant telecommunications markets (such as markets for the provision of content services or other telecommunications markets) or for consumers? Would any of the other mandatory considerations either support or militate against the proposed restrictions coming into effect? Please provide reasons and evidence for your view.

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? Would other of the mandatory considerations either support or militate against the proposed restrictions coming into effect? Please provide reasons and evidence for your view.

25. Given that it effectively operates as a price ceiling rather than a price floor, is the BSO price commitment likely to have any adverse impacts upon competition, consumers or any other criteria to which the ACCC is to have regard? Please provide reasons and evidence for your view.

### *Interim Equivalence and Transparency*

26. Do the commitments in the SSU provide sufficient assurance that Telstra will provide equivalence of outcome until the designated day?
27. Is the scope of Telstra's proposed commitments - in terms of services covered, implementation, and enforceability – appropriate?
28. Do the interim price measures – the rate card and TEM Reports - provide for appropriate and effective price equivalence and transparency? If not, what changes to the price measures and/or additional price measures should be considered?
29. Does the SSU appropriately ring-fence functions to effectively promote equivalence?
30. Are the proposed limits on staffing of separated business units, including any exceptions/exemptions, appropriate and effective in promoting equivalence?
31. Are the proposed limits on incentives and employee benefits, including any exceptions/exemptions, appropriate?
32. Are the proposed arrangements with regard to the network services business unit appropriate given the objective of ensuring downstream competitors can compete on their merits?
33. Do the proposed information security arrangements provide sufficient assurance to stakeholders that confidential and commercially sensitive information is protected from unauthorised disclosure or use?
34. Do the proposed interim non-price measures provide appropriate assurance that known equivalence and transparency issues will be remedied? What other such issues should be considered in assessing the appropriateness of these measures? Please consider issues that affect operational quality, technical quality and quality of systems support.
35. Do the proposed mechanisms for addressing equivalence and transparency issues that emerge over time provide appropriate assurance that these issues would be remedied appropriately and effectively? Is it clear and certain that all such issues would be within the scope of those mechanisms? What changes would potentially address perceived limitations?
36. Are the proposed equivalence and transparency metrics appropriate? Please consider the proposed target timeframes and performance standards, and the proposed exceptions and exemptions.
37. Is the proposed SLA scheme likely to be effective? For example, is the SLA scheme comprehensive and are the rebates sufficient to incentivise Telstra.
38. Does the SSU appropriately provide for equivalent service level and functionality of Regulated Services to comparable products?

39. Do the proposed information equivalence commitments, including notifications and wholesale customer engagement, provide appropriate and effective assurance of equivalence?
40. Are the proposed arrangements for TEBA (in relation to the supply of active declared services provided by Telstra) appropriate and effective in providing for equivalence and transparency?
41. Is the AIP an effective mechanism for the resolution of equivalence disputes between Telstra and wholesale customers?
42. Is the proposed ITA process likely to be effective in resolving equivalence complaints and incentivising Telstra's compliance with the substantive equivalence obligations?
43. Is the ITA likely to be independent, such that wholesale customers have assurance that disputes will be handled impartially?
44. Does the ITA have the powers necessary to ensure resolution of any disputes before it, including the power to require reasonable remediation by Telstra of its wholesale processes/systems?
45. What is an appropriate and effective dispute resolution process for price equivalence disputes?
46. 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?
47. In relation to the interim period, does the SSU provide for appropriate and effective ACCC monitoring of Telstra's compliance with the SSU and for Telstra to have systems, procedures and processes which promote and facilitate that monitoring?
48. In relation to the interim period, does the SSU provide for a Governance Framework that ensures appropriate oversight by Telstra of its compliance with the SSU?
49. In relation to the interim period, does the SSU contain compliance and governance measures that provide assurance to wholesale customers of compliance with the SSU?

## **Part B: Migration Plan**

50. Are the provisions of the draft Plan compliant with 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?

52. Are there any specific disconnection scenarios which are not adequately specified in the draft Plan?
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?
54. What key issues should be addressed in the development of any of the Required Measures?
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?
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?
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?
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?
59. What significant issues, if any, are likely to arise from the operation of clause 6.4 of the draft Plan?
60. Are there any other ways in which disruption to services can be minimised that are within Telstra's control?
61. Are the suggested monetary caps reasonable in the context of variations to Telstra's existing processes and disconnection measures?