

Requests to vary the Migration Plan by Telstra Corporation

Submission by Herbert Geer Lawyers on behalf of:

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Public Version

1. INTRODUCTION

Telstra has written to the ACCC seeking what Telstra describes as three minor variations (**the Proposed Variations**) to the *Migration Plan* given by Telstra Corporation Limited to the Australian Competition and Consumer Commission on 23 August 2011 under section 577BDA of the Telecommunications Act 1997 (**Migration Plan**). The Australian Competition and Consumer Commission (**ACCC**) has published Telstra's variation requests and is seeking feedback from interested parties on:

- whether the varied Migration Plan will meet the requirements of the *Telecommunications (Migration Plan Principles) Determination 2011* (the **Migration Plan Principles Determination**) and/or
- any broader industry concerns with the proposed variations.

Clause 17 of the Migration Plan includes obligations relating to Telstra no longer supplying new Copper Services and HFC Services using a Separating Network (**the Cease Sale Obligations**). The Cease Sale Obligations commence in respect of a particular Rollout Region on the Cease Sale Commencement Date for that Rollout Region. The Cease Sale Commencement Date for a Rollout Region is currently the later of:

- 1 May 2013; and
- 10 Business days after the Ready for Service Date for that Rollout Region.

There are four different types of Rollout Regions under the Migration Plan:

- an FSA Module;
- an Initial Release Rollout Region;
- an Acquired Network Rollout Region; and
- an In-fill Rollout Region.

The Proposed Variations seek to:

- defer the earliest commencement of the Cease Sale Obligations from 1 May 2013 until 1 July 2013 (**the Cease Sale Commencement Variation**);
- create a new exception to the Cease Sale Obligations (**the Cease Sale Exception Variation**); and
- extend the definition of Initial Release Rollout Region (**the IRRR Definition Variation**).

iiNet welcomes the opportunity of providing feedback on the Proposed Variations.

Please note that this submission contains commercial in confidence information which is marked '[c-i-c]' and highlighted in yellow.

Capitalised terms used in this submission that are not defined in this submission are as defined in the Migration Plan.

2. STRUCTURE OF THIS SUBMISSION

In this submission iiNet provides its feedback on each of the Proposed Variations in turn. In addition, iiNet also wishes to draw the ACCC's attention to:

- concerns that iiNet has regarding the applicability of the Cease Sale Obligations to Premises that are not NBN Serviceable; and
- amendments to clause 21 of the Migration Plan that iiNet believes are relevant to the Cease Sale Obligations and which are required to clarify the position regarding the provision of new Direct Special Services and Special Services Inputs in a Rollout Region during the period between:
 - the commencement of the Cease Sale Obligations in that Rollout Region; and
 - the Disconnection Date¹ in that Rollout Region,

(for ease of expression this period will be referred to in this submission as the **Cease Sale Applicability Period**).

iiNet also wishes to address the issue of Telstra's monitoring and reporting on compliance with the Cease Sale Obligations as regards Telstra providing equivalence between Telstra Retail and wholesale customers.

Therefore, the remaining sections of this submission are as follows:

- Overview of submission.
- The Cease Sale Commencement Variation.
- The Cease Sale Exception Variation.
- The IRRR Definition Variation.
- The applicability of the Cease Sale Obligations to premises that are not NBN Serviceable.
- Amendments required to clause 21 of the Migration Plan.
- Monitoring and reporting on compliance with the Cease Sale Obligations.

3. OVERVIEW OF THIS SUBMISSION

3.1 The Cease Sale Commencement Variation

iiNet submits that the reasons provided by Telstra as to why the commencement of the Cease Sale Obligations should be delayed are compelling. In light of this, it

¹ The Cease Sale Obligations are no longer required after the Disconnection Date because Telstra is under separate obligations not to reconnect premises after the Disconnection Date - see clause 18 of the Migration Plan.

would appear to be a fairly short journey to concluding that the Cease Sale Commencement Variation should be accepted. However, iiNet respectfully submits that a correct application of the relevant statutory test requires the ACCC to reject the Cease Sale Commencement Variation.

Subsection 577BF(3) of the *Telecommunications Act 1997* (**Telco Act**) requires the ACCC to consider whether clause 17 of the Migration Plan as amended by the Cease Sale Commencement Variation complies with the Migration Plan Principles Determination. iiNet submits that clause 17 of the Migration Plan as originally drafted and as amended does not comply with section 12 of the Migration Plan Principles Determination. This is because clause 17 of the Migration Plan does not meet the requirements of section 12(2)(b) of the Migration Plan Principles Determination. Section 12(2)(b) of the Migration Plan Principles Determination, as relevant to the Cease Sale Applicability Period, requires that the Cease Sale Applicability Period be the shortest period reasonably required. iiNet submits that rather than clause 17 providing for the shortest Cease Sale Applicability Period reasonably required, it provides for the longest Cease Sale Applicability Period reasonably required. In light of this, iiNet submits that the ACCC must refuse to approve the Cease Sale Commencement Variation.

This outcome is, of course, undesirable because it means that the Cease Sale Obligations will formally commence on 1 May 2013 in circumstances where Telstra has provided compelling reasons why the Cease Sale Obligations should not commence on 1 May 2013. This leads to something of a quandary. However, iiNet is hopeful that the spirit of cooperation that has been demonstrated at the Wholesale Telecommunications Forum will lead to Telstra speedily submitting a revised variation to clause 17 that reduces the Cease Sale Applicability Period to the shortest period reasonably required, and, thereby, allows the ACCC to accept the required variations to clause 17 - i.e. a revised variation could have the effect of making the Cease Sale Applicability Period for a Rollout Region a specified period prior to the Disconnection Date. As regards what is an appropriate period, iiNet can see no reason why the Cease Sale Applicability Period should be more than four to six months.

Furthermore, it appears to iiNet that Telstra's identification of 1 July 2013 as the easiest date for the commencement of the Cease Sale Obligations appears to be largely based on when Telstra anticipates Telstra's systems and the systems of its wholesale customers will be able to deal with the Cease Sale Obligations. Although this is clearly a consideration of fundamental importance, it is not the only such consideration. iiNet submits that a consideration of equal importance is the availability to end users (including medium and large business customers) of a range of tried and tested competitive services (i.e. offered by more than just one RSP) provided over the NBN which are suitable replacements for the services that will be subject to the Cease Sale Obligations. This should not just include Broadband Internet and standard voice telephony services but also services that support vital business applications such as EFTPOS and monitoring and alarm systems.

