



**Australian
Competition &
Consumer
Commission**

Assessment of Telstra's draft Migration Plan Required Measures

- 1(a) Process for obtaining consents and releases from wholesale customers for pull through
- 1(b) Process for notifying wholesale customers of pull through exception events

Final decision

April 2013

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List of acronyms and other terms

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
December Discussion Paper	<i>ACCC's Required Measures Discussion Paper</i> , December 2012
Definitive Agreements	Each of: <ul style="list-style-type: none">(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
Disconnection date	<ul style="list-style-type: none">(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

(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
ITA	Independent Telecommunications Adjudicator
LIC	Lead-in-conduit
LOLS	Linx Online System
LSS	Line Sharing Service
NBN	National Broadband Network
NBN Co	NBN Co Limited
Notification event	has the meaning given in clause 10.2 of the migration plan
NTT	NBN Transition Tool (Telstra system)
Pull through Activities	has the meaning given in clause 10.1(a) of the migration plan
Pull through exception event	a circumstance that prevents Personnel from being able to complete Pull Through Activities or Cable Rectification
RSP	Retail Service Provider
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
SIAM	Telstra's assurance system for recording customer faults
Special Services	Direct Special Services and Contracted Special Services (clause 21.12 of the migration plan)
SSU	Structural Separation Undertaking
STS	Standard Telephone Service

Telstra

Telstra Corporation Limited

ULLS

Unconditioned Local Loop Service

WBA

Wholesale Broadband Agreement

Contents

1	Introduction.....	4
1.1	Migration plan required measures	4
1.2	Decision making framework for required measures.....	5
1.3	Consultation.....	6
1.4	The pull through process	6
2	Summary of the ACCC’s decision.....	8
2.1	Required measure 1(a).....	8
2.2	Required measure 1(b).....	9
3	ACCC approach to assessment of draft required measures 1(a) and 1(b).....	10
3.1	ACCC response to Telstra concerns	11
4	Process to obtain consents and releases from wholesale customers for pull through activities to occur.....	16
4.1	Telstra’s proposed draft required measure 1(a).....	17
4.2	December discussion paper and submissions received	18
4.3	ACCC assessment of draft required measure 1(a).....	19
5	Process to notify wholesale customers of pull through exception events.....	38
5.1	Telstra’s draft required measure 1(b)	39
5.2	December discussion paper and submissions received	40
5.3	ACCC assessment.....	40
6	The end-to-end pull through process	48
6.1	Clarity of the end-to-end process.....	49
6.2	Proposed arrangements for end-user consent	50
6.3	Priority assistance and medical alert services.....	52
	Attachment A: Illustrative guidance to take into account the ACCC concerns	60
	Attachment B: Overview of pull through	62
	Attachment C: Required Measures and corresponding regulatory requirements	64

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 on the ACCC website.¹

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.² 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 protected. 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.³

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 <http://www.accc.gov.au/content/index.phtml/itemId/1003999>.

² Migration plan, clause 5.1(c).

³ 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.⁴

1.2 Decision making framework for required measures

Pursuant to section 577A(18) of the *Telecommunications Act 1997* and clause 5.4 of the migration plan, 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).⁵

The ACCC must refuse to approve the draft required measure if it does not comply with the Determination and direct Telstra to resubmit the draft required measure amended to take into account the concerns raised by the ACCC.⁶ 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

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.⁹

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

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.¹⁰

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:

- General principles, which describe the overarching principles that must be met by the migration plan. These include equivalence and continuity of service objectives.

⁴ <http://www.telstrawholesale.com.au/nbn/migration-plan/index.htm>.

⁵ Available on the Department of Broadband, Communications and Digital Economy's website at www.dbcde.gov.au.

⁶ Migration plan, clause 5.4(d).

⁷ Migration plan, clause 5.4(e).

⁸ Migration plan, clause 5.4(g).

⁹ Migration plan, clause 28.2(b).

¹⁰ Migration plan, clause 26(a).

- 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.¹¹

1.3 Consultation

On 18 December 2012, the ACCC released a discussion paper on Telstra's draft required measures 1(a) and 1(b) (the December discussion paper). Submissions closed on 1 February 2013.

The ACCC received ten submissions to the discussion paper, including two supplementary submissions from Telstra, a late submission from NBN Co as well as a letter from the Telecommunications Industry Ombudsman (TIO). The remaining submissions were made by Optus, AAPT, Herbert Geer (on behalf of iiNet), the Independent Telecommunications Adjudicator (ITA), the Australian Communications Consumer Action Network (ACCAN) and Tunstall Healthcare. All submissions are published on the ACCC's website.

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

1.4 The pull through process

Pull through is a process that NBN Co will use to connect premises that have not been connected to the NBN during the "build drop" phase of the NBN rollout. It will involve an NBN Co contractor returning to the premise to connect it by using the existing copper line to "pull the NBN fibre cable through" the lead-in-conduit (LIC). This process will result in an outage to the existing communications services until they can recommence, either over the reinstated copper line or a temporary line.

Pull through will assist in efficient and timely migration of premises that could not otherwise be connected during the build drop phase of the NBN fibre rollout. This is because it will maximise the use of existing infrastructure and minimise the need for NBN Co to install new LICs or use an aerial drop to connect the premises. NBN Co considers that pull through may be an important part of NBN Co's connection processes to the NBN fibre network.¹²

While pull through is likely to be used for a relatively small proportion of NBN connections (NBN Co has indicated that it estimates it could be used for about five percent of connections), due to the scale of the NBN fibre rollout this may in fact result in a significant total number of pull through connections.

¹¹ The Determination, subsection 6(1).

¹² NBN Co submission, February 2013, p. 6.

As the access provider to the existing access network, Telstra will play an important role in identifying existing communications services that may be interrupted by pull through as well as helping to limit any adverse consequences of the service outage. The importance of Telstra's role as an intermediary between wholesale customers and NBN Co and its contractors is reflected in the scope of the required measures.

Notwithstanding this, the success of the end-to-end pull through process will require the involvement and cooperation of other retail service providers, end-users and NBN Co. The ACCC considers that it will be important that the roles and responsibilities of all parties involved in pull through are clearly articulated and understood to ensure end-user interests and competition are protected.

2 Summary of the ACCC's decision

The ACCC is not satisfied that draft required measures 1(a) and 1(b) comply with the Determination and therefore has decided to refuse 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 – 2.2 below.

Chapters 5 and 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, NBN Co and Telstra provided to the ACCC in response to its December 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 1(a)

Telstra's draft process for obtaining consents and releases from wholesale customers for pull through does not comply with the Determination for the following reasons:

The draft required measure does not establish reasonable policies and business practices that provide for Telstra to facilitate, to the extent that it is in Telstra's control to do so, the management by wholesale customers of the migration of their customers in a way that minimises the period of the service outage occasioned by pull through. This is because the nature of the consents, releases and undertakings sought under the draft Deed Poll do not facilitate, to the extent that it is in Telstra's control, wholesale customer management of the period of the service outage for their end-users.

The draft required measure does not provide for arrangements that minimise disruption to the supply of fixed-line carriage services caused by pull through to the extent that it is in Telstra's control to do so. This is because the releases sought under the draft Deed Poll inappropriately limit Telstra's liability for losses occasioned by pull through where they are the party best placed to manage the risk.

The draft required measure does not provide for equivalence between Telstra's retail business units and Telstra's wholesale customers in relation to pull through. This is because Telstra has sought to release itself from responsibility for the operation of wholesale communications services over reinstated copper lines where it would not do so for its own retail customers.

The draft required measure does not specify those known circumstances where a wholesale customer may not be able to control the timing of disconnection resulting from pull through, such as where there is a complete migration event and the wholesale customer is a losing service provider.

2.2 Required measure 1(b)

Telstra's draft process for notifying wholesale customers of pull through exception events does not comply with the Determination for the following reasons:

The draft required measure does not include sufficient detail to enable the ACCC to be satisfied that Telstra's proposed approach to notifying wholesale customers of notification events facilitates the management by wholesale customers of the migration of their customers in a way that minimises the period of any service outage.

The draft required measure does not include sufficient detail to enable the ACCC to be satisfied that Telstra's proposed approach to notifying wholesale customers of notification events will be equivalent as between wholesale customers and Telstra's retail business units.

The draft required measure does not ensure that the ACCC will be provided with sufficient information to monitor Telstra's compliance with, and the effectiveness of, the draft required measure.

3 ACCC approach to assessment of draft required measures 1(a) and 1(b)

The ACCC considers that Telstra has an important role to play in helping to minimise the impact of the service outage caused by pull through. As the network operator, Telstra has responsibility for managing service outages on the copper access network. Telstra also has up to date information about which wholesale customers provide services to a particular premises. Telstra is therefore best placed to provide accurate and timely advice to NBN Co as to the wholesale customers that will be affected by pull through and to inform the wholesale customers about any longer term faults or outages to the existing copper based communications services they provide to their end-users.

The importance of Telstra's role in pull through is reflected in the arrangements concluded between Telstra and NBN Co under the Definitive Agreements. In its submission NBN Co states that:

Telstra's role, as contemplated by the Definitive Agreements, is to inform the NBN Co installer when a cable in the LIC cannot be used for a pull through (i.e when a cable has the designation of 'non-removable') and the identity of the relevant Telstra Wholesale customer. This information helps to ensure that NBN Co's processes for undertaking pull through minimise any disruption to either Telstra's wholesale customers or end-users...The Definitive Agreements work to ensure that NBN Co has sufficient knowledge and information about Telstra's network infrastructure to facilitate the efficient and timely rollout of the NBN.¹³

The service outage occasioned by pull through poses risks to end-users as they will be without fixed line communications services. There is potential that difficulties will be encountered and that longer outages will occur or temporary above ground cables may need to be installed. For some end-users, such as those with a life threatening medical condition who acquire priority assistance services or use medical alert services, even a brief service outage could pose significant adverse consequences. Outages may also have adverse consequences for small businesses that may have less capacity to handle long term outages.

The ACCC considers that competition and consumer protection objectives will be promoted where the party best placed to manage the risk at a particular stage of the pull through process is assigned responsibility for it. For example, a gaining service provider will be best placed to collect information on any special needs that an end-user may have when migrating to the NBN. In such instances, pull through processes, including connection order arrangements, should enable the NBN RSP to manage the migration of their end-user to ensure a smooth pull through experience.

Accordingly, the ACCC considers that it is important that the pull through required measures commit Telstra to maximise continuity of service objectives to the extent that

¹³ NBN Co submission, February 2013, p. 6.

it is within Telstra's control to do so. The processes must also provide for equivalent treatment of wholesale customers and Telstra's retail business units in the implementation of the relevant processes.

