



Australian
Competition &
Consumer
Commission

Assessment of Telstra's draft Migration Plan Required Measures

- (2) Managed disconnection of copper services
- (3) Managed disconnection of HFC services
- (4) Building copper paths to supply special services and special service inputs
- (6) NBN Information Security Plan

Final decision

February 2013

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List of acronyms and other terms

Added Premises	has the meaning given in clause 15.2(a) of the migration plan
Affected Premises	has the meaning given in clause 15.3(a) of the migration plan
ACCAN	Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission
August 2011 Discussion Paper	<i>ACCC's Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan</i> , Discussion Paper, August 2011
Definitive Agreements	Each of: (a) the Implementation and Interpretation Deed dated 23 June 2011 and made between Telstra and NBN Co; (b) the Subscriber Agreement dated 23 June 2011 and made between Telstra and NBN Co; (c) the Infrastructure Services Agreement dated 23 June 2011 and made between Telstra and NBN Co; (d) the Access Deed dated 23 June 2011 and made between Telstra and NBN Co; and (e) any other documents agreed by NBN Co and Telstra to be Definitive Agreements
Direct Special Service	Those carriage services set out in the 'Access Service' column of Table 1 and 2 in Schedule 4 of the migration plan, including: (a) any Product Bundles specified in Schedule 4 that are provided over the corresponding category of Access Service; and (b) any Product Bundles subsequently provided over such Access Services
Disconnection date	(a) In respect of a Rollout Region, the date specified as the disconnection date for that Rollout Region in the Disconnection Schedule (b) In respect of all Copper Services in the Fibre Footprint within a Rollout Region that are not Special Services or Added Premises, the date published by Telstra as the disconnection date for that Rollout Region in the Disconnection Schedule;

	(c) In respect of Added Premises, the date determined as the disconnection date in accordance with clause 15.2 of the migration plan;
	(d) In respect of a Direct Special Service or Special Service Input, the disconnection date for the applicable SS Class determined in accordance with clause 21.1 of the migration plan; and
	(e) In respect of a Contracted Special Service, the date determined as the disconnection date under clause 21.12 of the migration plan
Disconnection Schedule	The schedule of Disconnection Dates referred to in clause 7.1(a) of the migration plan as published by Telstra from time to time
Disconnection Protocols	Schedule 1 of the Subscriber Agreement;
(the) Determination	<i>Telecommunications (Migration Plan Principles) Determination 2011</i>
Final Decision Paper	<i>ACCC's Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan, Final Decision Paper, February 2012</i>
HFC	Hybrid Fibre-Coaxial
In train order premises	Has the meaning given in clause 15.1(b) of the <i>Migration Plan</i>
ITA	Independent Telecommunications Adjudicator
LIC	Lead-in-conduit
LOLO	LinxOnline Ordering
LSS	Line Sharing Service
No-order disconnection premises	Has the meaning given in clause 9(5) of the Determination
NBN	National Broadband Network
NBN Co	NBN Co Limited
NBN Co Migration Information	Has the meaning given in clause 24.1 of the migration plan
NBN ISP	NBN Information Security Plan
November Discussion Paper	<i>ACCC's Required Measures Discussion Paper, November 2012</i>

NPAMS	A Telstra network and service system
NTT	NBN Transition Tool (Telstra system)
PIM	NBN Co's Public Information on Migration campaign
PSTN	Public Switched Telephone Network
RFS	Ready for service
Ready for Service Date	(a) In relation to an Initial Release Rollout Region or Acquired Rollout Region, the date notified by NBN Co as the Disconnection Commencement Date for that Rollout Region; and (b) In relation to any other Rollout Region, the date advised by NBN Co in a notice published on its website that Fibre Services will be able to commence to be supplied in the Rollout Region
Special Services	Direct Special Services and Contracted Special Services (clause 21.12 of the migration plan)
Special Services Input	ULLS or LSS certified by a Wholesale Customer as being used to provide carriage services which are Service Equivalent to Direct Special Services.
Subscriber Agreement	The Definitive Agreement concluded between Telstra and NBN Co on 23 June 2011, entitled 'Subscriber Agreement'
SSU	Structural Separation Undertaking
STS	Standard Telephone Service
Telstra	Telstra Corporation Limited
TUSMA	Telecommunications Universal Service Management Agency
TUSMA Agreement	<i>The Telecommunications Universal Service Management Agency (TUSMA) Agreement</i> concluded on 23 June 2011 between Telstra and the Commonwealth
ULLS	Unconditioned Local Loop Service
WBA	Wholesale Broadband Agreement
WLR	Wholesale Line Rental

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1 Introduction

On 27 February 2012, the Australian Competition and Consumer Commission (ACCC) accepted Telstra's structural separation undertaking (SSU) and approved the draft migration plan. The SSU came into force on 6 March 2012 and the migration plan on 7 March 2012. Further detail on the ACCC's assessment of Telstra's SSU and migration plan can be found in the ACCC's February 2012 Final Decision paper — Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan, and in its August 2011 discussion paper . Both papers are available at <http://www.accc.gov.au/content/index.phtml/itemId/1003999>.

1.1 Migration plan required measures

Clause 5 of the migration plan provides that Telstra may develop certain disconnection measures or processes after the migration plan commences and submit them to the ACCC for approval.¹ These measures are referred to as 'required measures' and comprise specific disconnection processes needed to facilitate migration to the National Broadband Network (NBN) and a plan setting out how Telstra will ensure that information sourced from NBN Co under the Definitive Agreements is secured from retail business units. There are six required measures:

- (1) Pull through processes, which Telstra has lodged separately as:
 - a. process for obtaining consents and releases from wholesale customers for NBN Co to use pull through during the connection process
 - b. process for notifying wholesale customers that pull through exception events have occurred.
- (2) Process for managed disconnection of copper services (which are not special services) on the disconnection date.
- (3) Process for managed disconnection of hybrid fibre coaxial (HFC) services.
- (4) Process for Telstra to build copper paths at premises which had previously been permanently disconnected, in order to supply special services and special service inputs to that premises.
- (5) Processes which will be used to manage and implement disconnection of copper services of each special service class.
- (6) The NBN information security plan.²

The migration plan sets out the process that Telstra must follow when developing and lodging draft required measures for ACCC approval. This process requires the

¹ Migration plan, clause 5.1(c).

² Migration plan, sch. 7.

development of a high level road map and individual work plans for each measure. These documents are available on the Telstra Wholesale website.³

1.2 Decision making framework for required measures

The ACCC must approve a draft required measure if it is satisfied that it complies with the *Telecommunications (Migration Plan Principles) Determination 2011* (the Determination).⁴ Otherwise the ACCC must refuse to approve the draft required measure and direct Telstra to resubmit the draft required measure amended to take into account the concerns raised by the ACCC.⁵

In deciding whether to direct Telstra to resubmit a draft required measure, the ACCC must have regard to:

- (i) the costs to Telstra that would flow from the amended draft required measure;
- (ii) the effectiveness of the amended draft required measure; and
- (iii) the relative costs and benefits of amending the draft required measure.⁶

The migration plan provides further detail as to what certain measures must include in order to constitute the required measure.

The ACCC has 60 business days from the date of lodgement to approve a required measure, or otherwise direct Telstra to resubmit an amended draft. Telstra has 40 business days from receipt of such a direction to resubmit a draft required measure that addresses the concerns raised by the ACCC. These processes apply recursively.⁷ Once approved, a required measure forms part of the migration plan.⁸

If, through operational experience or otherwise, an approved required measure is found to not comply with the general principles in the Determination, then the ACCC may issue a direction to Telstra to rectify the required measure to ensure that it is compliant.⁹

1.2.1 The Determination

The objectives and scope of the migration plan are defined in the Determination which includes three different types of migration plan principles:

³ <http://www.telstrawholesale.com.au/nbn/migration-plan/index.htm>.

⁴ Available on the Department of Broadband, Communications and Digital Economy's website at www.dbcde.gov.au.

⁵ Migration plan, clause 5.4(d).

⁶ Migration plan, clause 28.2(b).

⁷ Migration plan, clause 5.4(e).

⁸ Migration plan, clause 5.4(g).

⁹ Migration plan, clause 26(a).

- General principles, which describe the overarching principles that must be met by the migration plan. These include equivalence and continuity of service objectives.
- Specific principles, which provide further specificity regarding how some of the general principles are to be given effect in the migration plan.
- Procedural principles, which set out the procedural provisions that must be included in the migration plan.¹⁰

1.3 Consultation

On 22 November 2012, the ACCC released a discussion paper on Telstra's draft required measures 2, 3, 4 and 6. Submissions closed on 14 December 2012.

The ACCC received nine submissions in relation to the discussion paper, including a supplementary submission from Telstra. These submissions are published on the ACCC's website.

The ACCC has had regard to all relevant submissions in forming its views on whether to approve the draft required measures.

1.3.1 Responses from end-users and consumer groups

The ACCC received three submissions from individual end-users and a submission from the Australian Communications Consumer Action Network (ACCAN).

ACCAN's submission noted that while industry is best placed to provide views on specific processes, "consumers must be at the centre of the ACCC's considerations on matters related to the migration of services".¹¹ ACCAN submits that in considering the draft required measures, the ACCC should seek to create arrangements that "optimise the migration process for consumers. This would mean as seamless a transition of services as possible and minimised service down time for consumers."¹²

The ACCC agrees that it is important to ensure that end-users experience minimal service disruption during the migration process. The Determination requires the migration plan to provide for the disconnection of services in a way that minimises disruption to the supply of these services, to the extent that it is in Telstra's control.¹³ The Determination also requires the migration plan to give wholesale customers the autonomy to minimise the disruption to their end-users' services, to the greatest extent practicable.¹⁴ For the purposes of giving wholesale customers autonomy, minimising

¹⁰ The Determination, subsection 6(1).

¹¹ ACCAN submission, p. 1.

¹² Ibid, p.1.

¹³ The Determination, subsection 8(1)(b).

¹⁴ Ibid, ss 8(1)(c).

service disruption and ensuring equivalence, the migration plan must require Telstra to have in place reasonable business practices relating to disconnection.¹⁵

Submissions from end-users note the importance of the NBN rollout in addressing issues with existing infrastructure, including access to high speed internet and freedom to choose retail service providers.¹⁶ One submission also noted that the draft required measures do not include any information on end-users' ability to decide whether to transfer their services to the NBN.¹⁷

¹⁵ Ibid, ss. 8(2), 8(3).

¹⁶ Corey and Fiona Broadway-Bennett submission, December 2012 and Anthony Simpson submission, December 2012.

¹⁷ David King submission, December 2012.

2 Summary of the ACCC's decision

The ACCC is not satisfied that draft required measures 2, 3, 4 and 6 comply with the Determination and therefore has decided not to approve them.

The ACCC directs Telstra to resubmit, within 40 business days from the date of the ACCC's direction, the draft required measures amended to take into account the concerns outlined in this decision paper. These concerns are summarised in sections 2.1 – 2.4 below.

Chapters 3 to 6 of this decision paper detail the ACCC's reasoning on each required measure. Each chapter sets out:

- The context for the required measure
- The relevant regulatory requirements under the Determination and the migration plan
- The relevant clauses of the draft required measure
- Submissions from wholesale customers and NBN Co provided to the ACCC in response to its November discussion paper
- ACCC views on the draft required measure
- The ACCC's consideration of the factors under clause 28.2(b) of the migration plan (summarised at section 1.2 above).

Attachment A contains illustrative examples of how Telstra may address the ACCC's concerns when amending the draft required measures.

2.1 Required measure 2

The draft required measure includes arrangements for the disconnection of no-order disconnection premises that are inconsistent with arrangements set out in the Definitive Agreements.

