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By email: ssu-migration@acc.gov.au

Sean Riordan
General Manager
Industry Structure and Compliance, Communications Group
Australian Competition and Consumer Commission
GPO Box 520, Melbourne VIC 3001
1 February 2013

Dear Sean,

Telstra Required Measures 1(a) and 1(b)

I make this short submission as the Independent Telecommunications Adjudicator. The views that I express are mine and I have not consulted the Office of the Independent Telecommunications Adjudicator (the ITA company) in preparing this submission.

There are a number of issues that arise from the Migration Plan Required Measures relating to the pull-through connection process that have the potential to either lead to disputes under the Plan or which affect equivalence. This submission is confined to these matters. Before addressing these issues, there are two practical matters which the ACCC may wish to take into account when reviewing the proposed required measures.

The first relates to pull-through generally. This matter arises from the fact that a pull-through installation will always be quicker than attempting to share a lead-in conduit. The impact of this will depend on the incentives that NBN Co provides to its installation contractors. However, given that pull-through is a more rapid means of installation, there is a significant risk that pull-through installations will occur at the end of a working day, if installers are remunerated with a piece rate package. This risk is highest at the end of the working week (either Friday or lunch time on Saturday,

depending on the construction rules in the council area where installation occurs). Telstra may well foresee a relatively low percentage of pull-through installations. However, if the NBN Co installation contractors have commonly adopted incentives, then these pull-through installations are likely to be collected into batches. The relevant notice is likely to be given in time to physically perform the pull-through before the end of a working day. In this case, the likelihood of an end-user being left without service is high. However, the construction of the Deed Poll means that this likelihood is potentially higher for end-users of Telstra Wholesale customers than end-users of Telstra Retail.

The second practical matter is the definition of priority assistance customers. This term is not defined in the Plan and Telstra's Structural Separation Undertaking only refers to the policy approved by the Minister under Telstra's carrier licence for the supply of priority assistance services to end users. The usual meaning of a priority assistance customer is a voice-only customer who is registered for priority assistance under either:

- (a) for Telstra retail customers—Telstra's Priority Assistance for Individuals Policy; or
- (b) for non-Telstra retail customers—the Priority Assistance for Life Threatening Medical Conditions Industry Code.

The ACMA reports that, in June 2012, there were only 216 priority assistance customers in the non-Telstra category out of a total of 221,666 priority assistance customers.¹ As a consequence, the reporting of priority assistance customers using this definition is a low threshold. It is possible that either Telstra or a Telstra customer would know that there is a temporary situation in a household that would mean that the absence of a phone service could be problematic. Such information could relate to a temporary situation that was reported as part of a fault report. It is not clear how Telstra or NBN Co would treat this information, given the absence of a clear definition of priority assistance.

¹ ACMA Communications Report 2011-12, 12 November 2012 page 84 at http://www.acma.gov.au/webwr/_assets/main/lib550049/comms_report_2011-12.pdf

Deed Poll

The releases in the Deed Poll have two potentially problematic issues. The first is the release in 1.6(c) in which a Telstra wholesale customer:

absolutely releases each NBN Co Person and each Telstra Person in relation to any Loss or Claim for or in relation to ... the operation, or lack of operation, of any carriage service on a Pull-through Cable (caused) by the Pull-through Activities, Cable Rectification or installation of a Temporary cable, for the period commencing on installation of a Temporary Cable until commencement of Cable Rectification

In this case, it appears unlikely that the release will promote activity by Telstra that is compatible with achieving an equivalence outcome. To some extent, the likelihood of equivalence will be indicated by whether Telstra seeks an exemption to the Customer Service Guarantee in comparable cases where the end-user is a Telstra Retail customer. If Telstra does seek such an exemption, then there is a prospect for equivalence, but the effect will be poor for end-users as the Deed Poll is premised on Temporary Cables being in place for up to 90 days.

The second is the release in 1.6(g) in which a Telstra wholesale customer:

absolutely releases each NBN Co Person and each Telstra Person in relation to any Loss or Claim for or in relation to ... a failure by Telstra to notify [Customer] completely and accurately of a Pull-through Exception Event or installation of a Temporary Cable to the extent Telstra was not notified by NBN Co Entity completely and accurately of a Pull-through Exception Event or installation of a Temporary Cable

The incidental issue from the release is that it is odd to release each NBN Co Person for an NBN Co entity failing to provide information to Telstra. That is, Telstra could say that NBN Co did not notify and NBN Co could agree but point to the release to suggest that there should be no consequence.

The equivalence issue that arises from this release is similar to the issue arising from 1.6(c). It is likely that if the end user is a Telstra Retail customer, Telstra will have a mechanism to deal with NBN Co to ensure that it is notified "completely and accurately". However, given the release, Telstra has no incentive to have an equivalent process for Telstra Wholesale customers. One solution to this would be to remove this element of the release.

Specific Issues on which the ACCC has sought submissions

In this section, I address some of the questions raised in the ACCC discussion paper.

- 4. Would the inclusion in the required measures of a notification process to wholesale customers ahead of the use of pull-through assist wholesale customers manage service continuity for their end users?**

In my view, even if the notification did not assist in managing service continuity, such notice would mean that Telstra Wholesale customers would have the ability to manage their end-user expectations in a manner similar to the expectation management that Telstra Retail could adopt. That is, such notice would be consistent with Telstra's obligations under clause 9.3 of the Plan.

- 5. Does the release under draft clause 1.6(c) of the Deed Poll undermine the capacity of wholesale customers to minimise the period of any service outage for their end users?**

Yes, as set out above.

- 9. In the absence of wholesale customer agreement to undertake Reinstatement or Remote Tests, is there sufficient assurance that existing communications services will be able to recommence for end-users who do not migrate all their services over to the NBN on the connection date?**

The Deed Poll commits Telstra Wholesale customers which opt in to undertake reasonable endeavours to carry out Reinstatement and Remote Tests within one hour of being requested to do so

by NBN Co.² One of the implications of the requirement of the Telstra Wholesale customer to perform tests is that these tests are performed using Telstra infrastructure in the case of services other than Unconditioned Local Loop Service. That is, the Telstra Wholesale customer's "reasonable endeavours" are limited by Telstra's actions in allowing the test to take place. In my view, the choice by a Telstra Wholesale customer to conduct the relevant tests should not be determined in respect of all of that customer's end-users at the time that the Deed Poll is executed. That is, the "tick box", if required at all, should be on a per end-user basis and not in respect of all that Telstra Wholesale customer's end-users.

[REDACTED]

12. Within what time period would wholesale customers need to be provided with notification of a pull-through exception event in order to take steps to minimise disruption of their end users' services?

It seems to me that a practical solution to the issue of notification of a pull-through exception event would be for NBN Co to either inform:

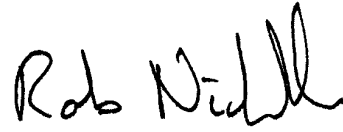
- (a) the Telstra wholesale customer affected by the event concurrently with Telstra; or
- (b) all Telstra wholesale customers concurrently with Telstra.

The second option would have the practical effect of keeping the industry updated with the level of pull-through exception events from time to time in specific areas or specific installation types. It would also be helpful to NBN Co to understand if levels of pull-through exception events vary significantly with the contractor employed.

² Draft clause 1.4 of the Deed Poll

Please let me know if I can clarify any of the matters raised in this letter.

Yours sincerely

A handwritten signature in black ink that reads "Rob Nicholls". The signature is written in a cursive style with a large, stylized 'R' and 'N'.

Rob Nicholls

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