These objectives reflect the requirements of the general principles under section 8 and 21 of the Determination. The sections of the Determination that the ACCC considers relevant to its assessment of draft required measures 1(a) and (b) are outlined on pages 3 and 4 of the December discussion paper. A detailed discussion of the ACCC's interpretation of the sections of the Determination relating to pull through is provided at pages 147 to 148 of the ACCC's August 2011 Discussion Paper.

3.1 ACCC response to Telstra concerns

In its first supplementary submission, Telstra raised a number of concerns with the ACCC's approach to assessing required measures 1(a) and 1(b). In summary these concerns are that:

- As pull through is intended to be a step in the NBN connection process that will only lead to a "short service outage", it should not be characterised as "disconnection" for the purpose of the migration plan principles.
- NBN Co will only use pull through as a "fall back" connection process and therefore it is unlikely to be used frequently, [with the implication that the ACCC's concerns outlined in the December discussion paper are overstated].
- Primary responsibility to manage migration of the end-user, including pull through, must lie with the NBN Retail Service Provider (RSP).

Given the above, Telstra asserts that it "cannot be solely responsible for the equivalent treatment of wholesale customers and retail business units in the pull through process."¹⁴

The ACCC acknowledges that, as pull through is a process that NBN Co will be using to connect premises to the NBN, many of the steps in the end-to-end pull through process will be NBN Co's responsibility. For example, NBN Co will be responsible for fulfilling connection orders from NBN RSPs on the agreed date. NBN Co installers will be responsible for the operational processes required for pull through on the day. This will include, where necessary, reinstating copper lines or installing temporary cables to ensure that they are capable of supplying the existing communications services to the premises.

Therefore, the ACCC agrees that Telstra cannot be solely responsible for the equivalent treatment of wholesale customers and retail business units through each step of the end-to-end process. Indeed, Telstra's role is reflected in the scope of the required measures 1(a) and 1(b), which focus on the arrangements Telstra will need to have in place to

¹⁴ Telstra supplementary submission, February 2013, p. 2.

confirm in a timely manner what line NBN Co installers can use for pull through and also to notify wholesale customers of pull through exception events.

The ACCC considers that the arrangements made to fulfil these responsibilities must commit Telstra to operate in a manner that satisfies the continuity of service and equivalence objectives of the Determination. This will ensure that the stages of the pull through process that Telstra is best placed to manage will contribute to the realisation of a smooth migration experience for end-users, RSPs and NBN Co.

The ACCC also notes that, in a practical sense, Telstra is already responsible for aspects of pull through outside the scope of the required measures, for example, in relation to its responsibility for fault rectification of reinstated copper based services until those services are disconnected. Telstra's continued fulfilment of these obligations will also be important to the success of the end-to-end process.

3.1.1 Pull through as a disconnection process

Telstra has stated that:

Pull through, of itself does not involve *disconnection* of copper services, as that term is used in both the Migration Plan Principles and the Migration Plan. To describe Telstra or a wholesale customer permanently ceasing to supply services to a premises. Rather, where it occurs, pull through is intended to be a step in the NBN connection process that will lead to a short service outage.¹⁵

The ACCC rejects any suggestion implicit in Telstra's contention that as pull through is an NBN connection process the draft required measures 1(a) and 1(b) should not be assessed against the migration plan principles. The ACCC considers that such an interpretation would be inconsistent with section 24 of the Determination which requires that the migration plan specify the processes that Telstra will use in various disconnection scenarios, including pull through.

Further, the ACCC considers that Telstra's position does not accurately reflect the fact that copper based communications services may be disconnected at the time a premises is connected via pull through. This is best understood by considering instances of "complete migration" where the existing communications services cease to be supplied at the time the premises is connected to the NBN via pull through. In such instances, pull through effectively results in "disconnection" as the copper paths will register as permanently disconnected in Telstra's systems once the NBN services are operational and any number porting is completed.¹⁶

¹⁵ Telstra supplementary submission, February 2013, p. 1.

¹⁶ Schedule 5 of the migration plan defines the "technical conditions constituting permanent disconnection".

That said, where there is not a “complete migration” event, the remaining copper based communications services will continue to be provided over reinstated or temporary cables until they are disconnected, either pursuant to a disconnection order or through a managed disconnection process. In such instances, pull through will result in a “temporary outage” in Telstra’s systems as the copper based services will recommence once the pull through cable is reinstated or a temporary cable installed.¹⁷

For example, some end-users may place a connection order with their existing RSP to migrate their broadband services over to the NBN while also choosing to acquire their voice services over VoIP. In order to trial the efficacy of the VoIP service they may choose to retain their copper based telephony services for some time after the NBN is connected. However, the end-user may have chosen to cease supply of the copper broadband service at the time pull through is conducted.

In these circumstances, pull through is properly regarded as a “step” in the disconnection process.

On the basis of the above, the ACCC considers that pull through will either result in disconnection or will constitute a step towards disconnection for the purposes of the Determination. The ACCC considers that this position is consistent with section 4 of the Determination which defines when Telstra disconnects a premises as when it “ceases to supply fixed line carriage services...to that premises.”

3.1.2 Likely incidence of pull through

The ACCC agrees that as pull through will only be used in instances in which NBN Co has been unable to connect a premises by pushing the fibre through the LIC, it is necessarily a secondary or “fall back” connection process.

Indeed, the ACCC understands from NBN Co that pull through is likely to be used in no more than five percent of NBN connections. The ACCC also understands from Telstra that pull through was only necessary for a small percentage of migrations in the South Brisbane exchange migration process.

Ultimately, the percentage of premises that are connected by pull through will depend on NBN Co’s operational processes and the success rate of NBN Co installers in pushing the NBN fibre through the LIC.

Regardless of the percentage of NBN connections for which pull through is used, the scale of the NBN roll out means that the total number of instances in which pull through could be used is potentially considerable. In its most recent Corporate Plan, NBN Co has stated that:

¹⁷ The ACCC’s August 2011 Discussion Paper – *Assessment of Telstra’s Structural Separation and draft Migration Plan – Discussion Paper – 30 August 2011.*

Over the period covered by the 2012-15 Corporate Plan, NBN Co will ramp up its construction capacity to a daily run rate of 6,400 premises passed per day during FY2015 (total of Brownfields plus Greenfields premises, out of which 5,500 relate to Brownfields premises only) in order to reach 2.9 million premises passed by Fibre at the end of FY2015.¹⁸

Even if only five percent of these premises are not able to be connected at the build drop stage, up to 320 premises per day may need to eventually be connected using pull through.

It is clear that incidences of pull through will not be negligible and therefore the ACCC considers that there must be clear and transparent processes governing its use. This is particularly so given the potentially serious consequences for some end-users that may arise from service outages.

3.1.3 Primary responsibility for managing the migration of the end-user

Telstra submits that the ACCC should consider that the copper based RSP, if they are a losing service provider in the migration to the NBN, will have a limited role to play in managing the pull through process for their end-users. Telstra submits that it is the gaining service provider who must take the primary responsibility for managing the migration of their end-users to the NBN.

The ACCC considers that the NBN RSP, whether a gaining service provider or the existing copper based service provider, will be best placed to manage the risks to their end-user customers posed by the service outage. This is for a number of reasons, including that the NBN RSP will:

- know if pull through may occur (from the service class information provided through NBN Co's service qualification system)
- know when pull through may occur (having lodged the connection order),
- have an opportunity to inform the end-user of the potential for pull through to be used and the impact that it will have on their existing services
- be best placed to inquire as to whether the end-user has any special needs services on their line (e.g. medical alert services or priority assistance services) and to encourage the end-user to make arrangements to prepare for the service outage (i.e. order interim call diversion services etc).

In light of the above, the ACCC considers that the assignment of rights and responsibilities and therefore legal liability between the parties must reflect that pull through involves a gaining service provider model of customer transfer. As a result, the ACCC recognises that there will be processes outside of Telstra's control that will be important to facilitating a smooth end-to-end pull through process for end-users. For

¹⁸ NBN Co Corporate Plan 2012-2015, 6 August 2012, p. 37.

example, contractual arrangements between NBN Co and NBN RSPs may be the best mechanism by which to promote informed end-user consent to pull through.

Chapter 6 of this decision paper outlines a number of arrangements relating to the connection process that parties have raised through the public consultation process which may help promote continuity of service for end-users. The ACCC considers that these proposals may serve to complement the processes and arrangements provided for under the required measures. For example, the consents, releases and undertakings sought from wholesale customers in favour of NBN Co under required measure 1(a) may be provided subject to any instructions that the service provider submits with a connection order.

Notwithstanding the above, the ACCC does not consider that the losing service provider has no role to play in ensuring the smooth migration of the end-user during pull through. This is because, there may be instances in which a losing service provider is, in a practical sense, best placed to ensure that the period of the service outage is minimised.

For example, where there is churn of the voice service provider, the NBN RSP (the gaining service provider) may not be in a position to provide call diversion services. The NBN RSP could encourage the end-user to consider setting up a call diversion service for their existing voice service. If they are a Telstra retail customer, the end-user may be able to set up call diversion services for themselves. However, where they are an end-user of a Telstra wholesale customer, they will have to contact the losing service provider (the Telstra wholesale customer) to set up call diversion on their behalf. As a result, the losing service provider may be best placed to help the end-user manage the effects of the service outage or any pull through exception event.

Ultimately, the ACCC considers that the guiding principle for assigning liabilities between NBN Co and NBN RSPs during pull through should be which party can most efficiently manage the risk at each stage of the end-to-end process. In light of the above, while the ACCC considers that responsibility for managing risk to end-users during pull through should reflect a gaining service provider model of customer transfer, the ACCC also recognises that until the end-user chooses to disconnect their existing copper services, the losing service provider can play an important role in ensuring service continuity.

The following sections detail the ACCC's concerns and responds to wholesale customer concerns with draft required measure 1(a) and (b).

4 Process to obtain consents and releases from wholesale customers for pull through activities to occur

Before an NBN Co contractor undertakes pull through at a premises they are obliged to contact Telstra to confirm what lines can be used for pull through. NBN Co cannot use a line for pull through that Telstra identifies as “non-removable”. This includes where the service provider of the existing communications services has not provided consent for NBN Co to use pull through.

Under the Definitive Agreements, Telstra has provided NBN Co with consents and releases to allow pull through on cables over which it provides services.¹⁹ However, such consents and releases have not been obtained for other service providers. Given that Telstra has the direct contractual relationships with its wholesale customers, Telstra is obliged under the Definitive Agreements to use “reasonable endeavours” to obtain the required consents, releases and undertakings that will enable NBN Co to use pull through.

Under clause 10.1(c) of the migration plan Telstra has committed to inform NBN Co that a LIC is not suitable for pull through where:

- (i) a copper line is used to supply a wholesale service and the wholesale customer has not given prior consent to pull through
- (ii) where there is more than one copper line over which wholesale services are being supplied and not all affected wholesale customers have given prior consent to pull through.