The draft required measure does not include sufficient detail to enable the ACCC to be satisfied that wholesale customers will receive equivalent notification of the final disconnection list as Telstra's retail business units will receive.

The draft required measure does not commit Telstra to facilitate wholesale customer management of the migration of their end-users in a way that minimises the period of any service outage. This is because the draft required measure does not include sufficient commitments to notify wholesale customers of premises that still have active copper services in the lead up to the disconnection date for that rollout region.

The draft required measure does not provide sufficient detail to enable the ACCC to be satisfied that the process for disconnecting premises during the primary disconnection window will be implemented in an equivalent manner.

The draft required measure does not provide sufficient assurance that wholesale services will not be placed on the final disconnection list in error. This reflects that:

- (a) at least some wholesale services will comprise special services or special service inputs that have not reached their disconnection date, and these wholesale services should not be on the final disconnection list; and,
- (b) the draft required measure does not provide a dispute resolution process for wholesale customers to object to the inclusion of premises in the final disconnection list that have been included in error.

2.2 Required measure 3

The draft required measure includes arrangements for the disconnection of no-order disconnection premises that are inconsistent with arrangements set out in the Definitive Agreements.

2.3 Required measure 4

The draft required measure does not include a commitment that a copper path that is built at a premises which had previously been permanently disconnected cannot be used to supply any copper service, other than the exempt special service and is therefore inconsistent with the Definitive Agreements.

The draft required measure does not include sufficient detail to enable the ACCC to be satisfied that the timeframe for Telstra personnel to approve the supply of a special service at a premise that had previously been permanently disconnected will be equivalent as between wholesale customers and Telstra's retail business units.

2.4 Required measure 6

The draft required measure does not adequately address concerns that Telstra may use NBN Co Migration Information to obtain an unfair commercial advantage. This is because:

- The scope of the information protected is not consistent with the definition of NBN Co Migration Information in the migration plan and migration plan principles.
- Telstra personnel, in particular retail staff, may have the capacity to use and disclose NBN Co Migration Information even though they do not 'need to know' NBN Co Migration Information, as defined in the migration plan.
- Telstra personnel may be able to use and disclose NBN Co Migration Information that is not stored in relevant systems covered by the draft required measure.

The draft required measure provides inappropriate mechanisms for any future amendment or variation to the required measure.

3 Process for Managed Disconnection of Copper Services (required measure 2)

Telstra is obliged to disconnect all premises within a fibre rollout region 18 months after NBN Co announces a ready for service date for that region (i.e. by the disconnection date).¹⁸ There are exceptions to this, such as for premises that acquire special services. It is intended that most premises will be disconnected pursuant to a disconnection order placed with Telstra by either their own retail customer or by a wholesale customer on behalf of their end-user. Telstra will use the business as usual disconnection processes outlined in Schedule 1 of the migration plan to disconnect these premises by the date committed to at the time the disconnection order is placed.

At the time Telstra lodged the migration plan with the ACCC, it had not yet agreed with NBN Co the process it would follow for the ‘managed disconnection’ of premises for which disconnection orders had not been received by the disconnection date (no-order disconnection premises).¹⁹ Under the migration plan, Telstra has 10 business days (the primary disconnection window) after the disconnection date to disconnect all no-order disconnection premises.²⁰ However, there are extended timeframes for certain premises:

- ‘in-train order premises’ – premises for which NBN Co has received an order for fibre services, but for which the supply of those services will not commence until after the disconnection date
- ‘added premises’ – premises that NBN Co has added to the fibre footprint after the ready for service date, but 6 months before the disconnection date
- ‘affected premises’ – premises to which Telstra is legally prohibited from ceasing provision of service and disconnecting.²¹

The purpose of required measure 2 is to set out the new processes by which Telstra will give effect to its obligation to manage the disconnection of copper services at no-order disconnection premises after the disconnection date.²²

Importance of service provider engagement with end-users

The ACCC recognises that certain end-user customers, such as those with priority assistance or medical alert services, may be adversely affected by managed disconnection. However, the ACCC considers these potential adverse consequences

¹⁸ Migration plan, clause 7.2(a)(ii).

¹⁹ Migration plan, clause 14.1(a).

²⁰ Migration plan, clause 14.1(b).

²¹ Page 135-137 of Chapter 13 of the ACCC’s *Assessment of Telstra’s Structural Separation Undertaking and draft Migration Plan – Discussion paper* outlines aspects of the Disconnection Protocols relevant to these arrangements in further detail.

²² The Determination, s.9(4); Migration plan, clause 14.2.

may be mitigated by service providers taking steps to ensure that these vulnerable end-users are migrated to the NBN prior to the disconnection date.

The ACCC considers that direct service provider engagement with end-users will be of utmost importance to ensure awareness of Telstra's disconnection obligations after the disconnection date.

Direct service provider engagement will be complemented by a number of communications that NBN Co will be making in relation to disconnection as part of its public information on migration (PIM) campaign.

The Telecommunications Universal Service Management Agency (TUSMA) will also provide assistance for Telstra to advise voice only end-users of the need to migrate to the NBN. The ACCC is aware that similar arrangements may be concluded with other service providers.²³ The fact that these arrangements have been put in place by the Australian Government support the ACCC's position that direct contact with end-users from their service provider is a fundamental step in ensuring that where possible, end-users migrate services to the NBN prior to the disconnection date.

3.1 Regulatory requirements

Attachment A of the November discussion paper identifies the main requirements of the migration plan and the sections of the Determination relevant to the ACCC's decision on whether to approve Telstra's draft required measure 2.

Subsection 9(5) of the Determination provides that the processes for 'no-order disconnection premises' must:

- (a) specify which services will be disconnected and the circumstances in which they will be disconnected
- (b) require Telstra to seek advice from NBN Co about whether NBN Co has received an order for connection at the premises
- (c) provide for the treatment of services supplied at premises in respect of which NBN Co has notified Telstra that an order for NBN services has been received but connection has not been completed by the disconnection date (i.e. in-train order premises)
- (d) specify the period during which services will be disconnected after the disconnection date
- (e) require Telstra to notify affected wholesale customers prior to disconnecting the no-order disconnection premises.

Subsection 9(6) of the Determination specifies timeframes within which no-order disconnection premises must be disconnected after the disconnection date.

²³ <http://www.tusma.gov.au/registers>.

Subsection 9(6B) of the Determination requires that the migration plan must specify types of no-order disconnection premises and timeframes for their disconnection that are consistent with the Definitive Agreements.

Schedule 3 of the migration plan provides a list of high level steps that Telstra considered would underpin the managed disconnection processes at the time the migration plan was lodged. The ACCC approved these commitments as compliant with the Determination.

Subsection 9(2) of the Determination requires that the managed disconnection 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 in sections 8 and 21 of the Determination.

Section 8 of the Determination requires that the processes must provide for the disconnection of fixed-line carriage services in a way that:

- ensures the efficient and timely disconnection of Telstra’s wholesale and retail services
- minimises disruption to end-user services
- gives wholesale customers autonomy in relation to the timing of disconnection of end-users
- provides for disconnection in an equivalent manner between Telstra and its wholesale customers.²⁴

Subsection 8(3) of Determination requires that Telstra have in place reasonable business practices and policies to facilitate, to the extent that it is reasonably in Telstra’s control to do so, the management by wholesale customers of the migration of their end-users in a way that minimises the period of any service outage.

Section 21 of the Determination 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.

3.2 Relevant clauses of draft required measure 2

Clause 2 of the draft required measure provides an overview of Telstra’s commitments at each stage of the managed disconnection process which can be briefly summarised as:

- At the disconnection date, Telstra will prepare a ‘Premises address list’, which sets out the premises in a rollout region that have active copper services.

²⁴ Explanatory Statement to the Determination, p.4.

- Telstra will prepare a ‘Final Disconnection List’ by removing in-train order, added or affected premises as well as those that receive special services from the premises address list as these premises will not be disconnected within the ‘primary disconnection window’ (the 10 business days following the disconnection date).
- At this point, Telstra will self generate orders to disconnect the premises on the final disconnection list. Telstra will notify wholesale customers, via the Telstra wholesale customer portal, of any wholesale services supplied at premises to be disconnected during the primary disconnection window.
- For up to 20 business days after the disconnection date, Telstra will maintain a soft dial tone to those premises that had received a standard telephone service (STS) or wholesale line rental (WLR) service.
- By 90 business days after the disconnection date, Telstra will have disconnected all premises that NBN Co had notified Telstra were the subject of an in train order for an NBN based fibre service.²⁵
- All premises that NBN Co has notified Telstra have been added to the rollout region after the ready for service date, but 6 months prior to the disconnection date, will be disconnected at the earlier of the end of any contractual notice period or 18 months after the date on which Telstra is notified.²⁶
- All premises that Telstra is legally prohibited from disconnecting or ceasing the supply of copper services to will be disconnected 5 business days after the relevant legal prohibition ceases to have effect.²⁷

Under clause 6 of draft required measure 2, Telstra commits to undertake a ‘single integrated process’ for sequencing the managed disconnection of retail and wholesale carriage services. Telstra will meet this commitment by grouping services with similar characteristics into the individual disconnection ‘categories’ as well as by considering specific factors that may be conducive to completing disconnection of a rollout region within the primary disconnection window. These factors include previous experience, the number and type of copper services in question, the tasks involved in and time typically taken to disconnect premises and the time remaining in the primary disconnection window as well as “other relevant factors”.²⁸ Where multiple rollout regions share or have a similar disconnection date, Telstra will seek to align the order in which premises are disconnected across rollout regions.

Telstra commits to produce a daily error report on those disconnection orders not completed due to a systems error and to resubmit those orders into the queue.²⁹ Telstra also commits to cease billing on the date a service is disconnected.³⁰

²⁵ Draft required measure 2, cl. 7.2.

²⁶ Draft required measure 2, cl. 7.3.

²⁷ Draft required measure 2, cl. 7.4.

²⁸ Draft required measure 2, cl. 6.1.

²⁹ Draft required measure 2, cl. 6.3.

³⁰ Draft required measure 2, cl. 6.4.

3.3 Submissions received

The November discussion paper invited interested parties to comment on whether they consider that Telstra's draft required measure 2 complies with the migration plan and the Determination. AAPT and Optus provided submissions.

Optus submits that draft required measure 2 is not compliant with the equivalence requirements of section 21 of the Determination.³¹ Optus considers that this is because Telstra is not required to provide "sufficient advance notification and detail to wholesale customers on any services that are due for cancellation under this [managed disconnection] process."³² To address this, Optus suggests that the draft required measure should be amended to require Telstra to provide wholesale customers with:

- An 'initial disconnection report' 10 business days after the ready for service date listing all ordinary copper services that Telstra provides to the wholesale customer in a rollout region.
- A 'draft final disconnection report' 10 business days before the disconnection date. Optus submits that this will enable it to have an "equal opportunity to arrange for the implementation of soft dial tone on ULL based standard telephone services".
- A 'final disconnection report' in the manner specified under clauses 3 and 4 of draft required measure 2, but within one business day after the disconnection date.³³

AAPT submits, for the ACCC to be satisfied that draft required measure 2 complies with sections 8 and 21 of the Determination, it must contain further detail on how Telstra will self-generate orders for disconnection and whether wholesale customers will be able to identify whether cancellation is the result of self-generated orders.³⁴

AAPT submits that it will require prior notice of each self-generated order as such disconnections are likely to trigger alarms in AAPT's network in a similar way to service faults and that any prior notice about self-generated orders must be sufficiently timely to ensure that disruptions to supply are minimised.³⁵

AAPT proposes that one method for providing this notice is to give wholesale customers access to the NBN Transition Tool (NTT) database as this would "give wholesale customers visibility of the copper services that remain active at premises...and help ensure that Telstra complies with its equivalence obligations."³⁶

³¹ Optus submission, December 2012, p.9.