3.2 The Cease Sale Exception Variation

For the same reasons as with the Cease Sale Commencement Variation, iiNet submits that the ACCC must refuse to approve the Cease Sale Exception Variation.

3.3 The IRRR Definition Variation

Note that for ease of expression a Rollout Region that is not an Initial Release Rollout Region or an Acquired Network Rollout Region will be referred to as a **Regular Rollout Region**.

The IRRR Definition Variation involves including additional specified Rollout Regions within the definition of 'Initial Release Rollout Region' in the Migration Plan. These specified Rollout Regions are listed in a proposed new Schedule 10 to the Migration Plan (**the Specified Rollout Regions**).

iiNet is not in a position to form a definitive conclusion on the merits of the IRRR Definition Variation. This is because:

- given that the Migration Plan is concerned with the disconnection of services from Telstra's networks rather than the connection of services to the NBN, it is not entirely clear why bringing the Specified Rollout Regions within the definition of 'Initial Release Rollout Region' under the Migration Plan would allow NBN Co to begin providing services in those Rollout Regions any faster than if they remained under the Definition of Rollout Region in the Migration Plan; and
- it is not clear to iiNet what criteria has been used to identify the Specified Rollout Regions.

In light of these uncertainties, iiNet's feedback on the IRRR Definition Variation is limited to making three observations based on a consideration of the definitions 'Ready for Service Date' and 'Disconnection Commencement Date' in the Migration Plan.

Firstly, as far as the Migration Plan is concerned, NBN Co has a completely unfettered discretion as to the determination of the Ready for Service Date for Initial Release Rollout Regions and, after having decided that an Initial Rollout Region is ready for service, NBN Co is only required to notify Telstra. However, in relation to Regular Rollout Regions, NBN Co must not declare a Regular Rollout Region as ready for service unless it has published a notice on its website that Fibre Services will be able to commence to be supplied in that Rollout Region.

Secondly, given that the Cease Sale Obligations are currently triggered by the Ready for Service Date, the IRRR Definition Variation could have implications for the Cease Sale Obligations because if the IRRR Definition Variation is implemented, NBN Co has, at least in theory, the ability to declare some or all of the Specified Rollout Regions as being ready for service (and thereby begin the clock ticking for the purposes of the Cease Sale Obligations²) in circumstances where NBN Co would not be able to if the Specified Rollout Regions remained as Regular Rollout Regions (i.e. there is nothing in the Migration Plan to stop NBN Co declaring a Specified Rollout Region as being ready for service before NBN Co is able to provide Fibre Services to any Premises, or any significant number of Premises, in that Rollout Region). iiNet acknowledges that this issue may be theoretical only but without knowing what the criteria were for selecting the Specified Rollout Regions, iiNet is unable to reach a conclusion on whether this issue is theoretical or real.

² This would also start the 18 month Migration Window - see clause 7.2(a)(i)(B) of the Migration Plan.

Thirdly, in declaring a Specified Rollout Region as ready for service, NBN Co need only notify Telstra. This could have implications for equivalence.

3.4 **The applicability of the Cease Sale Obligations to premises that are not NBN Serviceable**

iiNet notes that section 12(1) of the Migration Plan Principles Determination requires the Migration Plan to specify 'any reasonable circumstances' in which Telstra 'proposes to restrict the processing of transactions' in relation to the supply of fixed line carriage services³. iiNet submits that if clause 17 of the Migration Plan allows Telstra to restrict the processing of transactions during the Cease Sale Applicability Period in the following scenarios, then it will not comply with section 12 of the Migration Plan Principles Determination:

- An existing house is knocked down and a new house built, requiring a new lead in cable.
- An end user wishes to transfer from one service provider to another service provider using the ULLS.
- A customer in a multi dwelling unit requires a ULLS in circumstances where the transposition of a cable is required to enable the use of a free cable pair.

If Telstra refuses to process orders for services in these scenarios the end user would be left without an internet service⁴. iiNet submits that not processing orders in these circumstances would not come within the ambit of 'reasonable circumstances' that is allowed by section 12(1) of the Migration Plan Principles Determination, and so clause 17 of the Migration Plan, if it allows Telstra not to process orders in the above scenarios, would not comply with section 12(1) of the Migration Plan Principles Determination. This would provide a distinct basis on which the ACCC would be required to reject the Cease Sale Commencement Variation and the Cease Sale Exception Variation on the same reasoning as expressed in section 4 of this submission.

3.5 **Amendments required to clause 21 of the Migration Plan**

The applicability of the Cease Sale Obligations to Direct Special Services and Special Service inputs is dealt with by clause 17 of the Migration Plan being subject to clause 21 of the Migration Plan. However, clause 21 of the Migration Plan only obliges Telstra to provide new Direct Special Services and Special Service Inputs in a Rollout Region after the Disconnection Date and only in respect of premises that have previously been permanently disconnected. iiNet submits that amendments should be made to clause 21 of the Migration Plan that make it clear that Telstra will also provide new Direct Special Services and Special Services Inputs during the Cease Sale Applicability Period. The precise amendments sought are specified in section 8 below.

3.6 **Monitoring and reporting on compliance with the cease sale obligations**

There are no specific obligations relating to monitoring and reporting on Telstra's compliance with the Cease Sale Obligation as it relates to Telstra Retail. Given the potential harmful effects to competition that could result if Telstra does not implement and apply the Cease Sale Obligations in an equivalent manner as

³ Section 12(1) of the Migration Plan Principles Determination is set out in full in section 4.2 of this submission.

⁴ The Universal Service Obligation only applies to a standard telephone service.

between Telstra Retail and wholesale customers, iiNet submits that there should be a specific obligation in the Migration Plan that requires Telstra to monitor and report to the ACCC on Telstra's compliance with its equivalency obligations in respect of the Cease Sale Obligations.