At the time Telstra lodged the migration plan with the ACCC, it had not yet concluded upon the process it would follow for obtaining the consent of its wholesale customers for pull through. Clause 10.1(d) of the migration plan obliges Telstra to develop a standardised process that enables it to use reasonable endeavours to obtain:

- the consent of its wholesale customers to NBN Co undertaking pull through
- a release in favour of NBN Co for certain losses and claims arising out of or in relation to pull through activities
- the consent of wholesale customers for NBN Co to use and disclose information for the purposes of NBN Co performing pull through activities
- an undertaking from wholesale customers to provide information directly to NBN Co as to whether there is a priority assistance, medical alert or alarm

¹⁹ Draft required measure 1(a), p. 2.

service provided over a copper line (or service with substantially similar service levels to the foregoing).

The purpose of required measure 1(a) is to set out the new standardised process by which Telstra will give effect to its obligation to use “reasonable endeavours” to obtain these consents, releases and undertakings from its wholesale customers.

4.1 Telstra’s proposed draft required measure 1(a)

Under draft required measure 1(a), Telstra proposes to obtain, on a once off and global basis, the consents, releases and undertakings from wholesale customers outlined above.

Telstra proposes to do this via a Deed Poll which, if agreed to by the wholesale customer, can then be used by Telstra to confirm with NBN Co whether a cable can be used to perform pull through.

Clause 1.2 of the draft Deed Poll sets out the relevant consents sought from wholesale customers:

(a) [Customer] consents to:

- (i) NBN Co Entity undertaking Pull Through Activities;
- (ii) NBN Co Entity installing a Temporary Cable and Telstra Person supplying the carriage services over the Temporary Cable
- (iii) any outage of the carriage services on the Pull Through Cable:
 - (A) from the start of the Pull Through Activities until Cable Rectification; or
 - (B) in connection with the installation or replacement of any Temporary Cable;
- (iv) NBN Co Entity suspending Pull Through Activities if there is a Pull Through Exception Event; or
- (v) NBN Co Entity not performing or completing Cable Rectification (which may result in a Temporary Cable continuing to be used, NBN Co Entity not being able to install a Temporary Cable or a continuing outage of the carriage services) if:
 - (A) a Pull Through Exception Event has continued for more than 90 days;
 - (B) an appointment time to complete the relevant work has not been agreed between the end-user and NBN Co Entity to occur within 90 days after the Pull Through Exception Event is no longer in effect;
 - (C) an appointment time to remove any Temporary Cable and perform permanent Cable Rectification has not been agreed with the end-user and NBN Co Entity within 90 days after the date of installation of a Temporary Cable.

(b) [Customer] consents to NBN Co Entity not performing Cable Rectification if there is a Complete Migration Event.

Under clause 1.3 of the draft Deed Poll, Telstra also seeks contact details for wholesale customers and a consent for Telstra and NBN Co to use and disclose this information for purposes of pull through.

The draft Deed Poll also seeks an undertaking from wholesale customers to perform certain tests to ensure the connectivity of reinstated or temporary lines to premises at which pull through has been used. ‘Reinstatement tests’ are to be used to ensure the connectivity of reinstated copper lines or HFC cables. ‘Remote tests’ will be used to ensure the connectivity of temporary lines. Telstra wholesale customers may expressly indicate that they do not require these tests to be performed.²⁰

4.2 December discussion paper and submissions received

In addition to seeking general feedback on the compliance of the draft required measure 1(a) with the Determination, the December discussion paper sought feedback from interested parties on whether:

- The global nature of the consent sought under the draft Deed Poll undermine the capacity of wholesale customers to manage the period of the service outage for their end-users.
- The release sought under clause 1.6(c) of the draft Deed Poll releasing Telstra and NBN Co for liability for the operation of communications services over reinstated or temporary copper lines could undermine continuity of service objectives.
- The undertaking sought under clause 1.5 of the draft Deed Poll for wholesale customers to provide information on priority assistance and medical alert services to NBN Co on request is adequate to ensure continuity of service for consumers of these services.
- Wholesale customers should be required to perform certain tests to confirm that reinstated or temporary lines can supply communications services.

The submissions from iiNet, AAPT, Optus, Tunstall Healthcare and the ITA Adjudicator addressed some or all of these issues. Telstra’s supplementary submission and NBN Co’s submission also addressed the above matters.

In its submission, iiNet sought confirmation of its understanding that the Deed Poll is part of the required measure as it “is the process whereby Telstra will be obtaining consents.”²¹

The ACCC considers that the draft Deed Poll must be considered as part of the required measure because it is a fundamental element of Telstra’s proposed standardised process for using reasonable endeavours to obtain the relevant consents, releases and undertakings required by clause 10.1(d).

²⁰ The December discussion paper, p. 10.

²¹ iiNet submission, February 2013, pp. 2 and 8.

4.3 ACCC assessment of draft required measure 1(a)

The ACCC considers that Telstra's draft required measure 1(a) does not comply with the Determination. In particular, the ACCC considers that:

- The global consent sought under the draft Deed Poll does not facilitate, to the extent that it is within Telstra's control, the management by wholesale customers of the migration of their customers in a way that minimises the period of the service outage occasioned by pull through.
- The releases sought by Telstra under the draft Deed Poll may substantially undermine continuity of service objectives. This is because they may release Telstra from responsibility for the copper based carriage services in those circumstances where the copper will continue to be used to provide services after pull through occurs. This is inconsistent with Telstra's existing obligations to manage service outages on the copper network.

Attachment A contains illustrative guidance as to how the ACCC considers Telstra may best address its concerns.

The following section details the ACCC's concerns and responds to wholesale customer concerns with draft required measure 1(a).

The contractual mechanisms that the ACCC considers may serve to complement the required measure in promoting continuity of service objectives are discussed separately in Chapter 6.

4.3.1 The global nature of the consents and notice of pull through

Telstra is seeking to obtain wholesale customer consent to pull through on a once off and global basis. Clause 1.1 of the draft Deed Poll states that:

This deed poll consists of consents, releases and undertakings for the benefit of each NBN Co Person and each Telstra Person. This deed poll will apply in **respect of each carriage service [Customer] acquires from Telstra that is supplied by Telstra to [Customer] via a Copper Line in a LIC.** [emphasis added]

The consent to pull through activities and the disclosure of information to Telstra and NBN Co are sought under clauses 1.2 and 1.3 of the draft Deed Poll outlined at [4.1].

In its supporting submission, Telstra has stated that an "efficient and practical process is required (for obtaining wholesale customer consents) because Telstra must respond to NBN Co pull through inquiries within one hour".²²

For the ACCC to be satisfied that required measure 1(a) complies with the Determination, it must satisfy the continuity of service and equivalence objectives of

²² Telstra's supporting submission to required measure 1(a), August 2012, p. 3.

sections 8 and 21 of the Determination. The December discussion paper sought comment from interested parties on the following specific areas of concern:

- Whether a global consent could undermine the capacity of wholesale customer to manage the period of the service outage for their end-users and minimise disruption to the supply of communication services to their end-users.
- What arrangements for providing consent to pull through would be most likely to benefit wholesale customer autonomy while also not unduly limiting the timeliness and efficiency of the pull through process.

To assist interested parties in preparing their submissions, the December discussion paper noted a number of proposals that may alleviate these concerns. In particular, the December discussion paper sought feedback on whether the inclusion of a process for notifying wholesale customers ahead of the use of pull through might assist wholesale customers to manage service continuity for their end-users. Other proposals included whether to allow wholesale customers to provide consent on a global basis, but to also identify certain premises or services for which that consent is not granted or whether to allow consent on a line by line basis.

Submissions received on the nature of the global consents and the Deed Poll

iiNet and ACCAN do not support Telstra's proposed global consents approach. iiNet considers that there will be certain migration scenarios in which the global consent will undermine the capacity of wholesale customers and end-users to prepare for a service outage, as they may not be notified of pull through prior to its occurrence.²³ iiNet describes the following two scenarios to highlight its concerns:

Scenario 1 - There are two separate retail customers at a premises, Retail Customer 1 and Retail Customer 2. Retail Customer 1 is supplied by RSP 1. Retail Customer 2 is supplied by RSP 2. The services supplied to Retail Customer 1 and Retail Customer 2 use the same lead in conduit. The services supplied to Retail Customer 1 and Retail Customer 2 are not Excluded Services. It was not possible to connect the premises to the NBN during the 'build drop' phase. Both RSP 1 and RSP 2 provide the Consents, Release and Undertaking to Telstra. Retail Customer 1 requests RSP 1 to provide Retail Customer 1 with an NBN service and to simultaneously disconnect Retail Customer 1's copper service. RSP 1 obtains consent from Retail Customer 1 for NBN Co to undertake pull through activities. The NBN installer decides it is appropriate to use pull through. Telstra advises that the required consents have been given. NBN Co proceeds with the pull through which causes an outage to Retail Customer 1's service and Retail Customer 2's service in circumstances where Retail Customer 2 has not consented to it and neither Retail Customer 2 nor RSP 2 had any prior notice of the outage.

Scenario 2 - The retail customer receives a voice telephone service from RSP 1, and a broadband service (provided by means of the LSS) from RSP 2. The retail customer requests RSP 2 to provide the retail customer with an NBN broadband service. RSP 2 obtains consent from retail customer for pull through. However, the retail customer proceeds on the assumption that the outage will only affect the broadband service and not the voice telephone service.²⁴

²³ iiNet submission, February 2013, p. 6.

²⁴ Ibid.

To address this, iiNet suggests that consent to pull through should be given only with the submission of a connection order with NBN Co. iiNet suggests that the function of the NBN Co contractors call to Telstra is then principally for the purpose of alerting NBN Co of the need to obtain consent from other wholesale customers.²⁵

iiNet submits that while it is willing to provide consent to the disclosure of confidential information on a global basis, clause 1.3(b) of the draft Deed Poll is too broad given that the scope of the information that NBN Co may use and disclose is undefined.²⁶

ACCAN cites the scenarios outlined in iiNet's submission and states that it favours an approach that would avoid the consequences identified by iiNet by giving "more autonomy to retail service providers to respond in a flexible manner to the needs of their customers."²⁷

AAPT and Optus support global consents in principle, but object to the nature and form of the consents sought under the draft Deed Poll. Both parties consider that they would not sign the Deed Poll in its current form given the wide scope of the consents, releases and undertakings sought and the corresponding lack of clarity as to the responsibilities of Telstra and NBN Co in the end-to-end process.