³² Ibid, p.9.

³³ Ibid, p.9.

³⁴ AAPT submission, December 2012, pp.3-4.

³⁵ Ibid, p.4.

³⁶ Ibid, p.4.

AAPT submits that certain end-user customers, such as those with primary and redundancy sites as well as those with critical medical services, may be adversely affected by managed disconnection.³⁷ On this basis, AAPT submits that draft required measure 2 should afford wholesale customers with a greater degree of control over the timing of such disconnections, including the capacity to object to disconnection in a timely manner. AAPT suggests that allowing a wholesale customer to propose an alternative disconnection date in LOLO may satisfy its concerns in this regard.³⁸

3.4 ACCC views

As noted above at 2.1, the ACCC does not consider that Telstra's draft required measure 2 complies with the regulatory requirements in a number of respects.

The following sections detail the ACCC's concerns and responds to wholesale customer concerns with draft required measure 2.

3.4.1 Affected premises arrangements inconsistent with the Definitive Agreements

Subsection 9(6B) of the Determination requires that the migration plan specify types of no-order disconnection premises and timeframes for their disconnection that are consistent with the Definitive Agreements.

Clause 5.1(b)(ii) of the migration plan requires that Telstra must ensure that the required measures are consistent with and do not limit or restrict any obligation owed by Telstra to NBN Co under a Definitive Agreement.

Clause 6.5 of the Disconnection Protocols—a Schedule to the Subscriber Agreement, a definitive agreement between Telstra and NBN Co—provides that Telstra may continue to supply certain copper-based services after the disconnection date to premises to which Telstra is prevented by law from:

- ceasing the provision of those services to a premises; **and**
- disconnecting the premises.³⁹

The premises to which Telstra is allowed to continue providing copper based services are referred to as 'affected premises'. Telstra is only permitted to continue to provide copper based services to affected premises until 5 business days after Telstra is no longer prevented by law from ceasing the provision of those services and disconnecting the premises.

Clauses 3(d) and 7.4 of draft required measure 2 contain Telstra's commitments concerning the nature and timing of disconnection for affected premises.

³⁷ Ibid, p.5.

³⁸ Ibid, p.6.

³⁹ The commitment is also reflected in clause 15.3(a) of the migration plan.

Clause 3(d) of draft required measure 2 provides that affected premises will be removed from the premises address list (which then becomes the final disconnection list) to the extent that Telstra is prevented by law from ceasing the provision of copper services to the premises or disconnecting the premises.

The wording in draft required measure 2 is inconsistent with the wording relating to “Affected Premises” under clause 6.5 of the Disconnection Protocols. As a result, the ACCC considers that the draft required measure does not comply with subsection 9(6B) of the Determination. The draft required measure is also inconsistent with clause 15.3(a) of the migration plan.

To address this inconsistency, the ACCC considers that draft required measure 2 should be amended to ensure that the arrangements for managed disconnection of copper services at affected premises are consistent with arrangements for no-order disconnection premises set out in the Disconnection Protocols.

Consideration of the factors under clause 28.2(b) of the migration plan

The ACCC considers that as Telstra has already committed both contractually and in the migration plan, to disconnect this class of premises, any additional costs to Telstra that may be incurred as a result of amending the draft required measure are unlikely to be significant.

3.4.2 Equivalent treatment of Telstra retail business units and wholesale customers

Subsection 9(2) of the Determination requires that the managed disconnection 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 in sections 8 and 21 of the Determination.”⁴⁰

Section 21 of the Determination 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.”⁴¹

In its submission, Optus stated that:

There is also a risk that Telstra Retail will have earlier and more accurate access to Managed Disconnection data than wholesale customers...it is essential for service equivalence that all wholesale customers of Telstra have an equal ability to accurately identify each of the affected services based on the current Telstra copper address. Telstra Retail Business Unit[s] will have ready access to this information in the lead up period prior to the Disconnection Date.⁴²

⁴⁰ The Determination, s. 9(2).

⁴¹ The Determination, s. 21.

⁴² Optus submission, December 2012, p.9.

Notification of the final disconnection list

The ACCC considers that draft required measure 2 provides limited assurance that equivalent notifications will be provided to Telstra retail business units and wholesale customers. For example, in clause 4 of the draft required measure, Telstra includes a commitment to notify wholesale customers “as soon as practicable after the Disconnection Date for each Rollout Region” of any wholesale services provided at premises that are to be disconnected during the primary disconnection window.

However, the draft required measure is silent on when Telstra retail business units will be notified of the premises that are on the final disconnection list. It is therefore unclear what position Telstra retail may be in to inform Telstra retail customers of the impending disconnection.

The ACCC considers that in order to comply with the equivalence obligations in subsection 9(2) of the Determination, Telstra should include a commitment to provide wholesale customers with the final disconnection list no later than similar notifications are provided to Telstra retail business units.

The managed disconnection process

AAPT has also raised concerns about whether the level of detail in the draft required measure concerning the self-generated disconnection order process is sufficient to satisfy the requirements of subsection 9(2) of the Determination.⁴³

Telstra summarises its proposed managed disconnection process in clause 2.2 of draft required measure 2. In particular, clause 2.2 of draft required measure 2 states that:

[W]hen undertaking Managed Disconnections, Telstra will use substantially the same systems and technical processes as when it undertakes individual disconnections under the ‘business as usual’ disconnection arrangements.

The main difference will be that instead of disconnection being triggered by a cancellation order received from a Wholesale Customer or Retail Customer, Telstra will itself trigger bulk disconnection of Premises on the Final Disconnection List during the Primary Disconnection Window. This will be done by Telstra Operations Group self-generating cancellation orders for any Copper Services to be disconnected in the course of Managed Disconnection during the Primary Disconnection Window.⁴⁴

With regards to equivalence, clause 6.1 states that:

Consistent with the equivalence requirements of the Plan, there will be a single integrated process to determine, implement and undertake the sequencing of the disconnection of Retail Copper Services and Wholesale Services supplied at Premises on the Final Disconnection List... Retail and Wholesale Services supplied at Premises with similar characteristics will be included in the same category...[a]ny change in sequencing of disconnection will be by

⁴³ AAPT submission, December 2012, p.3

⁴⁴ Draft required measure 2, cl. 2.2.

category of premises and apply on an equivalent basis to Retail and Wholesale Copper Services in that category of Premises.⁴⁵

The ACCC is generally satisfied that the arrangements for self generating disconnection orders do not appear to allow Telstra to discriminate between wholesale and retail services in determining the premises to be subject to managed disconnection.

However, the ACCC notes that clause 6.1(e) of draft required measure 2 allows Telstra to consider “other relevant factors” in determining the sequencing of the disconnection of categories of managed disconnection premises. The open-endedness of this phrase may allow Telstra to consider whether a service is a wholesale service or a retail service in deciding upon the category of premises to be disconnected. Given this, the ACCC is not satisfied that the required measure complies with subsection 9(2) of the Determination in that it lacks sufficient detail to enable the ACCC to be satisfied that the processes will be implemented in an equivalent manner.

The ACCC considers that Telstra can address this concern by amending the draft required measure to clarify that Telstra cannot consider whether a service is a retail or a wholesale service as a factor in its decision on the sequencing of the disconnection of categories of premises that are subject to managed disconnection.

Consideration of the factors under clause 28.2(b) of the migration plan

The ACCC considers that amending the draft required measure to include a commitment to provide notifications to Telstra retail business units and wholesale customers at the same time is unlikely to result in additional costs to Telstra, as this amendment relates only to the timing of notifications, rather than the content or form of the notifications themselves. The ACCC considers that any costs in fact associated with amending the draft required measure will be outweighed by the benefit of such amendments to competition and consumers.

3.4.3 Steps in the managed disconnection process prior to the disconnection date

Subsection 8(3) of the Determination requires that Telstra’s policies and business practices relating to disconnection from a separating network must provide for Telstra to facilitate, to the extent that 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:

- (a) the period of any service outage; and
- (b) the time taken to complete local number portability processes and any ancillary procedures.

⁴⁵ Draft required measure 2, cl.6.1.

Optus and AAPT consider that draft required measure 2 is inadequate with respect to the degree to which it allows wholesale customers to make decisions over the timing of disconnection. They have suggested that Telstra has a greater capacity to facilitate wholesale customer management of the migration of their end-users in a way that minimises the period of any service outage.

Notifications to be provided in the lead up to the disconnection date

In its submission, Optus suggested that, in the lead-up to the disconnection date, Telstra should be required to provide wholesale customers with reports identifying those premises in a rollout region that are yet to be disconnected. Optus submits that this will ensure that wholesale customers are able to make arrangements to assist their own end-users at premises that may be subject to managed disconnection.⁴⁶

Telstra's supporting submission states that:

In order to facilitate the reviews by Wholesale Customers of their remaining copper services ahead of the Disconnection Date, Telstra will provide a list to each Wholesale Customer, no less than three months prior to the Disconnection Date, of the Premises with Copper Services remaining to be disconnected. This is consistent with the notification that Telstra intends to give to Retail customers at no less than three months prior to the Disconnection Date.⁴⁷

The draft required measure does not contain such a commitment.

The ACCC considers that in order to comply with subsection 8(3) of the Determination, Telstra should include a commitment in required measure 2 to notify wholesale customers of premises with copper services three months prior to the disconnection date.

While Optus' proposes that Telstra should provide three notifications to wholesale customers prior to the disconnection date, the ACCC considers that three months is sufficient notice to ensure that wholesale customers are able to minimise the period of any service outage and to undertake local number portability processes and other ancillary procedures.

Consideration of the factors under clause 28.2(b) of the migration plan

The ACCC considers amending draft required measure 2 to include a three month notification commitment could result in additional costs to Telstra. However, as Telstra has already committed to provide these notifications, any additional cost is unlikely to be substantial. Further, the ACCC considers that any additional cost would be outweighed by the benefits that may flow from greater wholesale customer awareness of those premises that may be subject to managed disconnection, including an improved capacity to make arrangements for the smooth migration of their end-users.

⁴⁶ Optus submission, December 2012, p.3.

⁴⁷ Telstra supporting submission, October 2012, p.3.

Wholesale customer access to Telstra’s NBN Transition Tool (NTT)

Optus and AAPT both made specific suggestions as to how Telstra could remedy their concerns in relation to the lack of notifications provided to wholesale customers prior to the disconnection date.⁴⁸ In particular, AAPT suggested that this objective may be better served by amending the required measure to allow wholesale customers to access Telstra’s NTT or to enable a wholesale customer to object to specific disconnections.⁴⁹

The ACCC took these suggestions into consideration in its assessment of draft required measure 2.

However, the ACCC does not consider it would be appropriate to provide wholesale customers with access to Telstra’s NTT. Rather, given that the processes need to be implemented by Telstra, the ACCC’s view is that allowing Telstra to propose the most appropriate measure to minimise the period of any service outage is preferable.

3.4.4 Dispute resolution

Subsection 33(1) of the Determination requires the migration plan to provide for adequate dispute resolution processes and mechanisms for potential migration plan disputes between Telstra and its wholesale customers.

AAPT’s submission raised concerns that “there is no clear process under which wholesale customers can object to a planned disconnection under the managed disconnection process in a timely manner, particularly where flexibility is required.”⁵⁰ AAPT submits that one way to allow wholesale customers to notify an objection in a timely manner would be to allow them to propose an alternative disconnection date in LOLO.⁵¹

Draft required measure 2 does not include a process to enable wholesale customers to object to the disconnection of their end-users under the managed disconnection process.