4. THE CEASE SALE COMMENCEMENT VARIATION

Telstra seeks to push back the earliest possible commencement of the Cease Sale Obligations for a Rollout Region from 1 May 2013 to 1 July 2013. Telstra is seeking this variation because⁵:

- Telstra requires additional time to prepare and deploy Managed Service Qualification (**MSQ**) functionality that is necessary to implement the Cease Sale Obligations. Telstra is looking to deploy MSQ on 27 May 2013; and
- enquiries that Telstra has made of its wholesale customers have indicated that many of them require more time to make the necessary changes to their processes and systems ahead of the Cease Sale Obligations applying.

Telstra concludes that neither Telstra nor many of Telstra's Wholesale Customers will be ready for the implementation of the Cease Sale Obligations by 1 May 2013. Telstra believes the proposed 1 July 2013 date for commencement of the Cease Sale Obligations provides sufficient time for Telstra and industry to be ready for the Cease Sale Obligations. Telstra points out that pushing back the commencement of the Cease Sale Obligation would provide benefits to end users as well as wholesale customers.

iiNet submits that the reasons provided by Telstra as to why the commencement of the Cease Sale Obligations should be delayed are compelling. However, iiNet respectfully submits that the application of the relevant statutory test requires the ACCC to reject the Cease Sale Commencement Variation. The basis on which iiNet has come to this conclusion requires consideration of the following:

- how Telstra proposes to implement the Cease Sale Obligations;
- the applicable statutory test that the ACCC must apply; and
- the ACCC's previous consideration of the Cease Sale Obligations.

Each of these will be considered in turn. iiNet's conclusion on the Cease Sale Commencement Variation is then set out.

4.1 How Telstra proposes to implement the Cease Sale Obligations

The Cease Sale Obligations are set out in clause 17 of the Migration Plan which provides as follows:

17.1 No supply of Copper Services

Subject to sub-clause 17.3 and clause 21, Telstra will not supply any new Copper Service to a Retail Customer or to a Wholesale Customer using a Separating Network after the Cease Sale Commencement Date for a Rollout Region at a

⁵ Telstra letter to ACCC dated 4 April 2013 - *Request to Vary Telstra's Migration Plan to Defer the Commencement of the Cease Sale Obligations in Clause 17*

Premises within the Fibre Footprint in that Rollout Region which, at the time the order or request is received by Telstra:

(a) is NBN Serviceable; or

(b) is not NBN Serviceable but would require the installation of new copper or other infrastructure (i.e. there is not an 'in place' copper connection at the Premises) except and to the extent that Telstra in its discretion supplies a new Copper Service to the Premises in order to fulfil a USO requirement.

17.2 No supply of HFC Services

Telstra will not supply any new HFC Service to a Premises using a Separating Network after the Cease Sale Commencement Date for a Rollout Region at a Premises within the Fibre Footprint in that Rollout Region which is NBN Serviceable.

17.3 Commencement and operation of Clause 17

Sub-clauses 17.1 and 17.2 do not apply to orders or requests for the supply of new Copper Services or HFC Services received by Telstra prior to the Cease Sale Commencement Date.

The Cease Sale Commencement Date is currently defined as the later of:

- 1 May 2013; and
- 10 Business days after the ready for service date for that rollout region.

It should be noted that what is or is not a 'new' Copper Service is not defined in the Migration Plan. However, according to information provided by Telstra, Telstra will implement the Cease Sale Obligations after the Cease Sale Commencement Date by refusing an order or request relating to the following as regards premises that are subject to the Cease Sale Obligations.⁶

[c-i-c]

(for ease of expression 2, and 3 above will be referred to together as the **Wider Orders** and 1, 2, 3 collectively as the **Relevant Orders**).

It should be noted that the Cease Sale Obligations:

- override Telstra's standard access obligations under Part XIC of the *Competition and Consumer Act 2010 (CCA)*⁷; and
- are not subject to the Competition Rule in Part XIB of the CCA⁸.

In light of these facts, and the broad scope of the Cease Sale Obligations, iiNet submits that the provisions relating to the Cease Sale Obligations should be given close scrutiny.

⁶ This information is based on a document presented by Telstra at the ACCC Wholesale Telecommunications Forum on 26 March 2013 which is marked as 'Telstra Confidential'.

⁷ By virtue of section 152AR(4)(e) of the *Competition and Consumer Act 2010*.

⁸ By virtue of section 577BA(6) of the *Telecommunications Act 1997* in combination with sections 51 and 151AJ(9) of the *Competition and Consumer Act 2010*.

4.2 The applicable statutory test that the ACCC must apply

Subsection 577BF of the Telco Act relevantly provides (emphasis added):

(1) This section applies if a final migration plan is in force.

(2) Telstra may give the ACCC a variation of the final migration plan.

(3) The ACCC must:

*(a) if the ACCC **is satisfied that the final migration plan as varied complies with the migration plan principles** approve the variation; or*

(b) otherwise - refuse to approve the variation.

iiNet submits that the emphasised wording above makes it clear that it is not sufficient for the ACCC to just consider the variations, the ACCC must consider *‘the final migration plan as varied’*. This means that the ACCC must technically consider the whole plan de novo. Clearly, if there are provisions of the Migration Plan that are not affected in any way by the variations and which have previously been found to comply with the Migration Plan Principles Determination (**Unaffected Provisions**), there is little need for anything other than an acknowledgement that, on the basis of the ACCC’s previous consideration, the Unaffected Provisions comply with the Migration Plan Principles Determination. However, in the case of provisions of the Migration Plan that are affected by the variations (**Affected Provisions**), section 577BF of the Telco Act requires that the ACCC give full substantive consideration to those provisions. iiNet submits that this substantive consideration is particularly important in circumstances, as iiNet submits exist as regards clause 17 of the Migration Plan, where full compliance with the Migration Plan Principles Determination has not previously been established (this issue is considered further in section 4.3 of this submission).

In light of the above, the applicable statutory test requires the ACCC to reject a variation to the Migration Plan if, on substantive and full consideration of the Affected Provisions, the Affected Provisions are found not to comply with the Migration Plan Principles Determination.