Optus submits that while it agrees that it is efficient for wholesale customers to provide a global consent for pull through:

Optus cannot agree to the global consent taking the form of a deed poll. A deed poll by nature is a one-sided instrument that places responsibilities and liabilities on one party while it releases other relevant parties of any accountabilities and liabilities. Wholesale customers impacted by pull through will have virtually no control over the event, yet the wholesale customer is made accountable when issues arise as a result of pull through and is fully liable in the event of loss or claim arising as a result of pull through.²⁸

As a solution, Optus proposes that the responsibilities of wholesale customers, Telstra and NBN Co should be concluded via a three party agreement. This agreement should also include service levels for each stage of the process. By way of example, Optus highlights the need for service levels for how long pull through is to take, exception event notification timeframes and a commitment from NBN Co that end-users will not be without a service at the end of pull through activity.²⁹

AAPT submits "wholesale customers are effectively being requested to consent to NBN Co carrying out pull through by any process it determines...[which is] not so unreasonable but for the Deed Poll *also* requiring wholesale customers to indemnify both NBN Co and Telstra against any claims should the pull through process determined

²⁵ Ibid.

²⁶ Ibid.

²⁷ ACCAN submission, February 2013, p. 2.

²⁸ Optus submission, February 2013, p. 4.

²⁹ Optus submission, February 2013, p. 5.

by NBN Co adversely affect AAPT's interest."³⁰ AAPT also does not consider it "practical or appropriate" for AAPT to provide consent on behalf of its own wholesale customers, noting that "Telstra itself has not been willing to do that."³¹

Submissions received on the proposal for a notification commitment

Submissions noted the following in relation to the effectiveness of a requirement that Telstra notify wholesale customers of pull through at the time pull through is to occur:

- Optus considers that "prior notification is unlikely to improve overall management of the customer." Optus submits that it is more important to establish a "well defined set of obligations on NBN Co and Telstra."³²
- The ITA Adjudicator submits that "such notice would mean that Telstra Wholesale customers would have the ability to manage their end-user expectations in a manner similar to the expectation management that Telstra Retail could adopt. That is, such notice would be consistent with Telstra's obligations under clause 9.3 of the Plan."³³

The TIO noted that the prevalence of wholesale arrangements in the industry means that any notification process must be distributed to all service providers in order that they have an equivalent opportunity to manage the period of the service outage.³⁴

Rather than a notice requirement, AAPT submits that a wholesale customer's ability to manage outages for their end-users and their own wholesale customer will be improved by allowing them to withdraw consent on a "per end-user basis or service type basis, subject to ...a legitimate need being established."³⁵ Further measures that AAPT considers would benefit wholesale customers include requiring NBN Co to:

- inform wholesale customers that pull through may be required at the time that the contractor advises an end-user that they were unable to connect their premises during the build drop stage
- allow wholesale customers to manage and change pull through appointment times.³⁶

In response to AAPT, NBN Co states that it is "not feasible for NBN Co to advise the Telstra wholesale customer that a pull through can be used at the time an end-user is

³⁰ AAPT submission, February 2013, pp. 3-4.

³¹ Ibid, p. 6.

³² Optus submission, February 2013, p. 7.

³³ ITA Adjudicator submission, February 2013, p. 4.

³⁴ TIO letter to the ACCC, February 2013, p. 1.

³⁵ AAPT submission, February 2013, p. 7.

³⁶ Ibid.

advised their premises could not be connected to the NBN during the build drop process....NBN Co will not know the identity of the Telstra wholesale customer.”³⁷

Telstra’s supplementary submissions

In its first supplementary submission, Telstra submits that in situations where the end-user is migrating to the NBN with their existing service provider, the wholesale customer will “have the capacity to minimise the service interruption from pull through because the installation date is settled and can be changed and the ‘long lead time’ allows them to have service interruption measures in place.”³⁸

NBN Co disagreed with this contention in its submission, stating that:

the lead time for any appointment to be connected to the NBN will depend on the preference of the NBN Co customer and end-users as well as the availability of appointment times in NBN Co’s appointment calendar. NBN Co’s service levels will also be relevant. Depending on these factors, the lead-time for a connection to the NBN may not be significant.³⁹

Telstra acknowledges that in cases of churn during migration, the existing service provider will not know the installation date, and in the absence of notice, will be unable to arrange interim services. However, Telstra asserts that this is not a concern as principal responsibility for managing the service outage should lie with the gaining service provider, adding that the “migration plan principles do not specify a role for the losing service provider...(as they have) nothing to do with connection to the NBN services.”⁴⁰

Telstra also suggests that a gaining service provider will be placed on notice as to the potential need for pull through if the premises is categorised as a “service class 1” premises in NBN Co service qualification system. A “service class 1” refers to a premises that is NBN Serviceable for the purposes of being able to be supplied with a NBN Fibre Access Service (NFAS), but may not yet be physically connected to the NBN via drop fibre to the Premises Connection Device (PCD).⁴¹

In regards to alternative approaches to obtaining consents, Telstra submits that the benefits of any “qualified” or carved out consent arrangements would be outweighed by the added costs to Telstra of having to “identify, access and match the ‘opt out date’ of each wholesale customer providing services on any lines in the LIC.” Telstra also suggests that there would be increased deployment costs for NBN Co and administrative

³⁷ NBN Co submission, February 2013, p. 15.

³⁸ Telstra’s first supplementary submission, February 2013, p. 4.

³⁹ NBN Co submission, February 2013, p. 12.

⁴⁰ Ibid.

⁴¹ The other reason for a premises being service class 1 is that there may be some service augmentation or patching between the PCD and the NAP (Network Access Point) required for the supply of the NFAS. As defined in the *NBN Co Briefing Paper and Request for Expressions of Interest*, 28 September 2012, p. 9.

costs and difficulties associated with verifying whether individual wholesale customers are abiding by opt out rules.”⁴²

In its second supplementary submission, Telstra responded to AAPT’s opposition to providing consent on behalf of its own wholesale customers.⁴³ Telstra stated that “the coherence and efficiency of the global consent process breaks down if re-suppliers of wholesale customers could carve themselves out of the global consent given by wholesale customers.”⁴⁴ Telstra submits that any amendment to the global consent arrangements to address this concern would involve costs to Telstra and wholesale customers and would introduce inefficiencies and uncertainties into the process.

In regards to the introduction of a possible notification requirement, Telstra states that its effectiveness would be limited by the following:

- Telstra will not know whether the current wholesale customer is the NBN RSP.
- Telstra has only one hour to respond to NBN Co’s inquiries and therefore any notice is unlikely to be of much practical value to managing service outages.
- Line by line notification would substantially complicate the pull through process.⁴⁵

ACCC views on the global nature of the consents and notice of pull through

The ACCC considers that as it is in Telstra’s control to determine the form that the consents may take, it is obliged by section 8(3) of the Determination to seek consents for pull through in a manner that facilitates wholesale customer management of the period of the service outage.

The ACCC considers that Telstra’s proposed approach does not reflect an arrangement that allows for wholesale customers to manage the pull through process to the extent that it is reasonably in Telstra’s control to do so. As a result the ACCC is not satisfied that draft measure 1(a) complies with the Determination.

The ACCC recognises that acquiring the consents on a global basis is likely to be more efficient for Telstra and NBN Co.⁴⁶ However, the ACCC considers that an unqualified consent is inappropriate given the wide variety of migration scenarios in which pull through may be used. The scenarios outlined by iiNet provide useful examples of the wide variety of circumstances in which pull through may be used with potentially

⁴² Telstra’s first supplementary submission, February 2013, p. 5.

⁴³ AAPT submission, February 2013, pp. 3-4.

⁴⁴ Telstra’s second supplementary submission, March 2013, pp. 3-4.

⁴⁵ Ibid, p. 4.

⁴⁶ The December discussion paper, p. 10.

adverse consequences for those end-users and RSPs not directly involved in the NBN connection process.

As pull through is a demand driven process, the ACCC considers that the NBN RSP is best placed to manage the end-user's needs in pull through. This may be by way of informing an end-user of the potential for pull through to be used and the impact that it will have on existing communications services or by seeking information on whether the end-user has special needs, including whether they acquire priority assistance or medical alert services. This information could then be included by the NBN RSP on a connection order, thereby assisting NBN Co in responding to any special requirements the end-user has. The NBN RSP may also be obliged to acknowledge that preventing NBN Co from using pull through will likely result in the premises being connected by the installation of a new LIC or the deployment of aerial fibre. These proposals are discussed in further detail in Chapter 6.

The ACCC considers that the form of the consents sought can complement such mechanisms. One way in which it could do this is by allowing the wholesale customer to consent to pull through subject to any special instructions it provides on a connection order, e.g., that pull through is not to be used. Further, any release or indemnities the RSP has given would not be available when the instructions provided by the NBN RSP on a connection order are not complied with.

Where pull through is undertaken in cases of churn, the losing service provider (i.e. the Telstra wholesale customer), should not be required to indemnify or be liable for use of pull through. Any liability should instead attach to the gaining service provider where NBN Co has reasonably relied on any notes provided in the connection order, but the notes were incorrect, or the connection order does not include relevant notes.

The ACCC considers that the draft Deed Poll could operate as the principal mechanism for allocating rights and responsibilities between NBN Co, Telstra and wholesale customers involved in pull through. The ACCC considers that the guiding principle behind the development of the Deed Poll should be that liability for any loss or claim should attach to the party that is best placed to manage the risk.

In regards to the concerns posed in iiNet's scenarios, the ACCC considers that NBN Co should be incentivised to only use LICs that do not, for example, service multiple end-users. The ACCC notes that NBN Co has already committed to not use pull through on LICs where there are 10 or more pairs of copper lines in a LIC.⁴⁷

In response to AAPT's concerns the ACCC considers that it is unreasonable to seek the consent of a wholesale customer that resells services without that wholesale customer also seeking the consent of its resellers. That said, the ACCC considers that, in accordance with the principle that the party best placed to manage the risk should bear

⁴⁷ Definition of "non-removable cable" in the draft Deed Poll.

responsibility for it, wholesale customers should be responsible for obtaining these consents.

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

The December discussion paper noted the potential administrative benefits to all parties of a “global consent” approach. The paper also noted that any benefits of allowing wholesale customers to undertake a more granular approach to providing consent for pull through must be balanced against any efficiency costs, including any potential limits to NBN Co’s capacity to undertake pull through in a timely manner.

The ACCC does not consider that the inclusion of a qualification that consent is only provided by a wholesale customer subject to any notes or instructions on a connection order introduces any costs for Telstra. This is because the form of the consent is still provided on a global basis and will not involve the need for more sophisticated databases or more staff resources to respond to NBN Co in a timely manner. The ACCC considers that there are many benefits to the proposal. For example:

- Wholesale customers will be more willing to provide their consent to pull through because they will have greater assurance that they will not be liable for losses or claims arising from matters over which they have no control.
- Where there is no churn, the wholesale customer will have a greater capacity to manage the pull through process for their end-users as NBN Co will be incentivised to comply with any notes on the connection order.
- NBN RSPs will be incentivised to seek the informed consent of their end-users and to determine whether there are any special needs on a line. This will help inform an NBN Co installer’s decision as to whether to conduct pull through.
- NBN Co will have discretion to undertake pull through in any instance, but must bear liability for any loss or claim arising in instances in which a wholesale customer has not consented to pull through or where NBN Co has not acted in accordance with notes on a connection order.