The dispute resolution process in the migration plan allows wholesale customers to refer any migration plan dispute to the Independent Telecommunications Adjudicator (ITA) process for resolution.⁵² However, this process may take up to five weeks. While the ITA will be a useful body to investigate any systemic issues between Telstra and wholesale customers, such as the failure to remove special services from the final disconnection list, it will not be satisfactory for disputes relating to the final disconnection list provided to wholesale customers within the disconnection window.

⁴⁸ Optus submission, December 2012, p.10.

⁴⁹ AAPT submission, December 2012, p.4.

⁵⁰ AAPT submission, p.6.

⁵¹ Ibid, p.6.

⁵² Migration plan, clause 31(a).

The ACCC considers that in order to comply with subsection 33(1) of the Determination, required measure 2 should include a process where wholesale customers are able to object to premises that they consider have been included in the final disconnection list in error. The ACCC notes that any such facility must be subject to strict timeframes in order that Telstra's capacity to disconnect no-order premises within the 10 business day 'primary disconnection window' is not unduly limited. As such the ACCC considers that wholesale customers' capacity to 'object' to a premises on the final disconnection list should not inhibit Telstra's capacity to undertake managed disconnection in a timely and efficient manner.⁵³

Consideration of the factors under clause 28.2(b) of the migration plan

While Telstra will need to resource a process to ensure wholesale customer concerns are addressed, the cost will be within Telstra's control as the ACCC is not directing Telstra to implement a specific process. The ACCC considers that any costs that Telstra may incur from implementing a solution will be outweighed by the benefit of greater certainty as to the premises that will be subject to managed disconnection.

3.4.5 Need for wholesale customers to control the timing of certain disconnections

In its submission, AAPT noted that it will require flexibility to control the timing of disconnections under the managed disconnection process in certain circumstances, in particular for vulnerable end-users or customers with multiple sites across different rollout regions (with the same or close to the same disconnection date).

The ACCC shares AAPT's concerns about the potentially serious consequences of disconnecting vulnerable end-users, such as those who receive medical alert services, where they do not yet have comparable fibre services. The ACCC has noted its concerns in relation to service continuity for medical alert and priority assistance customers in its discussion paper on Telstra's draft required measure on pull through processes.⁵⁴

As outlined above, the Australian Government has put in place communications activities to be undertaken by NBN Co and TUSMA. These activities will be particularly important for priority assistance, medical alert and voice only customers.

The ACCC understands that providing wholesale customers with flexibility as to the time of disconnection for medical alert and priority assistance customers could be one means to ameliorate these concerns. However, the ACCC must balance these concerns with the fact that services must be migrated to the NBN in a timely and efficient manner.

⁵³ The Determination, section 8(1)(a).

⁵⁴ ACCC discussion paper – Telstra's draft required measure 1 (pull through related processes), December 2012, pp.12-13.

The ACCC considers that these matters may be reconciled by Telstra and wholesale customers taking steps to ensure that end-users with priority assistance and medical alert services are migrated to the NBN prior to the disconnection date.

It will be important for industry to engage on the development of mechanisms to address these issues. Each service provider will need to work with their end-users and NBN Co to ensure the smooth migration of vulnerable end-users. For example, the ACCC understands that NBN Co is proposing to include a provision in its wholesale broadband agreement which will require service providers to use 'reasonable endeavours' to provide NBN Co with information on the existence of any priority assistance or medical alert services at a premises on behalf of which they are lodging a order for NBN services.

4 Managed Disconnection of HFC Services (required measure 3)

Subsection 10(4B) of the Determination requires that the migration plan specify types of no-order disconnection premises and timeframes for their disconnection that are consistent with the Definitive Agreements.

Required measure 3 does not affect wholesale customers. No wholesale customers made a submission in relation to this required measure.

4.1 ACCC views

4.1.1 Affected premises arrangements inconsistent with the Definitive Agreements

As clauses 3(c) and 5.4 of draft required measure 3 concerning arrangements for the disconnection of no-order premises that receive HFC services are substantially similar to clauses 3(d) and 7.4 of draft required measure 2, the ACCC's concerns in relation to the affected premises exception outlined in 3.4.1 above, apply equally to clauses 3(c) and 5.4 of draft required measure 3.

The ACCC considers that the draft required measure does not comply with subsection 10(4B) of the Determination.

To address this concern, the ACCC considers that draft required measure 3 should be amended to ensure that the arrangements for managed disconnection of HFC services at affected premises are consistent with arrangements for no-order disconnection premises set out in the Disconnection Protocols.

Consideration of the factors under clause 28.2(b) of the migration plan

The ACCC considers that as Telstra has committed, both contractually and in the migration plan, to making its assessment in this way, any additional costs to Telstra that may be incurred as a result of amending the draft required measure are unlikely to be significant.

5 Building copper paths to supply special services and special service inputs (required measure 4)

End-users, or their retail service provider, will generally submit an order to disconnect any relevant copper service(s) at the time they order an NBN service or shortly after the NBN service is provisioned. After a disconnection order is received, Telstra will follow the process contained in Schedules 1 and 2 of the migration plan when disconnecting the copper service(s).

After the service is disconnected, the relevant copper path will be marked as ‘V’ in NPAMS, the system that Telstra uses to identify whether a copper path is available for provisioning a new or modified copper service. This ‘V’ status ensures that:

- the copper path cannot be associated in any Telstra system or database with any DSLAM or carriage service
- provisioning of any copper service over the copper path is not possible
- the copper path cannot be available to Telstra to enable Telstra to (or permit third parties to) deliver any communications to or from the premises.⁵⁵

After a copper path is marked as ‘V’ in NPAMs, this cannot be modified without the authorisation of appropriate Telstra personnel. These commitments are reflected in clause 4 of the Disconnection Protocols.

There are some services—special services—that will not have an NBN-based alternative at the time Telstra is obligated to cease the supply of copper-based services in a rollout region. Telstra is obliged to rebuild copper paths to supply these special services and any underlying Unconditioned Local Loop Service (ULLS) input over which they will be provisioned until NBN Co releases a disconnection date for that special service type.⁵⁶

At the time Telstra lodged its draft migration plan with the ACCC, it had not established the process that it would follow when building copper paths to supply special services and special service inputs. Draft required measure 4 outlines the processes that Telstra intends to follow when building copper paths at premises which had previously been permanently disconnected, in order to supply special services and special service inputs to that premises.⁵⁷

⁵⁵ Migration plan, sch. 5, s.1(a)(i).

⁵⁶ Migration plan, p. 30 (Explanatory Note: Disconnection of Direct Special Services). A list of the special services is contained in Schedule 4 of the migration plan and includes Integrated Digital Services Network (ISDN) services.

⁵⁷ Migration plan, cl. 21.2.

5.1 Regulatory requirements

Attachment A of the November discussion paper identifies the main requirements of the migration plan and the sections of the Determination relevant to the ACCC's decision on whether to approve Telstra's draft required measure 4.

Subsection 9(2) of the Determination requires that the processes in the migration plan must be set out in sufficient detail to enable the ACCC to be satisfied that the processes are in accordance with the general principles at sections 8 and section 21.

The general principle in section 8 of the Determination requires the migration plan to have processes that minimise disruption to the supply of carriage services.

Section 21 of the Determination requires that the migration plan must provide for the equivalent treatment of wholesale customers and retail business units in the implementation of the processes for disconnecting communication services.

Subsection 15(2) of the Determination requires that where the migration plan specifies circumstances in which Telstra can reactivate fixed-line carriage services, the migration plan must provide for the equivalent treatment of wholesale carriage services to Telstra retail carriage services in the implementation of any reactivation processes over a separating network.

5.2 Relevant clauses of draft required measure 4

Part 3 of draft required measure 4 outlines the process for building copper paths. In particular, clause 3.1 states that required measure 4 builds on existing processes with the following modifications:

- a) Each order for a direct special service or special service input will be assessed as part of the initial order acceptance process to determine if it is an order which falls under the scope of the required measure.
- b) Each relevant order will then be assessed to determine whether it requires a copper path to be rebuilt that has previously been disconnected.
- c) Telstra will undertake a modified provisioning process to build the copper path by varying the status of the copper path in NPAMS and, in the case of an order for a special service input, to perform reconnection of jumpers.

Schedule 1 of draft required measure 4 outlines four processes for building copper paths. There are some differences between the processes for ordering and provisioning different types of special services as they are ordered through different Telstra systems.

Clause 3.2 of draft required measure 4 clarifies that Telstra will not supply LSS as a special service input. This is because Telstra is prevented from providing a PSTN service by clause 17 of the migration plan. Clause 3.2 also outlines that if Telstra

receives an order from a wholesale customer to supply LSS as a special service input it will reject the order and suggest that the wholesale customer order the ULLS instead. Telstra will provide wholesale LSS customers with information regarding the ordering process for special service inputs within one month of the ACCC accepting draft required measure 4.⁵⁸

5.3 Submissions received

The November discussion paper invited interested parties to comment on whether they consider that Telstra's draft required measure 4 complies with the migration plan and the Determination. AAPT and Optus provided submissions.

Optus submits that required measure 4 should include a clear commitment to maintain or build a copper path for the purposes of supplying a new direct special service or special service input during the supply period of applicable special service classes, as reflected under clause 21.2(a) of the migration plan. In addition, Optus submits that required measure 4 should include a commitment to maintain and build these copper paths in an equivalent manner between retail business units and wholesale customers.⁵⁹

AAPT submits that a number of issues should be addressed in draft required measure 4 before the ACCC can properly assess whether it complies with the migration plan and the Determination. In particular:

- How wholesale customers will determine if they are able to order a special service at a particular premise, including whether existing service qualification tools should be updated.
- Whether existing service levels will continue.
- The timeframe for Telstra personnel to approve the supply of a special service at a permanently disconnected premise.⁶⁰

5.4 ACCC views

As noted above at 2.3, the ACCC does not consider that Telstra's draft required measure 4 complies with the regulatory requirements in a number of respects.

The following sections details the ACCC's concerns and responds to wholesale customer concerns with draft required measure 4.

⁵⁸ Draft required measure 4, p.9.

⁵⁹ Optus submission, December 2012, p.11.

⁶⁰ AAPT submission, December 2012, p.6.

5.4.1 Ensuring that the copper path rebuild must not be associated with other (non-special) services

The Disconnection Protocols require Telstra to ensure that from the date that a premises is disconnected, that premises remains disconnected.⁶¹ The Disconnection Protocols also specify that a copper path will only be disconnected where it satisfies specific criteria (outlined above). The ACCC considers that changing the ‘V’ status of a copper path in NPAMs may open up a potential avenue to supply services over the copper path that are not special services.

Draft required measure 4 does not include a clear statement that the changed status in NPAMs cannot be used to supply any copper service, other than the exempt special service(s).

The ACCC considers that without this certainty, draft required measure 4 is inconsistent with the Disconnection Protocols. As such, draft required measure 4 does not comply with clause 5.1(b)(ii) of the migration plan and clause 9(9) of the Determination, which require Telstra to ensure that required measures are consistent with any obligation owed by Telstra to NBN Co under a Definitive Agreement. The ACCC considers that Telstra should document, in required measure 4, that the ‘V’ status of a copper path will only be changed in order to supply special services or special service inputs.

Consideration of the factors under clause 28.2(b) of the migration plan

The ACCC considers that amending the draft required measure to provide assurance that a rebuilt copper path at a permanently disconnected premise will only be used to supply special services or special service inputs will not result in any additional costs to Telstra, as Telstra has already made a commitment to do so pursuant to clauses 3 and 4 of the Disconnection Protocols.

5.4.2 Approving the supply of a special service at permanently disconnected premises on an equivalent basis

As outlined above, section 21 of the Determination requires the migration plan to provide for the equivalent treatment of wholesale customers and retail business units. Subsection 9(2) of the Determination requires that Telstra’s 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.