In this case Telstra is seeking a variation to the definition of the Cease Sale Commencement Date. This concept is central to the operation of clause 17 of the Migration Plan. In light of this, iiNet submits that the ACCC is required to undertake a substantive assessment of clause 17 of the Migration Plan as it would operate if the Cease Sale Commencement Variation were accepted.

iiNet submits that section 12 of the Migration Plan Principles Determination is highly relevant to clause 17 of the Migration Plan. Section 12 of the Migration Plan Principles Determination relevantly provides as follows (emphasis added):

12 Specific principle – restrictions on the supply of carriage services prior to and after the disconnection date

(1) The migration plan must specify any reasonable circumstances in which Telstra proposes to restrict the processing of transactions for retail customers or wholesale customers (including the rejection of, or failure to process, requests from such customers) in relation to the supply of fixed-line carriage services using a separating network in a fibre rollout region prior to the disconnection date.

(2) Any restrictions proposed in the migration plan regarding the processing of customer transactions must be:

(a) in accordance with the general principles at sections 8 and 21; and

(b) **imposed for the shortest period reasonably required.**

(3) The migration plan must require Telstra to review any restrictions imposed under subsection (1) with a view to determining whether the restrictions require adjustment with the benefit of operational experience in the migration process in each of the following circumstances:

(a) where Telstra is requested to do so by the ACCC;

(b) where Telstra is requested to do so by the independent telecommunications adjudicator;

(c) where Telstra is requested to do so by a wholesale customer, and that request is reasonable.

[...]

iiNet submits that Telstra blocking or refusing to process the Relevant Orders pursuant to the Cease Sale Obligations amounts to restrictions on the processing of transactions relating to the supply of fixed-line carriage services. Accordingly, the Cease Sale Obligations engage section 12 of the Migration Plan Principles Determination. Therefore, iiNet submits that the effect of the applicable statutory test is that the ACCC must reject the Cease Sale Commencement Variation if the ACCC concludes that clause 17 of the Migration Plan (as amended in accordance with Cease Sale Commencement Variation) does not comply with section 12 of the Migration Plan Principles Determination.

Section 12(2)(b) of the Migration Plan Principles Determination expressly requires that the Cease Sale Applicability Period be as short as reasonably required. Given that the Cease Sale Obligations have the potential to foreclose competition on the Separating Networks and, in doing so, limit consumer choice during the Cease Sale Applicability Period, it is understandable that section 12 of the Migration Plan Principles Determination requires the Cease Sale Applicability Period to be as short as reasonably required. However the question arises: *reasonably required for what?*

iiNet submits that the answer to this question becomes evident when the objects of the Migration Plan Principles Determination are considered. These are to⁹:

- provide for the efficient and timely disconnection of wholesale and retail carriage services from a separating network as the NBN Co fibre network is deployed; and
- provide for equivalence in the disconnection processes that Telstra will implement for its wholesale customers and retail business units.

In light of the objects of the Migration Plan Principles Determination, iiNet submits that section 12(2)(b) of the Migration Plan Principles Determination as it applies to the Cease Sale Applicability Period requires the following question to be answered:

⁹ See section 3 of the Migration Plan Principles Determination.

What is the shortest Cease Sale Applicability Period that is consistent with the timely and efficient disconnection of services from Separating Networks?

iiNet submits that a similar question arises, mutatis mutandis, as regards achieving Order Stability prior to the Disconnection Date¹⁰. iiNet notes that Telstra requires a period of only 20 Business Days before the Disconnection Date in order to achieve Order Stability¹¹. It is not clear to iiNet why a period that is significantly longer than this should be required for the Cease Sale Applicability Period or why the commencement of the Cease Sale Applicability Period should be referable to the Ready for Service Date rather than the Disconnection Date (i.e. why should the Cease Sale Applicability Period not be a specified period before the Disconnection Date?). iiNet acknowledges that the volume and nature of the Relevant Orders may require the Cease Sale Applicability Period to be longer than the period needed to achieve Order Stability. iiNet also acknowledges that it may be appropriate to distinguish between:

- Relevant Orders that would require new copper infrastructure to be installed (to which a longer Cease Sale Applicability Period would apply); and
- Relevant Orders that do not require new copper infrastructure to be installed (to which the minimum Cease Sale Applicability Period would apply).

However, iiNet believes that a Cease Sale Applicability Period that in the vast majority of cases¹² will be only 10 Business Days shorter than the entire Migration Window cannot be the *shortest* period reasonably required. This issue is considered further in section 4.4 of this submission.

4.3 The ACCC's previous consideration of the Cease Sale Obligations

Telstra first submitted a draft Migration Plan for consideration in July 2011 (**the July 2011 Draft Migration Plan**). The July 2011 Draft Migration Plan contained the following clause 17:

17.1 No supply of Copper Services

Subject to clause 21, Telstra will not supply any new Copper Service to a Retail Customer or to a Wholesale Customer using a Separating Network after the Ready for Service Date for a Rollout Region at a Premises within the Fibre Footprint in that Rollout Region which is Passed and:

- (a) is NBN Serviceable; or*
(b) is not NBN Serviceable but would require the installation of new copper or other infrastructure (i.e. there is not an-in place' copper connection at the Premises) except and to the extent that Telstra in its discretion supplies a new Copper Service to the Premises in order to fulfil a USO requirement.

17.2 No supply of HFC Services

Telstra will not supply any new HFC Service to a Premises using a Separating Network after the Ready for Service Date for a Rollout Region at a Premises within the Fibre Footprint in that Rollout Region which is Passed and NBN Serviceable.

(the Original Clause 17).

¹⁰ Order stability is provided for in clause 13 of the Migration Plan.

¹¹ See clause 13.1(b) of the Migration Plan.

¹² i.e. those Rollout Regions to which paragraph (b) of the definition of Cease Sale Commencement Date applies.

The Original Clause 17 is different to the current clause 17 of the Migration Plan set out in section 4.1 of this submission above. The Original Clause 17 provides a Cease Sale Applicability Period that is the same as the Migration Window.

In its public supporting submission for the July 2011 Draft Migration Plan¹³, Telstra did not expressly explain why Telstra believed that the Original Clause 17 complied with section 12 of the Migration Plan Principles Determination. In particular, Telstra did not explain why a Cease Sale Applicability Period that is as long as the Migration Window could satisfy the requirement in section 12(2)(b) of the Migration Plan Principles Determination that the Cease Sale Applicability Period be as short as reasonably required.