Overall, the ACCC considers that any costs to the efficiency of the process will be minimal and outweighed by the benefits of allowing wholesale customers to manage the pull through process for their end-users (to the extent that it is in Telstra’s control to do so). Most importantly, the ACCC considers that the benefit of enabling wholesale customers to better manage the service outage for vulnerable consumers will help mitigate the potentially serious consequences of the service outage for these customers.

4.3.2 The scope of the releases under the draft Deed Poll

Clause 10.1(d)(ii) of the migration plan requires Telstra to develop a standardised process for obtaining a release from wholesale customers in favour of NBN Co for certain losses or claims arising out of or in relation to pull through.

The draft Deed Poll includes a number of clauses that release NBN Co and Telstra from liability from any loss or claim relating to the operation or lack of operation of the existing copper services that may arise from pull through. Some of the releases under the draft Deed Poll are broad. For example, clause 1.6(c) of the draft Deed Poll provides that, subject to a negligent act or omission, the wholesale customer:

...absolutely releases each NBN Co Person and each Telstra Person in relation to any Loss or Claim for or in relation to...the operation, or lack of operation, of any carriage service on a Pull Through Cable (caused) by the Pull Through Activities, Cable Rectification or installation of a Temporary cable, for the period commencing on installation of a Temporary Cable until commencement of Cable Rectification.⁴⁸

The December discussion paper invited interested parties to comment on whether the release under clause 1.6(c) of the draft Deed Poll undermines the capacity of wholesale customers to minimise the period of any service outage for their end-users.

Submissions raised concerns about clause 1.6(c) as well as the general scope of the releases sought, in particular under clause 1.6(g) of the draft Deed Poll.

Submissions received on clause 1.6(c) of the draft Deed Poll

Optus submits that clause 1.6(c) of the draft Deed Poll “puts an unfair onus on the wholesale customer to minimise the impact to end-user’s service and managing the end-user’s expectations. However, the wholesale customer will not even know that Pull Through has taken place and will have no control over the Pull Through process. This exclusion provides end-users with no comfort that any service outage resulting from Pull Through will be rectified.”⁴⁹

iiNet submits that “unless there is a clear incentive for NBN Co to deal with any problems in reconnecting the copper service (where required), end-user services could be disrupted for a longer period than necessary.” iiNet suggests that there should at least be assurance that “Telstra and NBN Co are not excluded from any liability under compensation contribution scheme established under section 118A of the Telecommunications Act.”⁵⁰

AAPT submits that clause 1.6(c) is “overly broad and makes AAPT reluctant to provide consent on a global basis.”⁵¹

The ITA Adjudicator submits that “it appears unlikely that the release will promote activity by Telstra that is compatible with achieving an equivalence (sic) outcome.” Further, the ITA Adjudicator considers that given the “Deed Poll is premised on Temporary Cables being in place for up to 90 days” there is a potential for poor outcome

⁴⁸ Draft Deed Poll, clause 1.6(c).

⁴⁹ Optus submission, February 2013, p. 9.

⁵⁰ iiNet submission, February 2013, p. 7.

⁵¹ AAPT submission, February 2013, p. 9.

for end-users. He notes that this would be particularly the case if Telstra were to obtain any exemption from the customer service guarantee.⁵²

Submissions received on other releases sought under the Deed Poll

AAPT raised a general concern with the scope of the releases under the draft Deed Poll submitting that it “should not have to indemnify either NBN Co or Telstra for causing an outage of a line carrying a special service because that line was used by NBN Co for pull through when it should never have been.”⁵³

Optus submits that the critical concern is that while wholesale customers will have no visibility of or control over the pull through process, nevertheless they are expected to assume almost all liability for the process. This is neither reasonable nor acceptable.⁵⁴

The ITA Adjudicator, AAPT and Optus raised concern over the appropriateness of the release in favour of NBN Co under clause 1.6(g) of the draft Deed Poll which states that:

Subject to clause 1.7 and 1.8 [Customer] absolutely releases each NBN Co Person and each Telstra Person in relation to any Loss or Claim for or in relation to the following:

...a failure by Telstra to notify [Customer] completely and accurately of a Pull Through Exception Event or installation of a Temporary Cable to the extent Telstra was not notified by NBN Co Entity completely and accurately of a Pull Through Exception Event or installation of a Temporary Cable.

Telstra’s supporting submissions

Telstra submits that “[a]s a point of commercial principle, Telstra should not be potentially liable for activities over which it has no effective control...the required measures and the consents between Telstra and wholesale customers are not the appropriate vehicle for any safeguards which the ACCC considers necessary to deal with the service quality of temporary cables or any other aspects of NBN Co’s pull through activities.”⁵⁵

ACCC views on the proposed releases under the draft Deed Poll

The ACCC is not satisfied that the releases sought under the draft Deed Poll comply with the requirements of the Determination.

While the December discussion paper focussed on clause 1.6(c) of the draft Deed Poll, the ACCC has concerns about a number of the other releases sought under clause 1.6.

⁵² ITA Adjudicator submission, February 2013, p. 3.

⁵³ AAPT submission, February 2013, p. 5.

⁵⁴ Optus submission, February 2013, p. 3.

⁵⁵ Telstra supplementary submission, February 2013, p. 6.

The ACCC considers that the releases sought under the draft Deed Poll ultimately allow Telstra and NBN Co to avoid liability for matters that they are much better placed to manage than wholesale customers.

The ACCC considers that Telstra should not have any release from loss or claim for the operation of existing communications services that conflict with its regulatory obligations to rectify faults over the copper network. The releases sought under clause 1.6(a) of the draft Deed Poll appear to have this effect in relation to reinstated cables while clause 1.6(c) appears to have a comparable effect in relation to temporary cables. This is inconsistent with service continuity objectives as it inappropriately limits the capacity of the wholesale customer to ensure the quality of the copper based services once pull through has occurred. The ACCC considers that it must be made clear that Telstra will remain responsible for the quality of copper based communications services until those services are disconnected.

Further, as suggested by iiNet, the ACCC considers that assurance must also be provided that “Telstra and NBN Co are not excluded from any liability under compensation contribution scheme established under section 118A of the Telecommunications Act.”⁵⁶

In addition, the ACCC considers that the releases sought from wholesale customers should be equivalent to the releases Telstra has provided to NBN Co. Telstra would not provide a release in favour of itself that avoids responsibility for the quality of communications services it provides to its retail customers. The effect of the releases sought under clause 1.6 would therefore appear to be that Telstra may not be obliged to respond to service quality complaints from wholesale customers in a manner equivalent to the way in which it will respond to service quality or fault complaints placed by retail customers with its retail business units. The ACCC considers that any release with such an effect does not comply with the equivalence objectives of section 21 of the Determination.

Notwithstanding the above, the ACCC agrees with Telstra that it cannot be held liable for activities over which it has no effective control. The ACCC understands that NBN Co will be responsible for reinstating copper lines and the installation of temporary cables. The quality of the installation work may ultimately affect the quality of the services that can be provided over these lines. NBN Co must therefore be responsible for ensuring the quality of the manual and operational work that is required to ensure that these lines are correctly reinstated or connected.

The ACCC appreciates that Telstra is obliged to use reasonable endeavours to obtain the required consents, releases and undertakings from its wholesale customers for NBN Co to undertake pull through. Chapter 6 of this decision paper provides further detail on

⁵⁶ iiNet submission, February 2013, p. 7.

why the ACCC considers that it may be unreasonable to expect wholesale customers to sign the current draft Deed Poll given the scope of the releases being sought. This discussion includes consideration of clause 1.6(g) of the draft Deed Poll.

On the basis of the above, the ACCC considers that the draft Deed Poll must be amended to ensure that Telstra, to the degree that it is within Telstra's control, will remain responsible for the continued operation of copper based carriage services on lines that have been used for pull through.

For example, the ACCC agrees that it is appropriate that Telstra should have the benefit of the release under draft clause 1.6(g) as ensuring the accuracy of information that NBN Co provides to Telstra is not reasonably within Telstra's control.

The ACCC also considers that draft required measure 1(a) must provide greater assurance that Telstra's responsibility for ensuring the operation of copper based carriage services are equivalent as between Telstra wholesale and retail carriage services.

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

The ACCC does not consider that the amendment of the releases under the draft Deed Poll to address the above concerns will result in substantial costs to Telstra. The ACCC considers that any costs that are incurred will be outweighed by the end-user benefits of improvements in wholesale customer capacity to manage the pull through process on behalf of their end-users.

The ACCC considers that any costs to Telstra that may be incurred from having to respond to service outages on a reinstated cable or temporary line in a timely manner will be commensurate with the costs it incurs in responding to such service faults already.

4.3.3 Undertaking to provide information on priority assistance and medical alert services

NBN Co has stated that it will not undertake pull through on lines that are used for medical alert or priority assistance services.

The ACCC considers that pull through should not be undertaken on lines that are used to provide priority assistance or medical alert services unless appropriate and adequate safeguards are in place to ensure the interests of these vulnerable consumers are protected.

The ACCC considers that any commitment from NBN Co on priority assistance and medical alert services will only be effective if the relevant information is made available to NBN Co. For example, while NBN Co has made the above public statement it is not clear to the ACCC how NBN Co will ensure that its installers will have the requisite

information to ensure that they do not undertake pull through at such premises. The ACCC considers that the draft Deed Poll provides one mechanism by which NBN Co can obtain this information.

Clause 10.1(d)(iv) of the migration plan requires Telstra to develop a standardised process that enables it to use reasonable endeavours to obtain an undertaking by the wholesale customer to provide information, if requested to do so, directly to NBN Co on whether they provide a priority assistance or a medical alert service over a copper line.⁵⁷ Clause 10.1(f) of the migration plan states that Telstra is not responsible for providing NBN Co with any information on the priority assistance and medical alert services status of a wholesale customer line.

Clause 1.5 of the draft Deed Poll seeks to implement clause 10.1(d)(iv) of the migration plan as follows:

1.5 [Customer] to provide information to NBN Co Entity on request

If:

(a) there is one of the following types of services being supplied over the Copper Line (other than by Telstra):

- (i) a priority assistance service;
- (ii) a medical alert service;
- (iii) an alarm service; or
- (iv) a service with substantially similar service levels to the services listed in clauses 1.5(a)(i) to 1.5(a)(iii); and

(b) NBN Co Entity requests information as to whether any of those services is being supplied over the Copper Line for the purposes of Pull Through Activities,

then:

(c) [Customer] undertakes to provide that information under this clause 1.5 completely and accurately to NBN Co Entity directly and immediately on request; and

(d) [Customer] indemnifies each Telstra Person and each NBN Co Entity for any Loss or Claim arising out of or in relation to a failure by [Customer] to provide that information under this clause 1.5 completely and accurately to NBN Co Entity immediately on request.