Subsection 15(2) of the Determination requires that the migration plan must provide for the equivalent treatment of wholesale carriage services to Telstra retail carriage services in implementing any reactivation processes over a separating network.

⁶¹ Disconnection Protocols, clause 3.1(d).

In its submission, Optus states that “a positive obligation to maintain or build a copper path for the purposes of supplying a new Direct Special Service or Special Service Input...should be made and applied equally to Telstra retail and wholesale customers alike.”⁶²

Draft required measure 4 is silent on the time that it will take Telstra personnel to approve the supply of a special service at a permanently disconnected premise for both retail and wholesale end-users.

For this reason, the ACCC is not satisfied that required measure 4 complies with sections 15(2), 9 and 21 of the Determination. The ACCC considers that further detail on the approval timeframe should be included in the required measure and a commitment that Telstra will approve the supply of special services at permanently disconnected premises for Telstra retail and wholesale customers on an equivalent basis.

Optus also submits that required measure 4 should replicate Telstra’s commitment in clause 21.2(a) of the migration plan to use all reasonable endeavours to build a copper path at the premises in order to enable the supply of the ordered direct special service or special service input.⁶³

As the required measures form part of the migration plan once they are approved,⁶⁴ the ACCC considers that it is unnecessary for Telstra to replicate this commitment in required measure 4.

Consideration of the factors under clause 28.2(b) of the migration plan

The ACCC considers that the inclusion of additional information on the applicable timeframe for the approval of the supply of special services and a commitment to supply special services in an equivalent manner may result in additional costs to Telstra. However, the ACCC considers that these costs will likely be outweighed by the potential benefits of clearer provisioning timeframes and a commitment to ensuring equivalence.

5.4.3 Wholesale customers’ ability to determine if they are able to order a special service at a particular premise

While Telstra has not set out a preferred process for wholesale customers to order a special service, it has indicated that orders can be made through a number of channels—online, facsimile, telephone, email or other forms of communication.

The ACCC expects Telstra to provide further details to wholesale customers on the most appropriate facsimile number, telephone number and email address for ordering

⁶² Optus submission, December 2012, p. 11.

⁶³ Ibid, p.11.

⁶⁴ Migration plan, cl. 5.4.(g).

special services. However, the ACCC does not consider that Telstra needs to amend draft required measure 4 to include this information.

5.4.4 Detail on existing service levels

The ACCC recognises that it is important for wholesale customers to have certainty in relation to the service levels that Telstra will be required to meet in provisioning and activating special services. However, the migration plan only deals with the connection and supply of services in limited circumstances and does not include any requirements regarding service levels.

In addition, required measure 4 relates to the discrete processes regarding the connection of copper paths in order to supply special services and special service inputs.

While the migration plan does not deal with the required service levels for special services, the ACCC considers that service levels will continue to be determined in accordance with wholesale customers' contracts with Telstra.

6 NBN Information Security Plan (required measure 6)

The Explanatory Statement to the Determination states that:

In order to meet its commitments under the migration plan, from time to time Telstra may be provided with information by NBN Co and by Telstra's wholesale customers in relation to the supply of fibre services or the disconnection of services from premises in a fibre rollout region. Section 29 requires the migration plan to set out effective measures so that Telstra cannot use such information to gain an unfair commercial advantage over its wholesale customers.

When the ACCC accepted Telstra's migration plan, it understood that Telstra was not yet in a position to specify the precise measures that it would use to protect NBN Co Migration Information.⁶⁵ As a result, Telstra chose to develop these measures as a required measure.⁶⁶ However, as the ACCC and Telstra considered that the arrangements would likely be significant to the protection and promotion of competition over the NBN, Schedule 6 of Telstra's migration plan includes a list of principles that govern the development of this required measure. The ACCC has approved these principles as being compliant with the Determination.

In the draft NBN ISP, Telstra has committed to protect certain categories of information provided to it by NBN Co that relate mainly to the connection and disconnection of premises. The draft NBN ISP adopts a systems-based approach to protecting this information. The systems-based approach generally limits access and use of the information to those 'authorised personnel' who have a 'need to know' the information. The draft NBN ISP also includes an overarching commitment to protect information that is provided by NBN Co to a particular group (the NBN Interface Group) within Telstra as well as compliance and reporting commitments.

The ACCC's November discussion paper invited interested parties to comment on the following issues:

- Whether the scope of the information protected under the draft NBN ISP is compliant with the regulatory requirements – in particular the suitability of an exclusion for non-premises related information.
- Whether the proposed processes and measures governing the use and disclosure of NBN Co Migration Information are effective – with a focus on an exception for retail business unit staff allowing them to use information concerning the status of the lead-in-conduit (LIC).
- Whether previous concerns of wholesale customers, raised during the migration plan consultation process had been effectively dealt with – focusing

⁶⁵ The scope of NBN Co Migration Information is defined in cl. 24.1 of the migration plan.

⁶⁶ Migration plan, clause 24.3.

on the suitability of arrangements for the physical security of NBN Co migration information.

Submissions received

Herbert Geer (on behalf of iiNet Group), AAPT, Optus and NBN Co made submissions on the NBN ISP issues raised in the November discussion paper. NBN Co also provided a public submission identifying how the NBN ISP could potentially be varied. Telstra also made a supplementary submission.

6.1 ACCC approach to assessment of the draft NBN ISP

Under the Definitive Agreements, NBN Co will provide Telstra with information for the purpose of commencement of supply of fibre services or the disconnection of fixed-line carriage services during the NBN rollout. The principal objective of the NBN ISP is to ensure that Telstra cannot obtain an unfair commercial advantage from this information.⁶⁷ In order for the ACCC to approve the NBN ISP, it must be satisfied that measures and processes for the protection of NBN Co Migration Information are appropriate and effective to fulfil this objective. As noted in the November discussion paper, while the migration plan provides important detail as to what the NBN ISP must include, the ACCC must ultimately be satisfied that the NBN ISP complies with section 29 of the Determination in order to approve it.⁶⁸

6.1.1 Telstra concerns regarding the ACCC's approach to assessment of the draft NBN ISP

Telstra's supplementary submission to the November discussion paper raised concerns about the ACCC's approach to assessing the NBN ISP.

Telstra indicated that the ACCC is bound to consider the draft NBN ISP solely against the migration plan requirements stating that "the Required Measure approval process is not intended to provide a basis for 're-opening' provisions in the migration plan that have already been approved by the ACCC as consistent with the MPPs."⁶⁹ In the ACCC's Final Decision paper, the ACCC acknowledged that the "principles governing the development of Telstra's information security arrangements are outlined in Schedule 6 of the draft Plan."⁷⁰ However, by their nature, these principles did not constitute an exhaustive implementation of the requirements of section 29 of the Determination.⁷¹ As Telstra notes, paragraph 1(b) of Schedule 6 states that "the

⁶⁷ The Determination, section 29.

⁶⁸ ACCC's November discussion paper.

⁶⁹ Telstra supplementary submission, December 2012, p.2.

⁷⁰ Final Decision paper, p.103.

⁷¹ Final Decision paper, p.105.

NBN ISP will set out the processes and procedures to be implemented by Telstra which are based on, and give effect to, the principles set out in this Schedule 6.⁷²

The ACCC considers that, to the degree that certain details of the NBN ISP are new, or represent more granular elements than those provided under Schedule 6, the ACCC will not be re-opening its decision to approve the migration plan, rather it will be assessing whether the new aspects or the more granular elements comply with the Determination. This approach is consistent with the power provided to the ACCC to assess required measures.⁷³

Telstra also raised a concern about the ACCC's intention to consider issues raised by wholesale customers during the migration plan consultation process in assessing the draft NBN ISP. The ACCC agrees that, to the degree that these concerns have been effectively addressed in the draft NBN ISP or fall outside of the scope of the NBN ISP, there is no need to consider them further. However, those issues do assist the ACCC in assessing the draft NBN ISP to the degree that they have not been addressed. This position is consistent with the ACCC's Final Decision to approve the migration plan.⁷⁴

6.1.2 ACCC assessment of the draft NBN ISP against the regulatory requirements

As noted above at 2.4, the ACCC does not consider that Telstra's draft required measure 6 complies with the regulatory requirements in a number of respects.

The following sections details the ACCC's concerns and responds to wholesale customer concerns with draft required measure 6.

6.2 Scope of the information protected under the NBN ISP

Subsection 29(1) of the Determination and clause 24.1 of the migration plan are the main regulatory requirements relevant to defining the scope of the information to be protected under the NBN ISP. These are set out in full on pages 7 and 8 of the November discussion paper.

Clause 5.1, 5.2 and Schedule 1 are the principal commitments in the draft NBN ISP defining the scope of NBN Co Migration Information for the purposes of the required measure. These are discussed at pages 9 to 11 of the November discussion paper.

⁷² Telstra supplementary submission, December 2012, p.5 [original emphasis].

⁷³ Migration plan, cl. 5.4(d)(i).

⁷⁴ Final Decision paper, p.105.

The November discussion paper sought comment from interested parties on:

- Whether the scope of the information protected under the draft NBN ISP is consistent with section 29 of the Determination.
- What competitive harm might be occasioned by exclusions to the scope of NBN Co Migration Information in the draft NBN ISP – in particular the exclusion, under paragraph 1(d)(iii) of Schedule 1, of information concerning backhaul arrangements, reservations of exchange space, dark fibre links, rack spaces and other information provided for the purpose of forecasting NBN Co infrastructure demand from the scope of NBN Co migration information.
- Whether Telstra’s proposed overarching commitment under clause 5(d) of the draft NBN ISP provides sufficient reassurance that the objectives of the NBN ISP will be met.⁷⁵

6.2.1 Submissions received

Optus, AAPT, Herbert Geer and NBN Co all indicated that they consider that the scope of the information protected under the NBN ISP is inconsistent with the scope of information defined under section 29 of the Determination.⁷⁶

AAPT and NBN Co raised concerns with the category based approach adopted by Telstra. AAPT stated that “the purpose of schedule 1 of the NBN ISP is to describe in a non-exhaustive manner what might be considered to be information requiring protection as contemplated and defined in subsection 29(1) of the migration plan principles, not to set a hard limit on what can fall within that definition.”⁷⁷ NBN Co agreed, adding that the effect of Telstra’s approach is to “restrict the operation of the applicable provisions in the migration plan by limiting their application to only those categories of information in Schedule 1.”⁷⁸

All submissions indicated that the exclusions under paragraph 1(d)(iii) of Schedule 1 are too broad, and hence inappropriately exclude information that should be protected by subsection 29(1) of the Determination. Optus submits that once analysed in detail, information concerning NBN Co backhaul arrangements and reservations of exchange space etc may assist Telstra to identify an area that NBN Co is rolling out to ahead of NBN Co issuing a definitive rollout plan or ready for service date.⁷⁹ AAPT submits that this information may provide Telstra with an unfair commercial advantage in relation to forecasting demand for backhaul services over the NBN.⁸⁰ AAPT and NBN

⁷⁵ ACCC November discussion paper, pp.9-11.

⁷⁶ Optus submission, December 2012, p.6; AAPT submission, December 2012, p.7; Herbert Geer submission, December 2012, p.4; NBN Co submission, December 2012, p.2.

⁷⁷ AAPT submission, December 2012, pp.7-8.

⁷⁸ NBN Co submission, December 2012, p. 2.

⁷⁹ Optus submission, December 2012, p.7.

⁸⁰ AAPT submission, December 2012, p.8.