The ACCC considered the July 2011 Draft Migration Plan in the ACCC's Discussion Paper of August 2011 entitled: *Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan (the August 2011 Discussion Paper)*. The ACCC's express consideration of section 12 of the Migration Plan Principles Determination was as follows (footnotes omitted)¹⁴:

Telstra has stated in its supporting submission to the SSU and draft Plan that:

Telstra is concerned that, in the lead-up to the Disconnection Date, Telstra's ability to handle and process retail and wholesale disconnection requests could be jeopardised if Telstra also simultaneously receives other kinds of order requests within the fibre footprint in the same Rollout region (for example, new orders to move or add new features to existing services).

Section 12 recognises that there could be times during migration, otherwise referred to as "order stability periods", which may necessitate Telstra imposing restrictions on the processing of orders relating to the supply of fixed line carriage services to premises in particular roll out regions. Section 12 requires that the migration plan specify any "reasonable" circumstances in which Telstra proposes to restrict the processing of transactions for retail or wholesale customers (including the rejection of, or failure to process, requests from such customers). Further, section 12 requires that any such restrictions proposed in the migration plan be:

- in accordance with the general principles at sections 8 and 21*
- imposed for the shortest period reasonably required.*

Section 12(3) states that the migration plan must require Telstra to review any such restrictions imposed with a view to determining whether the restrictions require adjustment with the benefit of operational experience in the migration process when requested to do so by the ACCC, the ITA or a wholesale customer, and that request by the wholesale customer is reasonable. The migration plan must require Telstra, in conducting a review, to consult with NBN Co.

Such restrictions will only satisfy the principles where the arrangements for order stability periods outlined in the migration plan are capable of being applied in an equivalent manner between retail and wholesale services. Further, the migration plan must set out the actions that Telstra will take if, as a result of a review it is requested to undertake, Telstra determines that the restrictions imposed require adjustment.

Under the Disconnection Protocols, where premises are serviceable by the NBN Co fibre network Telstra is prevented (with certain exceptions) from reconnecting or reactivating services to those premises once they have been disconnected. In

¹³ Telstra's 31 July 2011 submission entitled: *Telstra's Structural Separation Undertaking and Migration Plan* available at - available at: <http://transition.accc.gov.au/content/index.phtml/itemId/1003999>

¹⁴ August Discussion Paper at pp. 140-141.

other words, if a premise is disconnected during the 18 month migration window, preference is given to connecting it to the NBN over reconnecting it to the copper or HFC network. Section 12(6) requires the migration plan to specify the circumstances in which Telstra will refuse, or agree, to supply fixed line carriage services over a separating network to a premises in a fibre rollout region where the request to supply has been received after the relevant premises has been disconnected. An example of the latter circumstance is where a subscriber has requested the supply of "special services"(see section 13 discussion).

This consideration does not include consideration of whether the Original Clause 17 complies with section 12 of the Migration Plan Principles Determination. Nor did any of the submissions in response to the August 2011 Discussion Paper deal with this issue. iiNet submits that the fact that the ACCC and interested parties did not raise this issue at the time of the August 2011 Discussion Paper is perhaps understandable given that:

- the Migration Plan was considered together with Telstra's Structural Separation Undertaking (**SSU**), and the ACCC's consultation involved consideration of a large number of complex and significant issues; and
- the manner in which Telstra would implement the Cease Sale Obligation was unknown (i.e. it was not known that the Wider Orders would be subject to the Cease Sale Obligation as well as the Order Stability Period).

In August 2011 Telstra submitted a revised draft of the July 2011 Draft Migration Plan (**the August 2011 Draft Migration Plan**). The August 2011 Draft Migration Plan included the Original Clause 17 without any amendments. The ACCC released a further discussion paper in December 2011¹⁵. However, that discussion paper was limited to issues relating to the SSU, and did not consider issues relating to clause 17 of the Migration Plan.

In February 2012, the ACCC issued its decision to accept the August 2011 Draft Migration Plan¹⁶. The ACCC's Final Decision does not include any explanation as to why the Original Clause 17 satisfies the requirements of Section 12 of the Migration Plan Principles Determination. In particular, there is no discussion of whether clause 17 of the Migration Plan provides for the shortest Cease Sale Applicability Period reasonably required.

In light of the above, it appears to iiNet that the issues relating to the specific requirement in section 12(2)(b) of the Migration Plan Principles (i.e. that the Cease Sale Applicability Period be the shortest period reasonably required) passed under interested parties' and the ACCC's radar during the ACCC's public inquiry regarding acceptance of the SSU and Migration Plan.

In October 2012, Telstra sought variations to the Original Clause 17 of the Migration Plan (**the October 2012 Variations**). The October 2012 Variations included¹⁷:

- deferring the commencement of the Cease Sale Obligations until 1 May 2013. The justification for this variation was stated as being: '*principally (a) to allow*

¹⁵ Telstra's Structural Separation Undertaking Discussion Paper December 2011.

¹⁶ Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan Final decision - February 2012.

¹⁷ Variation to the Migration Plan given by Telstra Corporation Limited to the Australian Competition and Consumer Commission under Section 577BF of the Telecommunications Act 1997 (Cth) Overview and Supporting Submission - 9 October 2012.

Telstra the necessary time to implement changes in its systems necessary to implement the cease sale arrangements in a way that will better achieve equivalence as between Wholesale Customers and Retail Customers, and to give wholesale customers more time to make any changes they require to their processes and systems ahead of the cease sale applying, and (b) to allow for further important communication to customers and other industry participants on the impact of cease sale for them¹⁸; and

- as regards those Rollout Regions that are declared to be ready for service after 1 May 2013, delaying the application of the cease sale obligation until 10 Business Days after the Ready for Service Date for each Rollout Region. The justification given for this variation was that without the variation Telstra would not have: *'sufficient time to input service class data from NBN Co into Telstra systems to support service qualification, and industry has more time to make any changes they require¹⁹.*

As regards the effect of the October 2012 Variations, Telstra submitted the following²⁰:

Given that the variations Telstra proposes are not substantial as they do not alter the intended purpose and effect of the Cease Sale obligation, but simply propose its deferral (which will be of benefit to industry and end-users, as it will allow more time for all parties to prepare for the Cease Sale obligation taking effect) Telstra considers that, for the purposes of s 577BF of the Act, the variations are minor in nature.