In the December discussion paper, interested parties were invited to comment on:

- Whether the required measures provide assurance that wholesale customers of Telstra obtain and supply information to NBN Co regarding the existence of priority assistance and medical alert services.
- What information do wholesale customers currently provide to Telstra about priority assistance and medical alert services.
- Could the required measures be amended in any way to provide additional assurance that priority assistance and medical alert customers will be identified to NBN Co.

⁵⁷ “or a service with substantially similar service levels to the foregoing”.

- What other measures could be established to provide such additional assurance.

As clause 1.5 of the draft Deed Poll is the principal means by which Telstra is seeking to obtain the undertaking from wholesale customers, the following sections detail the submissions relevant to the ACCC's assessment of required measure 1(a). Submissions on other proposals to address the issue are dealt with separately at Chapter 6.

Submissions received on the undertakings sought under the draft Deed Poll

Optus and Tunstall Healthcare submit that the required measures do not provide sufficient assurance for the provision of information about priority assistance and medical alert services to NBN Co.

Optus states that a wholesale customer would not be aware of any service until it checks its database. Optus indicated that it provides priority assistance information to Telstra for Wholesale Line Rental customers; however, there is no mechanism to provide this information for ULL customers.⁵⁸ Optus submits that "Telstra should have this information in its data base and should be able to provide confirmation to NBN Co. Telstra and NBN Co should also be able to contact the wholesale customer for further confirmation if required."⁵⁹

Optus notes that in cases of churn the NBN RSP will have no knowledge of the type of service the end-user may have and will have to rely on the end-user to provide this information.⁶⁰

AAPT submits that "wholesale customers already supply information about priority assistance and medical alert services to Telstra, who then tags the relevant line as a priority assistance line."⁶¹

iiNet submits that the required measures do provide sufficient assurance of the provision of priority assistance and medical alert services to NBN Co. However, iiNet raises concern that the scope of the undertaking to provide information is too broad as it "could put an obligation on the wholesale customer to provide information to NBN Co and indemnify Telstra and NBN Co in respect of the accuracy of that information." iiNet notes that it does not provide priority assistance and medical alert services.⁶²

Telstra's supplementary submissions

In its first supplementary submission, Telstra states that the draft Deed Poll allows wholesale customers to exclude their priority assistance customers from pull through

⁵⁸ Optus submission, February 2013, p. 9.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ AAPT submission, February 2013, p. 9.

⁶² iiNet submission, February 2013, p. 12.

and to also provide this information directly to NBN Co if they wish.⁶³ Telstra submits that the required measures are not the appropriate mechanism by which to address these concerns.

The ACCC also understands from Telstra that while Telstra will know if a wholesale line rental service is being used to provide priority assistance, it will not know this for a ULLS based service. Further, given that medical alert services are provided by third party over the top providers, the ACCC understands that neither Telstra nor wholesale customers will know whether a line is being used to provide these services.

ACCC views on the draft Deed Poll

The ACCC considers that the need for clarity in the assignment of responsibilities for providing information to NBN Co on priority assistance and medical alert services is paramount given the potentially serious consequences that may arise from the service outage occasioned by pull through.

The ACCC considers that the arrangements proposed in required measure 1(a) do provide some assurance that information on priority assistance and medical alert services provided over a particular copper line will be made available to NBN Co when it is deciding on the use of pull through. However, the ACCC considers that as Telstra is responsible for the form of the undertaking that is sought through required measure 1(a), it is within Telstra's control to seek an undertaking that provides greater assurance that information on priority assistance and medical alert services will be provided to NBN Co.

More specifically, the ACCC considers that the draft Deed Poll could be amended to seek an undertaking from wholesale customers to provide information on the special needs of an end-user on any connection order they place in their capacity as an NBN RSP. The ACCC considers that such an amendment is consistent with the principle that the party that is best placed to manage the risk is assigned responsibility for it. This is because a gaining service provider (the NBN RSP) will be best placed to collect information on an end-user's special needs directly from the end-user at the point of sale of NBN services.

Such a commitment could also be sought through or complemented by contractual arrangements between NBN Co and NBN RSPs. The possible scope of such a mechanism is discussed in further detail at Chapter 6 of this decision paper.

The ACCC also recognises that the ready availability of such information to an NBN RSP will depend in part upon whether the end-user was churning in migration to the NBN. Where the end-user is not churning, the ACCC considers that a failure to include such information in the notes field of a connection order should mean that the NBN RSP

⁶³ Telstra's first supplementary submission, February 2013, p. 7.

is liable for any loss or claim relating to matters that NBN Co had not been notified of. The ACCC considers that such an undertaking is appropriate because where the service provider remains the same during migration, they will be best placed to know or obtain information on the nature of the services that are provided to their end-user. By requiring them to make this information available to NBN Co greater assurance is provided that vulnerable end-users will be protected during pull through.

Where the end-user is churning, the ACCC considers that the NBN RSP should be obliged to undertake reasonable enquiries of the end-user to determine whether their customer has special needs. If the information is made available to the NBN RSP then they should be obliged to disclose this to NBN Co.

Proposed contractual commitments on NBN RSPs to use reasonable endeavours to collect this information and disclose to NBN Co whether they have or have not obtained it from the end-user at the point of sale are discussed in further detail at Chapter 6.

The ACCC considers that amending the draft Deed Poll to include an undertaking from wholesale customer to provide information on the special needs of their end-users on a connection order may complement the proposals discussed in Chapter 6. Together these measures should help ensure that the potentially adverse consequences of the service outage for vulnerable consumers are minimised.

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

The ACCC does not consider that amendment of the draft Deed Poll to seek a more specific undertaking from wholesale customers to provide information on priority assistance and medical alert services to NBN Co will involve costs to Telstra.

Any costs that do arise will be borne by all NBN RSPs and will involve administrative costs associated with ensuring that accurate and complete information on the nature of the services acquired by their end-users is provided to NBN Co.

The ACCC considers that the benefits to consumer protection that will accrue from maximising assurance as to the availability to NBN Co of accurate and complete information on the special needs of end-users will outweigh any costs incurred by RSPs associated with meeting these commitments.

4.3.4 Tests to determine whether service has been restored

The draft Deed Poll seeks an undertaking from wholesale customers to perform certain tests to ensure the connectivity of reinstated or temporary lines to premises at which pull through has been used.⁶⁴

⁶⁴ 'Reinstatement tests' are to be used to ensure the connectivity of reinstated lines while 'Remote tests' will be used to ensure the connectivity of temporary lines that have been installed by NBN Co.

The December discussion paper highlighted that if a wholesale customer opted out of undertaking these tests, there appeared to be little capacity for the end-user to confirm that the reinstated or temporary lines will be capable of recommencing the supply of existing services. This could prove to be problematic for end-users who do not migrate all their services over to the NBN on the connection date.

The ACCC indicated that, particularly in light of the scope of the releases under clause 1.6 of the draft Deed Poll, allowing wholesale customers to opt out from these tests may inappropriately undermine the migration plan's continuity of service objectives. The December discussion paper invited interested parties to comment on this issue.

Submissions received

iiNet, Optus and AAPT submit that NBN Co should have the principal responsibility for reinstating and testing the operation of copper services after pull through.⁶⁵

iiNet submits that the any requirements on wholesale customers to conduct tests should distinguish between tests for "on-net" and "off-net" services.⁶⁶ iiNet suggests that agreements should be concluded with NBN Co that set out the tests to be undertaken and the obligations on Telstra to conduct the tests where they are better placed to do so, for example in relation to "off net services".⁶⁷

The ITA Adjudicator also notes that wholesale customers are limited in their capacity to test the operation of non-ULLS based services. The ITA Adjudicator notes that as a result, the "reasonable endeavours" of a wholesale customer to undertake the test are limited by Telstra's actions in allowing the test to take place. The ITA Adjudicator suggests that the undertaking to perform the tests should be on a "per end-user basis" rather than the proposed global basis.⁶⁸

Optus submits that the restoration of the service can be tested by checking whether there is a dial tone. Optus suggests that this can be done at first instance between NBN Co and the end-user but if "further testing is required, then the end-user should contact the wholesale customer to arrange this."⁶⁹ AAPT agrees though considers that more clarity is required around what the tests involve.⁷⁰

ACCAN submits that there is a need for a clear commitment from NBN Co to ensure that the existing communications services are reinstated and functioning properly.⁷¹ The

⁶⁵ iiNet submission, February 2013, pp.12-13; Optus submission, February 2013, p.10; AAPT submission, February 2013, p. 10.

⁶⁶ iiNet submission, February 2013, pp. 12-13.

⁶⁷ Ibid.

⁶⁸ ITA Adjudicator submission, February 2013, p. 5.

⁶⁹ Optus submission, February 2013, p. 10.

⁷⁰ AAPT submission, February 2013, p. 10.

⁷¹ ACCAN submission, February 2013, p. 2.

TIO states that it is important that a robust framework for ensuring the functionality of existing communications services after pull through is established.⁷²

Telstra's supplementary submissions

Telstra submits that the objective of the migration plan principles "is to enable wholesale customers to minimise service disruption, not to mandate them to continue to provide service...requiring the RSP to go to the expense and trouble of participating in retesting where the RSP has no continuing supply obligations serves no purpose." Telstra also suggests that such a requirement would be outside the scope of the required measures which can only apply to Telstra.⁷³

ACCC views

In light of submissions in response to this issue, the ACCC does not consider that wholesale customers should be required to conduct remote and reinstatement tests.

The ACCC notes NBN Co's statement that it is obliged to ensure that the existing communications services can be supplied over any reinstated or temporary cable.⁷⁴ Further, the ACCC understands that NBN Co will undertake certain tests of its own to ensure the functionality of these lines before it leaves the premises. The ACCC considers that such commitments provide greater assurance of continuity of service for end-users.

That said, the ACCC strongly encourages RSPs to opt-in to any testing arrangements established by NBN Co to determine whether a reinstated line or temporary cable is capable of providing the existing communications services.

The ACCC notes that, in its submission, NBN Co acknowledged iiNet's concerns in relation to distinguishing between tests for on-net and off-net services. NBN Co indicated that it considers that it would not be feasible to establish a separate agreement with each wholesale customer to govern what tests will be undertaken. However, NBN Co clarified that regardless of the variance in the nature of the tests undertaken, the principal objective of the tests will be to determine whether a line is active and has been successfully reconnected.⁷⁵

4.3.5 Other concerns with draft required measure 1(a)

AAPT raised concerns in relation to clause 2.2 and 3.1(c) of the draft Deed Poll.

AAPT submits that clause 2.2 of the draft Deed Poll, which allows Telstra to terminate the Deed Poll if the ACCC approves a required measure 1(a) in a form that is

⁷² TIO letter to the ACCC, February 2013, p. 2.

⁷³ Telstra's first supplementary submission, February 2013, p. 8.