Co noted that not all the exclusions in the draft NBN ISP were referable to exclusions provided for in clause 24.1 of the migration plan.⁸¹

All wholesale customers consider that the overarching commitment under draft clause 5(d) is not fit for purpose. NBN Co submits that the way in which the overarching commitment is drafted “leaves open the possibility that Telstra could gain an unfair commercial advantage from the use of information provided by NBN Co under the Definitive Agreements but still comply with the NBN ISP.”⁸² Optus submits that “the overarching commitment does not ensure the objectives of the NBN ISP are met because the ISP only restricts the Telstra retail business unit and not other business units.”⁸³

6.2.2 Telstra’s supplementary submission

In its supplementary submission, Telstra sought to clarify its intentions with respect to the approach it has taken to defining NBN Co Migration Information under the draft NBN ISP. In summary, Telstra submits that the “NBN ISP does not change the definition or agreed scope of Telstra’s obligations, but merely sets out how Telstra intends to apply those commitments through its systems and policies.”⁸⁴ The specific points that Telstra makes in support of this position are that:

- The scope of NBN Co Migration Information is confined to information that might enable Telstra to identify premises that were being connected or disconnected. Telstra submits that the ACCC would need to point to a ‘material change’ in circumstances that has caused the migration plan to no longer comply with subsection 29(1) of the Determination in order to extend the scope of information beyond that directly related to connection or disconnection of premises.⁸⁵
- NBN Co will be making a large amount of commercially useful information available to all Access Seekers in the lead up to the announcement of a ready for service date for a rollout region. Any amendment requiring Telstra to continue to protect NBN Co Migration Information after that information is published by NBN Co would be inconsistent with the migration plan.
- The high level of abstraction of NBN Co transit and exchange information as well as the fact that NBN Co will provide this information to Telstra “several years in advance of any RFS date for an individual Rollout region”⁸⁶ makes it unsuitable for retail activities.

⁸¹ AAPT submission, December 2012, p.7; NBN Co submission, December 2012, p.2.

⁸² NBN Co submission, December 2012, pp. 2-3.

⁸³ Optus submission, December 2012, p.7.

⁸⁴ Telstra supplementary submission, December 2012, p.6.

⁸⁵ Telstra supplementary submission, December 2012, p.6.

⁸⁶ Telstra supplementary submission, December 2012, p.7.

- The overarching commitment is not intended to do the ‘heavy lifting’ of capturing all NBN Co Migration Information but rather to operate as a “residual” protection to apply “even where that information has not yet been identified and included as a category of NBN Co Migration Information.”⁸⁷
- Further restrictions on Telstra’s capacity to use or access NBN Co Migration Information would “likely impose substantial cost, delay and disruption.”⁸⁸

6.2.3 ACCC views

The ACCC considers that, in order to provide assurance that Telstra cannot use or disclose NBN Co Migration Information to gain an unfair commercial advantage over its wholesale customers, the NBN ISP must provide effective safeguards against Telstra using or disclosing NBN Co Migration Information to further its own downstream operations.

In this regard, the ACCC considers that all information that is captured by the definition of NBN Co Migration Information in clause 24.1 of the migration plan should be secured in accordance with the terms of the NBN ISP. In particular, the ACCC considers that all information exchanged by Telstra and NBN Co under the Definitive Agreements concerning NBN Co’s access to Telstra infrastructure to install the NBN fibre network is NBN Co Migration Information, and hence the security of that information must be addressed in Telstra’s migration plan via this required measure.

This reflects that in order to commence the supply of fibre services, NBN Co will need to access a variety of Telstra infrastructure in order to build its fibre network from the relevant NBN point of interconnection through to the end-user premise. Hence, information relating to NBN Co’s access to this infrastructure generally—and not just, for example, lead-in conduits (LICs) at the premise—will relate to the connection of the premises and the commencement of the supply fibre services over the NBN fibre network.

The ACCC considers this view is consistent with the scope of the requirement as reflected in the terms of the Determination and migration plan, and is reinforced by the recent adoption of a ‘build drop model’ for the NBN. Under this model it will typically be the case that the activation of NBN fibre services will follow some time after and will not be coincidental with the installation of any particular subset of NBN infrastructure. Therefore, confining the scope of the information to be protected to that which relates to “connection” and the “commencement of supply of fibre services” would constitute and inappropriate narrowing of the scope of NBN Co Migration Information.

⁸⁷ Ibid, p.8.

⁸⁸ Ibid.

Further, the ACCC considers that the full range of NBN Co Migration Information is of potential commercial value, and hence should be protected. It is difficult to exhaustively identify at this time all the ways in which this information could be used to obtain an unfair commercial advantage. However, details around NBN Co's duct access, backhaul arrangements and reservations of exchange space within the fibre footprint would allow Telstra an additional perspective from which to determine the likely commencement date of NBN fibre services, and possible capacity constraints that might arise over time, within particular areas.

Hence, if not protected, this information would likely provide Telstra with an unfair commercial advantage over its wholesale customers in forecasting when the NBN would become available in particular areas and other aspects of service supply over the NBN.

When viewed against this standard, there are two deficiencies in the draft NBN ISP.

Firstly, as noted by AAPT and NBN Co, the draft NBN ISP expressly excludes certain categories of information from the scope of NBN Co Migration Information.⁸⁹ These exclusions are additional to the exclusions provided under clause 24.1 of the migration plan. In this regard, the ACCC considers that the draft NBN ISP should be amended to be consistent with the terms of clause 24.1 of the migration plan.

Secondly, the draft NBN ISP only specifies detailed measures which are to apply to those categories of NBN Co Migration Information that are listed in Schedule 1. This is in circumstances where the 'overarching commitment' under draft clause 5.1(d) of the NBN ISP acknowledges the potential for additional categories of information to comprise NBN Co Migration Information.

In this regard, the ACCC considers that it is inappropriate for the NBN ISP to include two channels for protecting NBN Co Migration Information. The ACCC considers that the NBN ISP should operate consistently across all categories of NBN Co Migration Information. This would avoid the shortcoming of the category based approach by protecting any new 'categories' of information simply on the basis that the information can be characterised as information provided for the purpose of disconnection or commencement of supply of fibre services. The ACCC considers that the existing categories of information under Schedule 1 of the draft required measure could be retained as descriptors of the types of information that fall within scope and still be consistent with paragraph 2(b)(ii) of Schedule 6 of the migration plan.

Finally, in its supporting submission to the NBN ISP, Telstra has indicated that its intention is to only use publicly available information to further its retail activities on

⁸⁹ AAPT submission, December 2012, p.7; NBN Co submission, December 2012, p.2.

the NBN.⁹⁰ The ACCC considers that this statement reflects the primary objective of the regulatory requirements, namely that Telstra cannot gain an unfair commercial advantage from NBN Co Migration Information. The inclusion of a specific commitment to this effect in the NBN ISP would address many of the ACCC's concerns relating to Telstra's category based approach to defining NBN Co Migration Information and could form the basis of an effective overarching commitment.

Consideration of the factors under clause 28.2(b) of the migration plan

The ACCC notes that Telstra has stated in its supplementary submission that further restrictions on Telstra's capacity to use or access NBN Co Migration Information would likely impose substantial cost, delay and disruption.

However, in terms of potential costs to Telstra of including additional information within the NBN ISP, the ACCC considers that these costs would potentially comprise the additional cost of identifying and dealing with all such information, as well as possible additional operating expense in not having access to the information for downstream operational purposes.

In this case, the ACCC considers that the additional costs to Telstra will not be excessive. It can be noted that the information is to be provided through a specific operational interface that is discrete to other communications between Telstra and NBN Co, and this greatly simplifies the task of identifying relevant information. Further, Telstra has stated that it does not intend to utilise this information in its own downstream operations as a practical measure to ensure compliance.

6.3 Whether processes and measures for use and disclosure of NBN Co Migration Information are effective

Subsection 29(1) of the Determination and Paragraphs 2 and 3 of Schedule 6 of the migration plan are the main regulatory requirements relevant to the nature and scope of the processes and measures that Telstra must commit to in the NBN ISP. Clauses 9 and 10 and Schedules 3 and 4 of the draft NBN ISP are the principal commitments in the draft NBN ISP concerning the processes and measures that Telstra has made to protect NBN Co Migration Information. These requirements and proposed commitments are discussed on pages 12 and 13 of the November discussion paper.

⁹⁰ Telstra's supporting submission, October 2012, p.5.

The November discussion paper highlighted some specific concerns that the ACCC has with the approach Telstra has taken in the draft NBN ISP to satisfy these requirements. In particular, the November discussion paper sought comment on:

- Whether the scope of the ‘need to know principle’ under clause 9 of the draft NBN ISP complies with the regulatory requirements – in particular whether any further clarity as to the uses and disclosures of NBN Co Migration Information may be needed to ensure that the regulatory requirements are met.
- Whether the exception under clause 10(f) of the draft NBN ISP that allows retail business unit staff to access lead-in-conduit (LIC) access service information is a justifiable exception to the general restrictions on retail business unit staff access under draft clause 10(b) of the NBN ISP.

6.3.1 The ‘need to know’ principle under draft clause 9

Paragraph 3.1 of Schedule 6 of the migration plan requires that NBN Co Migration Information must only be disclosed to, and made available for use or disclosure by ‘authorised personnel’ on a strictly ‘need to know’ basis. The ‘need to know’ principle is defined by reference to whether a particular Telstra personnel require the information for the purpose of “performing an agreement with NBN Co” and either “facilitating connection of premises and commencement of supply” or “disconnecting carriage services”.⁹¹

As noted above, Telstra has adopted a systems based approach with draft clause 9.1(c) outlining the need to know principle for the purpose of defining those personnel who may access systems that house NBN Co Migration Information. Clause 9.1(c) includes a number of qualifications that are not specifically identified by the migration plan. For example, Telstra Personnel may access NBN Co Migration Information if it is “reasonably necessary in order for those Personnel...to perform their duties effectively”.⁹²

Submissions received

NBN Co and Herbert Geer submit that the ‘need to know’ principle in the draft NBN ISP has a wider scope than under the migration plan.⁹³ NBN Co states that clause 9.1(c) of the draft NBN ISP should be amended to be consistent with clause 3.1(b) of Schedule 6 of the migration plan.⁹⁴

AAPT submits that Clause 9.1(a) of the draft NBN ISP should be amended to incorporate the ‘use of’ Migration Information and not just ‘access to’ that information. AAPT suggests that the information protection measures should not be

⁹¹ Migration plan, Sch. 6. para 3.1(b).

⁹² Draft required measure 6, cl. 9.1(c).

pegged to compliance with the ‘User Access Control Requirements’ and that the current definition of ‘Authorised Personnel’ under Schedule 4 is too broad.⁹⁵

Optus submits that the ‘need to know’ principle under clause 9.1(c) of the draft NBN ISP is compliant with the migration principles. However, Optus considers that the effectiveness of the information protection processes and measures is ultimately undermined by Telstra’s organisational structure and the presence of staff who do not work solely on NBN activities. Optus submits that the principal concern in this regard will be Network Services Unit/Operations Personnel who may be doing NBN related activities that will directly or indirectly benefit retail staff.⁹⁶

To address this concern, Optus suggests that Telstra should share information with other service providers because it would be impractical for Telstra to fully separate its workforce.⁹⁷

Optus also submits that clause 9.1(c) should include an exhaustive list of the type of duties under the specific terms of the Definitive Agreements where access to migration information is required. Further, Telstra should report periodically to the ACCC on who has been granted access to information and for what reason.⁹⁸

Telstra’s supporting submission

Telstra submits that the use of the phrase “reasonably necessary in order for those Personnel or groups to perform their duties effectively” does not weaken the application of the ‘need to know’ principle as the form of words “closely reflects language [used] in defining” the principle.⁹⁹

Telstra also submits that it has sought “to identify with considerable precision the groups and sub-groups within Telstra that access relevant systems.” Telstra adds that it would “not be reasonably practicable for Telstra to define or record every reason for which Telstra Operations employees access those systems on any given day.”¹⁰⁰

Telstra considers that its system based approach is supported by “robust and objective compliance measures” including, with certain exceptions, an ‘absolute’ restriction on retail business unit staff access to NBN Co Migration Information and staff training on their requisite obligations.¹⁰¹

⁹³ NBN Co submission, December 2012, p.4; Herbert Geer submission, December 2012, pp.5-6.