As regards the October 2012 Variations' satisfying the applicable statutory test, Telstra stated the following (emphasis added)²¹:

The key objectives of the Migration Plan Principles (found principally in the general principles at MPPs 8 and 21) are to ensure that the Migration Plan provides for the efficient and timely disconnection of wholesale and retail carriage services by Telstra as part of the migration process, and equivalence in the disconnection processes that Telstra will implement for its wholesale and retail customers.

The ACCC approved the existing Clause 17 as part of the Migration Plan approved on 27 February 2012.

As varied, Clause 17 of the Migration Plan **would continue to comply with the Migration Plan Principles**. In particular, the variations to clause 17:

(a) Do not involve any substantial departure from the intent or purpose of the Cease Sale obligation, and that obligation will operate as originally intended. The variations merely clarify the obligation and enable Telstra to implement it practically, and in a timeframe which will promote better outcomes for industry and end-user customers. Telstra has also, as far as possible, limited the extent of the variations necessary to achieve this.

(b) Would be consistent with the efficient and timely disconnection of carriage services. The Cease Sale obligation is concerned with Telstra ceasing to supply new services, rather than disconnecting services, the proposed variations will not affect the efficient and timely disconnection of carriage services.

¹⁸ *ibid* at p. 2.

¹⁹ *ibid*.

²⁰ *ibid* at p. 3.

²¹ *ibid* at p. 8.

(c) Would be consistent with the minimisation of disruption to the supply of fixed-line carriage services. The Cease Sale obligation as varied will operate consistently with the intention of the Migration Plan that end-users will not impact on any disruption to the supply of fixed-line services. The proposed variations that clarify that Cease Sale applies to orders and requests when received by Telstra will also assist to give Telstra customers greater visibility of the Cease Sale obligation and when it will apply.

(d) Are likely to enhance Telstra's ability to implement the Cease Sale obligation in a more consistent manner across its customer base, by allowing Telstra greater time to implement system changes that will promote the equivalent treatment of Wholesale Customers and Retail customers, particularly by allowing Telstra a greater timeframe to implement systems changes so that orders or requests from both sets of customers may be processed using the same service qualification interface.

The above submission from Telstra is based on the premise that the Original Clause 17 complies with all of the relevant sections of the Migration Plan Principles Determination. However, as demonstrated above, the compliance of the Original Clause 17 with section 12(2)(b) of the Migration Plan Principles Determination has never been established.

In light of Telstra's submissions, and in iiNet's view not surprisingly, the ACCC decided to treat the October 2012 Variations as minor and accept the October 2012 Variations. This led to the current version of clause 17 of the Migration Plan being adopted. However, and in iiNet's view of crucial significance to consideration of the Cease Sale Commencement Variation, Telstra's submission in support of the October 2012 Variations failed to explain why a Cease Sale Applicability Period of 17+ months is the shortest period reasonably required. This means that the issue of clause 17 of the Migration Plan's compliance with section 12 of the Migration Plan Principles Determination still remains at large. iiNet notes that Telstra's letter in support of the Cease Sale Commencement Variation does not expressly address compliance with section 12(2)(b) of the Migration Plan Principles Determination.

4.4 Conclusion on the cease sale commencement variation

In iiNet's view it appears clear that a Cease Sale Applicability Period of 10 Business Days less than the entire Migration Window is the longest period that could reasonably be required (i.e. on the basis of Telstra's own submissions in October 2012, a Cease Sale Applicability Period that gives less than 10 Business Days' reaction time would not be reasonable because Telstra would not have sufficient time to input into Telstra's systems the relevant data provided by NBN Co). It therefore appears clear to iiNet that clause 17 of the Migration Plan does not meet the requirements of section 12(2)(b) of the Migration Plan Principles Determination because it provides for the longest period reasonably required rather than the shortest period reasonably required. In light of this, iiNet submits that when the ACCC undertakes its consideration of clause 17 of the Migration Plan as varied by the Cease Sale Commencement Variation, the ACCC must conclude that the varied clause 17 does not comply with section 12(2)(b) of the Migration Plan Principles Determination, and, accordingly, the ACCC must refuse to approve the Cease Sale Commencement Variation.

This outcome is, of course, undesirable because it means that the Cease Sale Obligations will formally commence on 1 May 2013. As stated above, Telstra has provided compelling reasons why the Cease Sale Obligations should not commence on 1 May 2013. This leads to something of a quandary. However, iiNet is hopeful that the spirit of cooperation that has been demonstrated at the Wholesale

Telecommunications Forum will lead to Telstra speedily submitting a revised variation to clause 17 that reduces the Cease Sale Applicability Period to the shortest period reasonably required, and, thereby, allows the ACCC to accept the required variations to clause 17 - i.e. a revised variation could have the effect of making the Cease Sale Applicability Period for a Rollout Region a specified period before the Disconnection Date for that Rollout Region. As regards what is an appropriate period, iiNet can see no reason why the Cease Sale Applicability Period should be more than four to six months. iiNet believes that a pragmatic outcome where Telstra voluntarily submits a revised variation would be preferable to the ACCC having to use its formal rectification powers under the Migration Plan. In this regard, iiNet notes that the Migration Plan does not appear to contain a specific review provision relating to order refusals as contemplated by section 12(3) of the Migration Plan Principles Determination. This may also be something that Telstra wishes to address in its revised variation.

Furthermore, it appears to iiNet that Telstra's identification of 1 July 2013 as the easiest date for the commencement of the Cease Sale Obligations is largely based on when Telstra anticipates Telstra's systems and the systems of its wholesale customers will be able to deal with the Cease Sale Obligations. Although this is clearly a consideration of fundamental importance, it is not the only such consideration. iiNet submits that a consideration of equal importance is the availability for end users (including medium and large business customers) to have access to a range of tried and tested competitive services (i.e. provided by more than just one RSP) provided over the NBN which are suitable replacements for the services that will be subject to the Cease Sale Obligations. This should not just include Broadband Internet and standard voice telephony services but also services that support vital business applications such as EFTPOS and monitoring and alarm systems.