⁷⁴ NBN Co submission, February 2013, p. 8.

⁷⁵ Ibid, p. 18.

inconsistent with the Deed Poll, is inappropriate. AAPT submits that this clause should be replaced with a clause to the effect that the Deed Poll ceases to apply to the extent of any inconsistency with the approved required measure.⁷⁶

AAPT also submits that clause 3.1(c) of the draft Deed Poll, which relates to the processes for publication of operational notices for notification events (see required measure 1(b) discussion below), should be deleted as wholesale customers should not be required to comply with processes that will be set out at a later date.⁷⁷

Optus raised concern about whether Telstra had in fact negotiated with wholesale customers in “good faith” about the pull through processes as required by section 23 of the Determination.⁷⁸

ACCC Views

The ACCC notes AAPT’s concerns relating to clause 2.2 of the draft Deed Poll. The ACCC does not consider that AAPT’s concerns relating to clause 3.1(c) of the draft Deed Poll are material concerns. This is because the process referred to therein, namely that for the provision of operational notices relating to pull through exception events, relates to the process outlined under draft required measure 1(b).

The ACCC notes Optus’ concern that Telstra has not negotiated with wholesale customers in good faith in relation to the development of required measure 1(a). The ACCC understands that many of the concerns raised in public submissions to its December discussion paper reflect the same concerns raised by wholesale customers during Telstra’s consultation with wholesale customers.

In light of this, the ACCC encourages Telstra to consult further with industry in amending the required measures to address the ACCC’s concerns.

The ACCC also notes that section 19(2) of the Determination requires that the migration plan must set out “any known circumstances where a wholesale customers may not be able to”...”take reasonable steps...in order to control the timing of the disconnection of by Telstra of wholesale carriage services.” Draft required measure 1(a) is silent as to when this may be the case in relation to pull through, such as where there is a complete migration event. The ACCC considers that draft required measure 1(a) should be amended to provide clarity in this regard.

⁷⁶ AAPT submission, February 2013, p. 7.

⁷⁷ Ibid.

⁷⁸ Optus submission, February 2013, pp. 3 and 5.

5 Process to notify wholesale customers of pull through exception events

In some cases, difficulties will be encountered during pull through and it may not be completed on the day. For example, poor weather conditions or an unmanageable occupational health and safety risk (fire, flood etc) may require the NBN Co contractor to discontinue the pull through process. Such circumstances are known as “pull through exception events”. Telstra states that the three most common types of pull through exception events are:

- Prevention of completion of pull through activities—where NBN Co’s fibre has not been passed through the LIC to the premises and cable rectification is not completed. This could occur if an end-user withdrew consent during the pull through process.
- Prevention of cable rectification—where the copper line was fully or partly removed during the pull through process but NBN Co cannot return the previous (or replacement) copper line back into the conduit. This could occur if adverse weather conditions required the NBN Co contractor to leave the site during the pull through process.
- Prevention of installation of a temporary cable—where NBN Co is prevented from installing a temporary cable to provide services on the NBN. A temporary cable will only be installed in circumstances where the copper line (or replacement) cannot be reinstated in the conduit. This could occur if the installing the temporary cable would expose the NBN Co contractor to an unmanageable workplace health and safety risk.⁷⁹

Pull through exception events have the potential to extend the period of the service outage occasioned by pull through. As the network operator of the copper access network, Telstra is best placed to identify the services or the wholesale customer that may be affected by a pull through exception event. Telstra can thus play an important role in helping to ensure that retail end-users and wholesale customers are notified of a pull through exception event and thereby able to manage any long term impact.

Clause 10.2 of the migration plan requires Telstra to develop a required measure outlining how it will give prompt notification to affected wholesale customer(s) if NBN Co advises Telstra that a pull through exception event has occurred or that NBN Co has installed a temporary cable (together referred to as ‘notification events’).

Draft required measure 1(b) outlines how Telstra proposes to advise wholesale customers that a notification event has occurred.

⁷⁹ Draft required measure 1(b), p. 3.

5.1 Telstra's draft required measure 1(b)

Part 5 of draft required measure 1(b) outlines the steps that Telstra will take to advise affected wholesale customers of a notification event:

- NBN Co will report a notification event to Telstra (currently via telephone to Telstra's help desk). The Telstra help desk will be staffed by trained Telstra employees between 7am and 8pm (Sydney time) Monday to Friday, excluding national public holidays. Outside these hours there will be a recorded message advising NBN Co to report notification events when the help desk is open.
- Telstra will record the notification event in the NBN Transition Tool (NTT)—the Telstra IT system that stores migration address and service information.
- NTT will match the details of the affected premises with details in Telstra's own system and will identify any wholesale customer(s) affected by the notification event.
- Telstra help desk staff will update Telstra's assurance system for recording customer faults (SIAM). Telstra anticipates that this step will be completed within minutes of NBN Co reporting a notification event.
- Telstra help desk staff will advise Telstra Wholesale of the notification event via an email to an established Telstra Wholesale email address.
- Telstra Wholesale will organise for affected wholesale customer(s) to be advised of the notification event. Telstra expects that in 90 per cent of cases, wholesale customers will be notified within four hours of NBN Co reporting the event to the Telstra help desk.
- Affected wholesale customer(s) will acknowledge receipt of the notification and initiate their customer communications.
- Telstra will record and store all advice to and from wholesale customers in accordance with Telstra's record keeping practices.⁸⁰

Part 6 of draft required measure 1(b) contains a flow diagram to illustrate the communications process for notification events.⁸¹ This flow diagram indicates that wholesale customers will be advised of notification events as soon as practicable and no later than two business days after Telstra receives the notice from NBN Co.⁸²

⁸⁰ Draft required measure 1(b), pp. 4-5.

⁸¹ Ibid, p. 6.

⁸² Ibid, p. 6.

5.2 December discussion paper and submissions received

The December discussion paper invited interested parties to comment on the extent to which draft required measure 1(b) complies with the Determination. The December discussion paper also asked specific questions regarding:

- When wholesale customers would need to be advised of notification events in order to take steps to minimise disruption of their end-users' services.
- The type of information that wholesale customers will need to know regarding a notification event in order to effectively manage the supply of services to their end-users.
- How wholesale customers can access relevant Telstra fault information.

AAPT and Optus' submissions responded to each of the matters raised in the December discussion paper. iiNet's submission discussed the compliance of draft required measure 1(b) with the Determination and the timing and content of Telstra's advice to wholesale customers regarding notification events.

5.3 ACCC assessment

The ACCC considers that Telstra's draft required measure 1(b) does not comply with the Determination. In particular, the ACCC considers that draft required measure 1(b) does not comply with the continuity of service and equivalence objectives provided in sections 8 and 21 of the Determination.

The following sections of the Determination are also relevant to the ACCC's decision:

- Subsection 9(2) requires that the processes must be set out in sufficient detail to enable the ACCC to be satisfied that they accord with the general principles in section 8 and 21.
- Section 11 of the Determination requires the migration plan to set out how Telstra will give wholesale customers autonomy in relation to decisions about disconnection in order to minimise the period of any service outage.
- Section 19 of the Determination requires the migration plan to set out the reasonable steps that a wholesale customer may take in order to control the timing of disconnection and any known circumstances where the wholesale customer may not be able to take these steps.

Subsection 31(4) of the Determination requires that the reporting framework in the migration plan must provide the ACCC with sufficient information to monitor Telstra's compliance with, and the effectiveness of the migration plan. As noted above at 2.2, the ACCC does not consider that Telstra's draft required measure 1(b) complies with the regulatory requirements. This is because:

- The draft required measure does not include sufficient detail to enable the ACCC to be satisfied that Telstra’s proposed approach to notifying wholesale customers of notification events facilitates the management by wholesale customers of the migration of their customers in a way that minimises the period of any service outage.
- The draft required measure does not include sufficient detail to enable the ACCC to be satisfied that Telstra’s proposed approach to notifying wholesale customers of notification events will be equivalent as between wholesale customers and Telstra’s retail business units.
- The draft required measure does not ensure that the ACCC will be provided with sufficient information to monitor Telstra’s ongoing compliance with, and the effectiveness of the draft required measure.

The following section details the ACCC’s concerns and responds to wholesale customer concerns with draft required measure 1(b).

5.3.1 Timing, form and content of notifications

If a notification event occurs, wholesale customers will require prompt and sufficiently detailed notifications from Telstra in order to respond to end-users’ queries or concerns. The timing and content of the notifications Telstra provides will also help a wholesale customer determine whether their end-user requires an alternative communications product and/or service and if so, the most appropriate product or service.

Draft required measure 1(b) outlines the steps that Telstra will take to advise wholesale customers of notification events, including proposed timing.

The process flow diagram in draft required measure 1(b) states that “advice of an exception event is to be received [by a wholesale customer] as soon as practicable, no later than 2 business days after receiving the notice from NBN Co.”⁸³ However, Telstra also states that it expects that in 90 per cent of cases, wholesale customers will be advised that a notification event has occurred within four hours.⁸⁴

However, in regards to the form of the notification, draft required measure 1(b) states that “Telstra Wholesale will make contact with the Wholesale Customer using at least one channel of communication (e.g. email), to advise of the Notification event.”⁸⁵ The mode of communication appears to be at Telstra’s discretion.

Draft required measure 1(b) is silent on the content of the notification advice.

Submissions received

⁸³ Draft required measure 1(b), p. 6.

⁸⁴ Draft required measure 1(b), p. 5.

⁸⁵ Draft required measure 1(b), p. 5.

In response to the ACCC's discussion paper, wholesale customers raised a number of concerns with Telstra's proposed timing for notifications.

AAPT submits that wholesale customers should be advised of notification events as soon as Telstra becomes aware of them and this should occur within minutes, not hours.⁸⁶ Optus submits that it is essential for wholesale customers to be advised of notification events as quickly as possible.⁸⁷

Optus also submits that in order for wholesale customers to be advised of notification events as quickly as possible, NBN Co must be obliged to notify Telstra within one hour of a notification event taking place. Telstra should then be obliged to advise affected wholesale customer(s) within one hour of NBN Co's notification.⁸⁸

iiNet submits that the time period in which wholesale customers are advised of notification events must be the same time period as Telstra Retail are advised of notification events.⁸⁹

The ITA Adjudicator submits that a practical solution would be for NBN Co to inform either the affected wholesale customer or all wholesale customers of a notification event at the same time it informs Telstra.⁹⁰

In regards to the desired content of the notification advice, AAPT submits that it would like to know what caused the exception event and what is being done to resolve the exception event (including anticipated timeframes).⁹¹

In addition, iiNet submits that Telstra and NBN Co should be required to provide as much detail regarding the notification event as is reasonably practicable. At a minimum, wholesale customers should be advised about the type of exception event, the particulars and anticipated timeframe.⁹²

Optus submits that it will need information regarding the end-user service affected by the notification event, when the pull through activities took place, the type of notification event, details of any temporary solution that NBN Co has provided and the anticipated rectification timeframe.⁹³ Optus further submits that NBN Co should also update wholesale customers periodically until the notification event is resolved.⁹⁴

No submissions were made in relation to the form of the notification advice.