⁹⁴ NBN Co submission, December 2012, p. 4.

⁹⁵ AAPT submission, December 2012, pp.9-10.

⁹⁶ Optus submission, December 2012, p.7.

⁹⁷ Ibid, pp.4-5.

⁹⁸ Ibid, p.8.

⁹⁹ Telstra supplementary submission, December 2012, p.9.

¹⁰⁰ Ibid, p.9.

¹⁰¹ Ibid, pp.9-10.

ACCC views

The ACCC considers that clause 9 of the draft NBN ISP does not implement the need to know principle in a manner consistent with the regulatory requirements. The introduction of qualifying phrases into the original drafting under paragraph 3.1(b) of Schedule 6 of the migration plan constitutes an unacceptable watering down of a principle crucial to the effectiveness of a systems based information security regime. The inclusion of permitted uses under clauses 9.1(c)(i) to (iv) of the draft NBN ISP also appears to water down the effect of this principle.

The ACCC considers that the ‘need to know’ principle in the draft NBN ISP must reproduce the wording of paragraph 3.1(b) of Schedule 6 of the migration plan. This will ensure that the systems based approach to information security will be underpinned by a clear and certain requirement that personnel or groups can only access information systems that house NBN Co Migration Information when they have established a clear ‘need to know’ that information.

The ACCC acknowledges the concerns of Optus with respect to the limitations of pegging the permitted uses of NBN Co Migration Information to artificial business unit functions that may not represent the sole tasks carried out by those personnel.¹⁰² However, the ACCC does not consider that the solution to this is to require Telstra to share all NBN Co Migration Information with its wholesale customers. Rather the ACCC considers that the preferable approach is for the information to be appropriately quarantined within Telstra.

This is because information reasonably necessary to support downstream activities will be contained in the discrete communications that NBN Co will undertake on a non-discriminatory basis directly to all its wholesale customers, and it is unlikely that all service providers would be in a position to readily and accurately interpret the NBN Co Migration Information were those data to be released more generally.

That said, the ACCC does consider that further clarity should be provided in relation to the activities for which authorised personnel may ‘need to know’ NBN Co Migration Information. This may be achieved by implementing a proposal similar to that suggested by Optus whereby all the activities for which each of the authorised personnel listed in Schedule 4 of the draft NBN ISP may ‘need to know’ NBN Co Migration Information are clearly defined. The ACCC considers that this would be best produced in a non-exhaustive but binding fashion, with any future as yet unidentified uses to be approved by the ACCC.

Consideration of the factors under clause 28.2(b) of the migration plan

The ACCC considers that as Telstra has committed in its migration plan that NBN Co migration information will only be disclosed to, and be made available within

¹⁰² Optus submission, December 2012, pp.4-5

Telstra's information and data systems for use or disclosure by, authorised personnel and strictly on a need to know basis, any additional costs to Telstra that may be incurred as a result of amending the draft required measures are unlikely to be significant.

The ACCC also considers that the benefits to competition that such an amendment will promote, outweigh any costs to Telstra of amending its information security arrangements.

6.3.2 The effectiveness of the retail business unit restrictions

Paragraph 3.3 of Schedule 6 of the migration plan requires that the NBN ISP specify that NBN Co Migration Information will not be made available to personnel in retail business units except with the consent of NBN Co or in accordance with any purpose specified in the NBN ISP and approved by the ACCC. The singling out of personnel in Telstra's retail business units in this way reflects the heightened propensity for disclosure to those Personnel to result in commercial advantage to Telstra.

Draft clause 10 of the NBN ISP contains Telstra's commitment to ensure that personnel of a retail business unit are not authorised to access NBN Co Migration Information. Draft clause 10(f) includes two exceptions to this commitment for:

- Information concerning the handover of LICs (provided under the LIC Access Service Module of the Infrastructure Services Agreement);¹⁰³ and
- Information in connection with the exercise by NBN Co of any right of first refusal to act as a supplier of fibre services.¹⁰⁴

The November discussion paper sought comment from interested parties specifically in relation to whether allowing retail staff access to LIC information (i.e. clause 10(f)(i) of the draft NBN ISP) is consistent with the Determination.¹⁰⁵

Submissions received

Herbert Geer and AAPT submit that the exception for LIC access service information is inconsistent with the Determination on the grounds that the equivalent information will not be provided to wholesale customers.¹⁰⁶

Optus reiterated its general concern that the information security restrictions for Retail business unit staff may be undermined by the nature of Telstra's organisational commitments provided under clause 8 of the SSU.¹⁰⁷ In particular, Optus is concerned about the potential for Telstra Operations personnel, who are a group that is pre-

¹⁰³ Draft required measure 6, cl.10(f)(i).

¹⁰⁴ Draft required measure 6, cl.10(f)(ii).

¹⁰⁵ ACCC November discussion paper, p.13.

¹⁰⁶ Herbert Geer submission, December 2012, p.8; AAPT submission, December 2012, p.11.

¹⁰⁷ Optus submission, December 2012, p.4.

authorised to access categories of NBN Co Migration Information, to use this information to undertake tasks that may benefit retail business unit staff.¹⁰⁸ Optus suggested that this issue would be resolved by requiring Telstra to share NBN Co Migration Information with all Telstra wholesale customers.¹⁰⁹

Optus also noted that there are no clear enforcement and reporting requirements to prevent the misuse of this information for the non-approved purposes listed in the exception under clause 10(f) of the draft NBN ISP.

Telstra's supporting submission

Telstra reiterated its original supporting submission statement that information about the handover status of a LIC is integral to quick and effective customer fault rectification and will help improve the migration experience for customers. Telstra submits that this exception is consistent with the general principle in subsection 8(b) of the Determination which requires that disconnection should, to the maximum extent in Telstra's control, minimise disruption to the supply of fixed-line carriage services.

In the November discussion paper, the ACCC indicated that retail business unit staff access to LIC information is not justifiable on customer service grounds because the end-user will be in a position to know whether their premises is NBN connected or not. In response, Telstra submits that there are likely to be "numerous cases where this may not be possible. Not least because it assumes that the customer contacting Telstra in relation to a fault is also aware of the activities recently undertaken by NBN Co."¹¹⁰

ACCC views

The main intention of the NBN ISP is to ensure that any NBN Co Migration Information is not used or disclosed by Telstra to gain or exploit an unfair advantage over its wholesale customers. Therefore, the restrictions on retail staff access and use of NBN Co Migration Information should be absolute unless sufficient justification can be made for an exception. This position is captured under paragraph 3.3 of Schedule 6 of the migration plan.

The ACCC does not approve the exceptions under clause 10(f)(i) that allow retail business unit staff to access LIC information or NBN Co Migration Information.

The ACCC does not consider that the operational or customer service benefits that Telstra asserts will flow from including this exception will outweigh the potential competitive detriment. The ACCC acknowledges that Telstra has included behavioural commitments that restrict the uses that retail staff can make of this

¹⁰⁸ Ibid, p.4.

¹⁰⁹ Ibid, p.4.

¹¹⁰ Telstra supplementary submission, December 2012, p.10.

information. However, the ACCC considers that, generally speaking, behavioural measures of this nature provide relatively weak constraints, given the dispersed nature of the relevant workforce and difficulty in detecting specific breaches of behavioural rules. The effectiveness of behavioural measures is further limited by the potential for conflict between the immediate business objectives of personnel within retail business units—to sell more retail services—and the competition objectives of the NBN ISP.

The ACCC also considers that any loss to customer service or operational efficiency that may result from the removal of this exception will be minimised by the fact that Telstra’s retail business units (and wholesale customers) will receive reports of service faults that are directly caused by the installation of the NBN lead in cable, the specifics of which are being considered as part of Required Measure 1.¹¹¹

Further, NBN Co will be undertaking a number of detailed communications with residents in the lead up to and at the completion of the installation of the NBN infrastructure at the premise pursuant to its public information campaign on migration and in providing notices to residents pursuant to the Telecommunications Act, and this is likely to substantially reduce the instances in which end-users will not know whether the NBN has been connected to their premises.

Clause 10(f)(ii) of the draft NBN ISP provides that retail staff can access NBN Migration Information that is given to Telstra in connection with the exercise by NBN Co of a right of first refusal. Telstra has not made out a sufficient justification for retail staff to have access to this information. As such, the ACCC does not approve the exception in clause 10(f)(ii) of the draft NBN ISP.

6.4 Other concerns with the draft NBN ISP

In accordance with its Final Decision to approve the migration plan, the ACCC noted that it would consider whether wholesale customer concerns raised during the migration plan consultation process had been, where necessary for compliance with section 29 of the Determination, adequately addressed in the draft NBN ISP. The only issue that the ACCC considered warranted further attention in this regard was the security measures for the handling of non systems based NBN Co Migration Information.

Other matters considered under this part of the paper include whether the NBN ISP should apply to wholly owned subsidiaries of Telstra and what the process should be for future variations to the NBN ISP.

¹¹¹ “Migration plan required measures relating to the pull through connection process”; ACCC Discussion paper, December 2012, p.15.

6.4.1 Effective physical security measures

To be effective, the NBN ISP must include processes and measures that protect NBN Co Migration Information in any form. The ACCC understands Telstra's rationale for taking a systems based approach to protection of NBN Co Migration Information. However, Telstra's proposed systems-based measures need to be supported by robust measures to ensure that physical or non-systems based NBN Co Migration Information is effectively protected in accordance with the objectives of subsection 29(1) of the Determination.

Telstra's draft clause 9.1(b) includes a commitment that physical copies of NBN Co Migration Information will only be provided to authorised personnel on a 'need to know' basis. However the draft NBN ISP does not go into specific detail on how Telstra will ensure that this commitment would be realised. The relevant commitments are discussed at page 14 of the November discussion paper.

The November discussion paper invited interested parties to comment on whether the level of detail was sufficient to satisfy the regulatory requirements.

Submissions received

Optus submits that Telstra commitments under clause 9.1(b) are inadequate and that more robust measures that identify how physical copies of NBN Co Migration Information will be kept or accessed are required.¹¹²

Herbert Geer and AAPT submit that there is a lack of detail as to how Telstra will meet its clause 9.1(b) commitments.¹¹³

NBN Co submits that the NBN ISP "should provide comfort that NBN Co Migration Information that is not held within an IT system will not (where able to be disclosed other than through a system) be disclosed in a manner that is inconsistent with the objectives of the ISP."¹¹⁴

Telstra's supplementary submission

Telstra submits that NBN Co Migration Information will only be exchanged in physical form in exceptional circumstances and that the security risks relating to this information may be effectively dealt with through staff training and internal policies. Telstra adds that there are protections governing physical security in clauses 9, 10 and 11 and that these measures are "appropriate and reasonable, considering the low level of associated risk."¹¹⁵

¹¹² Optus submission, December 2012, p.8.

¹¹³ Herbert Geer submission, December 2012, p.5; AAPT submission, December 2012, p.11.

¹¹⁴ NBN Co submission, December 2012, p.3.

¹¹⁵ Telstra supplementary submission, December 2012, p.11.

ACCC views

The ACCC considers that NBN Co Migration Information should be protected in a manner that ensures that Telstra cannot gain an unfair commercial advantage regardless of the form that the information takes. This is consistent with the definition of NBN Co Migration Information set out in clause 24.1 of the migration plan.

The ACCC considers that the commitments relating to the physical security of NBN Co Migration Information must be strengthened in order for the NBN ISP to be compliant with section 29 of the Determination.