5. THE CEASE SALE EXCEPTION VARIATION

As with the Cease Sale Commencement Variation, iiNet submits that the ACCC cannot accept the Cease Sale Exception Variation unless it is satisfied that, on a de novo consideration of clause 17 as amended by the Cease Sale Exception Variation, clause 17 will comply with the Migration Plan Principles Determination. For the same reasons as with the Cease Sale Commencement Variation, iiNet submits that the ACCC must refuse to approve the Cease Sale Exception Variation.

6. THE IRRR DEFINITION VARIATION

The IRRR Definition Variation involves three things. Firstly, amending the Definition of Initial Release Rollout Region in the Migration Plan as follows:

"Initial Release Rollout Region means:

(a) a geographic region determined by NBN Co and notified to Telstra within which the Rollout has commenced prior to the commencement of the Definitive Agreements; and
(b) each Specified Rollout Region"

Secondly, including a new definition of 'Specified Rollout Region' as follows:

Specified Rollout Region means an FSA Module agreed between Telstra and NBN Co as set out in Schedule 10.

Thirdly, adding a new Schedule 10 to the Migration Plan which lists 82 Regular Rollout Regions that Telstra and NBN Co have agreed should be included in Schedule 10 of the Migration Plan (**Specified Rollout Regions**).

Telstra states that the benefits of the IRRR Definition Variation would be as follows²²:

- *It will allow end-users within the Specified Rollout Regions who are interested in acquiring services on the NBN, and who are at premises which are already passed by the NBN, the ability to connect to the NBN earlier;*
- *It will allow RSPs the option to sell fibre services earlier than if the region remained as a regular rollout region. All RSPs obtain this benefit equally; and*
- *By allowing the earlier take-up of services on the NBN, it will allow end-users within the Specified Rollout Regions more time in which to migrate to the NBN, ahead of the final Disconnection Date.*

iiNet is not in a position to form a definitive conclusion on the merits of the IRRR Definition Variation. This is because:

- given that the Migration Plan is concerned with the disconnection of services from Telstra's networks rather than the connection of services to the NBN, it is not entirely clear why bringing the Specified Rollout Regions within the definition of Initial Release Rollout Region under the Migration Plan would allow NBN Co to begin providing services in those Rollout Regions any faster than if they remained under the Definition of Rollout Region in the Migration Plan; and
- it is not clear to iiNet what criteria has been used to identify the Specified Rollout Regions.

In light of these uncertainties, iiNet's feedback on the IRRR Definition Variation is limited to making the three observations below. These observations arise from consideration of the definitions 'Ready for Service Date' and 'Disconnection Commencement Date' in the Migration Plan. The definition of Ready for Service Date in the Migration Plan is as follows:

Ready for Service Date means:

(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;

The definition of Disconnection Commencement Date is as follows:

Disconnection Commencement Date means:

the date determined by NBN Co at its discretion for an Initial Release Rollout Region or Acquired Network Rollout Region and notified by NBN Co to Telstra;

The first observation that iiNet makes is that as far as the Migration Plan is concerned, NBN Co has a completely unfettered discretion as to the determination of the Ready for Service Date for Initial Release Rollout Regions and, after having

²² Telstra letter to ACCC dated 4 April 2013 - *Request to Vary Telstra's Migration Plan to Add Initial Release Rollout Regions*, at p.2.

decided that an Initial Rollout Region is ready for service, NBN Co is only required to notify Telstra. However, in relation to Regular Rollout Regions, NBN Co must not declare a Regular Rollout Region as ready for service unless it has published a notice on its website that Fibre Services will be able to commence to be supplied in that Rollout Region.

The second observation that iiNet makes is that given that the Cease Sale Obligations in respect of a Rollout Region are currently triggered by NBN Co's declaration of the Ready for Service Date for the Rollout Region, the IRRR Definition Variation could have implications for the Cease Sale Obligations because if the IRRR Definition Variation is implemented, NBN Co has, at least in theory, the ability to declare some or all of the Specified Rollout Regions as being ready for service (and thereby begin the clock ticking for the purposes of the Cease Sale Obligations²³) in circumstances where NBN Co would not be able to if the Specified Rollout Regions remained as Regular Rollout Regions (i.e. there is nothing in the Migration Plan to stop NBN Co declaring a Specified Rollout Region as being ready for service before NBN Co is able to provide Fibre Services to any Premises, or any significant number of Premises, in that Rollout Region). iiNet acknowledges that this issue may be theoretical only but without knowing what the criteria was for selecting the Specified Rollout Regions, iiNet is unable to be certain that this issue is theoretical or real.

The third observation that iiNet makes is that in declaring a Specified Rollout Region as ready for service, NBN Co need only notify Telstra. This could have implications for equivalence.

7. THE APPLICABILITY OF THE CEASE SALE OBLIGATIONS TO PREMISES THAT ARE NOT NBN SERVICEABLE

iiNet notes that section 12(1) of the Migration Plan Principles Determination requires the Migration Plan to specify 'any reasonable circumstances' in which Telstra 'proposes to restrict the processing of transactions' in relation to the supply of fixed line carriage services²⁴. iiNet submits that if the Migration Plan allows Telstra to restrict the processing of transactions in circumstances that are not reasonable, then it will not comply with section 12 of the Migration Plan Principles Determination.

iiNet notes that clause 17(1)(b) of the Migration Plan prevents Telstra from supplying a new Copper Service to Premises that are NBN Serviceable in circumstances where the installation of new copper or other infrastructure is required²⁵. The only exception to this is where Telstra in its discretion supplies a new Copper Service in order to fulfil its obligations under the Universal Service Obligation.

iiNet notes that Optus has sought clarification on whether orders relating to the following scenarios would be restricted by Telstra due to the Cease Sale Obligations²⁶ in circumstances where the Premises concerned are not NBN Serviceable:

- An existing house is knocked down and a new house built, requiring a new lead in cable.

²³ This would also start the 18 month Migration Window - see clause 7.2(a)(i)(B) of the Migration Plan.