While the ACCC endorses the underlying principle embodied in clause 9.1(b) of the NBN ISP, the draft NBN ISP does not specify how physical and non-systems based information will be protected in practice. Consequently, the ACCC considers that further detail is required on how Telstra will effectively protect non-systems based NBN Co Migration Information.

Consideration of the factors under clause 28.2(b) of the migration plan

The ACCC considers that the potential costs to Telstra of strengthening the commitments relating to the physical security of NBN Co Migration Information could potentially comprise any additional cost of implementing restrictions on employees printing or otherwise copying NBN Co Migration Information from Telstra's systems.

The ACCC considers that any additional costs to Telstra are unlikely to be substantial, particularly as Telstra has stated that NBN Co Migration Information will only be exchanged in a physical format in exceptional circumstances. In addition, the ACCC considers that any costs associated with amending the draft required measure will be outweighed by the competitive benefits of ensuring non-systems based NBN Co Migration Information is effectively protected.

6.4.2 Process for future variations to the NBN ISP

Section 577BF of the *Telecommunications Act 1997* outlines a specific process for the variation of the migration plan, including the conduct of public consultation on the proposed amendments. As noted above, once approved, the NBN ISP will form part of the migration plan.

Clause 3.3 of the draft NBN ISP states that any amendment or variation of the NBN ISP "does not constitute a request by Telstra for a variation of the migration plan, as contemplated by section 577BF of the Act."

Submissions received

NBN Co submits that clause 3.3 is not appropriate and that (any) “future variations of the NBN ISP should be treated as a variation to the migration plan under section 577BF of the *Competition and Consumer Safeguards Act* (sic) and that unless it is deemed to be a minor variation, the ACCC would need to consult on any future variations to the (NBN) ISP.”¹¹⁶

ACCC views

The ACCC notes that as the NBN ISP will form part of Telstra’s migration plan the statutory processes for variation that are spelled out under section 577BF of the Telecommunications Act is applicable.

In the ACCC’s view, the statutory processes for variation provide a useful counterpoint in assessing Telstra’s proposed ‘change mechanisms’ under clauses 5.3, 8.2, 9.3 and 11 of the draft NBN ISP.

Under the existing statutory processes, all variations would require proper regulatory scrutiny before they could come into effect and, unless the variation is minor in nature, would generally be subject to comment by interested parties.

In comparison, most of the ‘change mechanisms’ in the draft NBN ISP do not provide the same degree of assurance that they will be subject to appropriate regulatory scrutiny or industry consultation.

For instance, under the change mechanism proposed in clause 5.3 of the draft NBN ISP, protections around a class of NBN Co Migration Information could fall away immediately from the date that Telstra gives notice of the change to the ACCC (although these could potentially be reinstated later).

In addition, under clause 5.3 and 9.3 of the draft NBN ISP, the ACCC has a limited period in which to consider a notified change and object to its implementation, being 20 business days and 15 business days respectively. A constrained consideration period can alter the incentive of a regulated firm to cooperate and make it impracticable for others to assist. Here, the types of variations that could be proposed would potentially raise complex issues, and the ACCC would likely require the support and assistance of Telstra, and potentially other interested parties, to undertake a proper assessment of them.

Many of the changes that could be brought into effect under clauses 5.3 and 9.3 of the draft NBN ISP could potentially have fundamental consequences for whether the NBN ISP would remain appropriate and effective. Consequently, the ACCC does not

¹¹⁶ NBN Co submission, December 2012, p.4.

consider that those change mechanisms could be accepted within a NBN ISP, and any potential changes would be better dealt with under the statutory processes.

The change mechanism contained in clause 11 is not certain as to whether the change to the communications and training package could take effect prior to receiving ACCC consideration. In the ACCC's view, this change mechanism should be deleted – and any changes dealt with under the statutory process – or revised to expressly provide that the changes would not come into effect until such time as the ACCC has agreed to the changes.

Consideration of the factors under clause 28.2(b) of the migration plan

The ACCC considers that amending the NBN ISP to ensure that future variations will be dealt with under the statutory process, or will not come into effect until such time as the ACCC has approved the variations, will not result in any additional cost to Telstra.

6.4.3 Application to subsidiaries of Telstra

The effectiveness of the information security arrangements may be undermined by any gap in the protections for specific areas of Telstra's corporate structure.

The November discussion paper noted that the draft NBN ISP does not identify what information security arrangements will apply to staff engaged to work for subsidiaries.

Submissions received

Herbert Geer also submits that the draft NBN ISP is not compliant with section 29 of the Determination because it does not include a commitment that the measures will apply to Telstra's wholly owned subsidiaries.¹¹⁷

Telstra's supplementary submission

Telstra did not comment on this issue in its supplementary submission.

ACCC views

The ACCC considers that the staff of any subsidiary of Telstra must be subject to the same or a comparable regime of information security as Telstra personnel to ensure that the objectives of the NBN ISP can be realised. A commitment to this effect should be included in the required measure.

¹¹⁷ Herbert Geer's submission, December 2012, p.3

Attachment A – Illustrative guidance to take into account the ACCC concerns

Required measure 2

Draft required measure 2 could be amended to ensure that the arrangements for managed disconnection of copper services at “Affected Premises” are consistent with arrangements for no-order disconnection premises set out in the Subscriber Agreement. In particular, draft required measure 2 should be amended to provide that if Telstra is prevented by law from Disconnecting a Premises, Telstra will only continue to supply Copper Services to the Affected Premises to the extent that Telstra is prevented by law from:

- (i) ceasing the provision of those services to that Affected Premises; and
- (ii) Disconnecting the Affected Premises.

Draft required measure 2 could be amended to provide sufficient detail for the ACCC to be satisfied that commitments to notify wholesale customers of the final disconnection list are equivalent to notifications that Telstra will provide its retail business units.

Draft required measure 2 could be amended to include a commitment from Telstra to notify wholesale customers of premises that still have active copper services in the period leading up to the disconnection date for that rollout region.

Draft required measure 2 could be amended to clarify that Telstra is not permitted to consider whether a premise receives a wholesale customer service or a retail service in any decision relating to the sequencing of the disconnection of categories of premises on the final disconnection list.

Draft required measure 2 could be amended to provide a dispute resolution process for wholesale customers to object to the inclusion of premises in the final disconnection list that the wholesale customer considers has been included in error.

Required measure 3

Draft required measure 3 could be amended to ensure that the arrangements for managed disconnection of HFC services at “Affected Premises” are consistent with arrangements for no-order disconnection premises set out in the Subscriber Agreement. In particular, draft required measure 3 should be amended to provide that if Telstra is prevented by law from Disconnecting a Premises, Telstra will only continue to supply HFC Services to the Affected Premises to the extent that Telstra is prevented by law from:

- (i) ceasing the provision of those services to that Affected Premises; and

- (ii) Disconnecting the Affected Premises.

Required measure 4

Draft required measure 4 could be amended to ensure that the circumstances in which Telstra will rebuild a copper path to supply special services or a special service input are consistent with the Definitive Agreements. In particular, draft required measure 4 should be amended to provide a commitment that Telstra cannot rebuild a copper path at a permanently disconnected premises to supply any copper service, other than the exempt special service.

Draft required measure 4 could be amended to provide sufficient detail that for the ACCC to be satisfied that the timeframe for Telstra personnel to approve the supply of a special service at a permanently disconnected premise will be equivalent as between wholesale customers and Telstra's retail business units.

Required measure 6

Draft required measure 6 could be amended to ensure that Telstra is not able to obtain a commercial advantage through the use or disclosure of NBN Co Migration Information. In particular, draft required measure 6 should be amended to ensure that:

- (i) The scope of the information protected under the required measure is consistent with the definition of NBN Co Migration Information in clause 24.1 of the migration plan and in accordance with the objectives of subsection 29(1) of the Determination.
- (ii) The scope of the 'need to know' principle is consistent with the wording and objective of Schedule 6 of the migration plan.
- (iii) Retail business unit staff will not be permitted to use or disclose NBN Co Migration Information, as contemplated under clause 3.3 of schedule 6 to the migration plan.

Draft required measure 6 could be amended to ensure that any NBN Co Migration Information stored outside relevant systems is subject to the same information security measures and processes as 'systems based' NBN Co Migration Information.

Draft required measure 6 could be amended to clarify that any future variations to the categories of NBN Co Migration Information that is to be protected or the user access control requirements to apply to that information will be subject to the variation process under section 577BF of the *Telecommunications Act 1997*.

Draft required measure 6 could be amended to provide that any proposed changes to the staff communications and training provisions will not take effect until they have been approved by the ACCC.

Attachment B - Required Measures and relevant sections of the Determination and migration plan clauses

Required Measure 2: Process for Managed Disconnection of Copper Services (which are not Special Services) on the Disconnection Date	
<p style="text-align: center;"><i>The Determination</i></p> <ul style="list-style-type: none"> ▪ Section 8 – Disconnection of carriage services (General principle) ▪ Section 9 – Disconnection of carriage services using copper networks ▪ Section 11 – Coordination of connection and disconnection ▪ Section 14 – Maintaining soft dial tone ▪ Section 18 – Timing of disconnection orders ▪ Section 19 – Control of disconnection timing and processes ▪ Section 21 – Equivalence regarding disconnecting Telstra retail business units and wholesale customers (General principle) ▪ Section 23 – Use of adequate processes (General principle) 	<p style="text-align: center;"><i>Migration plan clauses</i></p> <ul style="list-style-type: none"> ▪ Clause 14 – Managed Disconnection commencing at the Disconnection Date ▪ Clause 15 – Types of Premises and related Disconnection Windows ▪ Clause 18 – Temporary Reconnection ▪ Clause 20 – Soft dial tone ▪ Schedule 1 – Telstra existing standard process for disconnection of Copper Services (other than Special Services) ▪ Schedule 3 – Principles for Managed Disconnection immediately following the Disconnection Date
Required Measure 3: Process for Managed Disconnection of HFC Services	
<p style="text-align: center;"><i>The Determination</i></p> <ul style="list-style-type: none"> ▪ Section 10 – disconnection of carriage services using hybrid fibre-coaxial networks 	<p style="text-align: center;"><i>Migration plan requirements</i></p> <ul style="list-style-type: none"> ▪ Schedule 2 – Telstra existing standard process for disconnection of HFC Services

Required Measure 4:	
Processes for Telstra to build Copper Paths at Premises which had previously been permanently disconnected, in order to supply Special Services and Special Service Inputs to that Premises.	
<p style="text-align: center;"><i>The Determination</i></p> <ul style="list-style-type: none"> ▪ As above for Required Measure 2 except for Section 14 ▪ Section 13 – special services ▪ Section 15 – reactivation of carriage services 	<p style="text-align: center;"><i>Migration plan requirements</i></p> <ul style="list-style-type: none"> ▪ Clause 14 – Managed Disconnection commencing at the Disconnection Date ▪ Clause 15 – Types of Premises and related Disconnection Windows ▪ Clause 16 - Disconnection of all Premises to be completed by the Designated Day ▪ Clause 17 - No supply of new Copper Services and HFC Services after a Premises becomes NBN Serviceable ▪ Clause 18 – Temporary Reconnection ▪ Clause 21 – Special Services ▪ Schedule 4 – Special Services
Required Measure 6:	
The NBN Information Security Plan	
<p style="text-align: center;"><i>The Determination</i></p> <ul style="list-style-type: none"> ▪ Section 8 – Disconnection of carriage services (General principle) ▪ Section 29 – Protection of information (General principle) 	<p style="text-align: center;"><i>Migration plan requirements</i></p> <ul style="list-style-type: none"> ▪ Clause 24 – Information Security ▪ Schedule 6 – Information security principles for development of NBN Co Migration Information security measure