²⁴ Section 12(1) of the Migration Plan Principles Determination is set out in full in section 4.2 of this submission.

²⁵ Clause 17 of the Migration Plan is set out in full in section 4.1 of this submission.

²⁶ Optus has previously raised concerns about this issue in a letter to the ACCC dated 3 April 2013.

- An end user wishes to transfer from one service provider to another service provider using the ULLS.
- A customer in a multi dwelling unit requires a ULLS in circumstances where the transposition of a cable is required to enable the use of a free cable pair.

iiNet submits that if any of these scenarios are captured by the Cease Sale Obligations then the Migration Plan would allow Telstra to restrict the processing of transactions in relation to the supply of fixed line carriage services in circumstances that are not reasonable. This is because the end user would be left without an internet service²⁷. Accordingly, clause 17 of the Migration Plan would not comply with section 12(1) of the Migration Plan Principles Determination which restricts the ambit of Telstra refusing to process orders to 'reasonable circumstances'. This would provide a distinct basis on which the ACCC would be required to reject the Cease Sale Commencement Variation and the Cease Sale Exception Variation on the same reasoning as expressed in section 4 of this submission.

8. AMENDMENTS REQUIRED TO CLAUSE 21 OF THE MIGRATION PLAN

iiNet submits that under the Migration Plan as currently drafted, there is uncertainty in relation to the following scenarios:

A wholesale customer makes a request to Telstra to provide a new Direct Special Service or Special Service Input in a Rollout Region (including a churn of any such service) during the Cease Sale Applicability Period for that Rollout Region in respect of a premises that has been disconnected from Telstra's network.

A wholesale customer makes a request to Telstra to provide a new Direct Special Service or Special Service Input in a Rollout Region (including a churn of any such service) during the Cease Sale Applicability Period for that Rollout Region in respect of a premises that has not yet been disconnected from Telstra's network.

As regards the applicability of the Cease Sale Obligations to Direct Special Services and Special Service Inputs, this is dealt with by clause 17 of the Migration Plan being subject to clause 21 of the Migration Plan. Clause 21 of the Migration Plan as relevant provides as follows:

21.1 Direct Special Services will continue to be supplied up to the Disconnection Date for each SS Class

(a) Telstra will continue to accept new orders for, and will continue to supply, each SS Class of Direct Special Service and each Special Service Input certified by a Wholesale Customer under clauses 21.6 or 21.7 as being used to supply a carriage service which is Service Equivalent to that SS Class, in respect of a Premises which is Passed in a Rollout Region:

- (i) that has otherwise been permanently disconnected; and*
- (ii) after the Disconnection Date for that Rollout Region,*

*up until the Disconnection Date for that SS Class, determined in accordance with clause 21.1(b),
(SS Supply Period).*

(b) Subject to clause 21.11, the Disconnection Date for each SS Class of Direct Special Services (and which will also be the Disconnection Date for any Special Service Inputs certified by a Wholesale Customer under clauses 21.6 or 21.7 as being used to supply a carriage service which is Service Equivalent to that SS Class) will be the date which is the earlier of:

²⁷ The Universal Service Obligation only applies to a standard telephone service.

- (i) the date that the SS Class is no longer supplied by Telstra or any earlier cease supply date applicable to Telstra's acceptance of new orders as determined in accordance with a standard Telstra product exit process as contemplated by clause 4.3; and
- (ii) the White Paper Disconnection Date, if any, applicable to that SS Class, as determined in accordance with clause 21.4 (in the case of new orders, subject also to any prior Order Stability Period).

[...]

It should be noted that although clause 21 of the Migration Plan guarantees that the Cease Sale Obligation will not apply during the 'SS Supply Period', the SS Supply Period commences after the Disconnection Date²⁸. Therefore, if it is taken literally, clause 21(a) of the Migration Plan has no effect during the Cease Sale Applicability Period. Furthermore, clause 21(a) only applies to premises that have been permanently disconnected. This further limits the scope of the exception. In iiNet's view there is no good reason why Telstra should not be required to provide new Direct Special Services and Special Service Inputs (including churns in respect of those services) to premises during the Cease Sale Applicability Period regardless of whether or not those premises have been permanently disconnected. In order to resolve the uncertainty arising from this issue, iiNet submits that subparagraphs (i) and (ii) should be removed from clause 21.1(a) of the Migration Plan so that clause 21.1(a) of the Migration Plan reads as follows:

*(a) Telstra will continue to accept new orders for, and will continue to supply, each SS Class of Direct Special Service and each Special Service Input certified by a Wholesale Customer under clauses 21.6 or 21.7 as being used to supply a carriage service which is Service Equivalent to that SS Class, in respect of a Premises which is Passed in a Rollout Region up until the Disconnection Date for that SS Class, determined in accordance with clause 21.1(b),
(SS Supply Period).*

A further corresponding minor change to clause 21.7(a) should also be made as follows:

(a) Telstra will not accept an order to supply a new ULLS or LSS to a Premises within the Fibre Footprint in a Rollout Region ~~after the Disconnection Date~~ during the SS Supply Period for that Rollout Region, unless:

[...]

9. MONITORING AND REPORTING ON COMPLIANCE WITH THE CEASE SALE OBLIGATIONS

It is clear that Telstra is obliged to provide equivalence between Telstra Retail and wholesale customers regarding the implementation of the Cease Sale Obligations. Telstra's Director of Equivalence is responsible for ensuring Telstra's compliance with Telstra's equivalence obligations under the Migration Plan. The compliance monitoring obligations in Part E of the SSU are also applicable²⁹. However, these obligations do not include any specific obligations relating to monitoring and reporting on Telstra's compliance with the Cease Sale Obligation in respect of Telstra Retail. Given the potential harmful effects to competition that could result if Telstra does not implement and apply the Cease Sale Obligations in an equivalent

²⁸ By virtue of clause 21(a)(ii) of the Migration Plan.

²⁹ See clause 27 of the Migration Plan.

matter, iiNet submits that there should be a specific obligation in the Migration Plan that requires Telstra to monitor and report to the ACCC on Telstra's compliance with its equivalency obligations in respect of the Cease Sale Obligations.

Herbert Geer on behalf of iiNet Limited
16 April 2013