⁸⁶ AAPT submission, 4 February 2013, p. 11.

⁸⁷ Optus submission, 4 February 2013, p. 6.

⁸⁸ Ibid, p. 6.

⁸⁹ iiNet submission, 1 February 2013, p. 13.

⁹⁰ Independent Telecommunications Adjudicator submission, 3 February 2013, p. 5.

⁹¹ AAPT submission, 4 February 2013, p. 12.

⁹² iiNet submission, 1 February 2013, p. 13.

⁹³ Optus submission, 4 February 2013, pp. 10-11.

⁹⁴ Ibid, p. 11.

ACCC views

In terms of timing, the ACCC considers that wholesale customers concerns are best addressed through ensuring that Telstra provides notifications as soon as practicable after receiving the relevant information from NBN Co. The timing of notifications should be equivalent as between wholesale customers and Telstra retail business units. This is discussed at 5.3.2 below.

The ACCC considers that draft required measure 1(b) does not contain sufficient information on the content of the notifications that Telstra will provide affected wholesale customers when a notification event occurs. The ACCC supports wholesale customer submissions on the desired content of notifications and considers that at a minimum, a notification should include at least as much detail as Telstra would provide to its retail business units to enable it to respond in a timely and effective manner to a retail customer affected by a notification event.

The ACCC considers that the notification must include the LOLS reference number to ensure that wholesale customers can track the progress of the notification event.

The ACCC also considers that allowing Telstra discretion as to the form of the notification introduces a degree of uncertainty as to whether the information provided to wholesale customers will be equivalent to that provided to Telstra retail business units.

The ACCC considers that greater certainty should be provided as to the form in which Telstra will notify wholesale customers of the notification event. If avenues other than existing communications channels are to be used, then clarity in this regard will allow wholesale customers to make any necessary process or system adjustments necessary to respond to these notifications, or alternatively to engage with Telstra on a preferred mode of receipt.

As a result, the ACCC considers that draft required measure 1(b) does not contain sufficient detail for the ACCC to assess that the processes for notifying wholesale customers of notification events satisfy section 8 of the Determination, as required by subsection 9(2) of the Determination.

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

The ACCC considers that amending draft required measure 1(b) to include further detail on the content of notifications to wholesale customers will not result in any substantial cost to Telstra.

The ACCC appreciates that the content of the notification will depend in part on what information NBN Co intends to provide to Telstra. However, the inclusion of this information in a notification to wholesale customers should not result in any costs over and above the reproduction of this information. Further, Telstra is already obligated

under the Definitive Agreements to provide these notifications to wholesale customers. Therefore, any costs incurred would be subsumed within the establishment costs of meeting this commitment.

The ACCC considers that any costs incurred will be outweighed by the competition and consumer benefits of ensuring wholesale customers are informed of the nature of a notification event in an equivalent manner to which Telstra retail business units are notified.

In terms of the form of the notification, the ACCC considers that amending draft required measure 1(b) to clarify how wholesale customers will be informed of notification events will not result in any additional costs to Telstra. This is because notifications will be best provided by existing communications channels. However, certainty in this regard is necessary to ensure clarity around Telstra's notification commitments.

Should these proposed amendments result in any additional cost, the ACCC considers that such cost is unlikely to be significant.

5.3.2 Whether the processes for notification are equivalent

Draft required measure 1(b) is silent on the process that Telstra will follow when alerting Telstra retail business units to a notification event that affects a Telstra retail customer.

It is also unclear whether the Telstra help desk, to which NBN Co will report notification events to, will be situated in a Telstra Retail business unit. The December discussion paper highlights that the location of the help desk could have important implications for equivalence.⁹⁵

In regards to access to information about notification events, draft required measure 1(b) outlines that in addition to logging the notification event in NTT, Telstra help desk employees will also record the notification event in SIAM.⁹⁶

The ACCC understands that Telstra Retail call centres will have access to the SIAM record and so will be in a good position to respond to end-user enquiries about notification events at the first contact with a Telstra Retail end-user. The December discussion paper sought confirmation from wholesale customers as to whether they are also able to access SIAM records to check the fault status of a line without having to contact Telstra Wholesale.

⁹⁵ The December discussion paper, p. 17

⁹⁶ Draft required measure 1(b), p. 5.

Submissions received

AAPT and Optus confirm that they have access to fault records through LOLS.⁹⁷ However, AAPT notes that “in order for AAPT to have access to fault status information in this system [LOLS], AAPT would need Telstra to provide the LOLS reference number that the exception is logged under. AAPT considers this to be a potential breach by Telstra of equivalent (sic) obligations.”⁹⁸

Telstra’s supplementary submission states that wholesale customers cannot directly access SIIAM. However, if a fault is logged in SIIAM on a wholesale customer service number, then information concerning that incident and status is available within Telstra’s Linx Online System (LOLS). This will include incidents generated as a result of pull through. Wholesale customers can use LOLS to track the progress of their service assurance incidents.⁹⁹

ACCC views

The ACCC considers that in order to comply with subsection 9(2) of the Determination, draft required measure 1(b) should contain a commitment to notify wholesale customers of notification events in an equivalent manner, and within an equivalent timeframe, as Telstra Retail is notified.

The ACCC considers that in order to comply with section 21 of the Determination, draft required measure 1(b) should be amended to ensure that wholesale customers and Telstra Retail business units are able to access information relating to notification events in an equivalent manner.

The ACCC considers that in order to provide for the equivalent treatment of wholesale customers and Telstra retail business units, the Telstra help desk should be situated outside both Telstra Retail and Telstra Wholesale. The ACCC considers that the NBN Interface Group may provide a suitably neutral location for staff fielding notifications from NBN Co. However, the ACCC recognises that this may not be convenient in terms of hours of operation and therefore encourages Telstra to consider a comparably neutral area of operations.

Further, the ACCC considers that the employees responsible for fielding notifications from NBN Co, should follow a similar, if not identical, process when alerting retail business units to a notification event as is following when providing notification to a wholesale customer.

⁹⁷ AAPT submission, 4 February 2013, p. 12, Optus submission, 4 February 2013, p. 11.

⁹⁸ AAPT submission, 4 February 2013, p. 12.

⁹⁹ Telstra supporting submission, February 2013, pp. 8-9.

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

The ACCC considers that amending draft required measure 1(b) to include a commitment to notify wholesale customers in an equivalent manner and timeframe as Telstra retail is notified will not result in additional costs to Telstra.

The ACCC considers that amending draft required measure 1(b) to ensure that wholesale customers are able to access information relating to notification events in an equivalent way to Telstra retail business units may result in some additional costs to Telstra, as Telstra may for example need to implement upgrades to the LOLS system to allow wholesale customers to access fault information without having a Telstra reference number.

However, the ACCC considers that any additional costs will be outweighed by the benefits associated with a more positive migration experience for end-users and the competitive benefits that will flow from wholesale customers being able to provide equivalent service to their end-users that Telstra is able to provide its end-users.

5.3.3 Compliance reporting

Subsection 31(4) of the Determination requires that the reporting framework in the migration plan must provide the ACCC with sufficient information to monitor Telstra's compliance with, and the effectiveness of the migration plan.

Part 7 of draft required measure 1(b) outlines that Telstra proposes to report to the ACCC quarterly on the:

- Total number of notification events that were notified by NBN Co during the quarter.
- Total number of notification events that were notified by NBN during the quarter that affected wholesale customer(s).
- Total number of notification events that were notified by NBN Co during the quarter that affected wholesale customer(s), and Telstra provided notification to all of the relevant wholesale customers under the required measure.

ACCC views

The ACCC considers that in order for the ACCC to monitor Telstra's compliance with and the effectiveness of draft required measure 1(b), it should be amended to include an additional metric relating to the time taken by Telstra to advise wholesale customers of notification events.

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

The ACCC considers that amending draft required measure 1(b) to include a metric relating to the time Telstra takes to advise wholesale customers of notification events

may result in some additional costs to Telstra as Telstra will need to capture additional information. However, the ACCC notes that Telstra is obligated to provide notifications within certain timeframes and will need to establish a mechanism to monitor its performance in meeting agreed timeframes in any event.

6 The end-to-end pull through process

The December discussion paper provided an overview of the end-to-end pull through process so as to contextualise Telstra's roles and responsibilities in pull through and assist interested parties to comment on the draft required measures.

While broadly agreeing with the ACCC's overview of the pull through process provided in the discussion paper, NBN Co clarified certain aspects of the operational process. These clarifications are provided at page 9 of NBN Co's submission and are reflected in an updated version of the overview of the end-to-end process provided at Attachment B to this decision paper.

The discussion paper also highlighted the potentially adverse consequences of the service outage occasioned by pull through for vulnerable consumers, such as those that acquire medical alert or priority assistance services. The discussion paper noted that the required measures provide one regulatory mechanism by which appropriate protections could be provided, but sought feedback on whether alternative mechanisms might be necessary.

In response, submissions identified the following general areas as requiring further development and consideration:

- The clarity of the end-to-end process, including the respective role and responsibilities of NBN Co and RSPs
- Arrangements for obtaining end-user consent to pull through
- Further protections for customers of priority assistance and medical alert services.

Advancing work on these issues will require cooperation and consultation between NBN Co and all service providers including Telstra. They cannot be fully dealt with in an appropriate or comprehensive manner under required measures 1(a) and 1(b).

However, as the issues have been ventilated through the current consultation process, the following sections provide a summary of the issues raised and advance ACCC views to assist with their resolution.

Consumer focussed responses to the December discussion paper

ACCAN and the TIO both emphasised the importance of protecting consumer interests during pull through.

ACCAN's submission noted that "minimising disruption to end-users must be the central principle in the migration process."¹⁰⁰ To this end, ACCAN submits that "it is therefore important for consumers to be adequately informed about all their options and for there to be sufficient warning and accurate information about service outages."¹⁰¹

The TIO emphasised that the period of any service outage and any disruption to the supply of communications services be kept to a minimum.¹⁰² The TIO also emphasised the need for clear processes for identification of customers using priority assistance or medical alert services.¹⁰³

6.1 Clarity of the end-to-end process

Submissions highlighted a lack of clarity on the end-to-end process for conducting pull through.

ACCAN raised particular concern with the lack of clarity regarding the nature of the roles and responsibilities that parties will take on in the end-to-end pull through process, stating that:

ACCAN would be very concerned if measures were approved by the ACCC whereby a retail service provider would be unaware if pull through would be used and therefore would not be able to make appropriate arrangements to assist their customers with call diversion and other interim arrangements.¹⁰⁴

Optus and AAPT submit that "pull through activities" should be redefined to clarify when pull through will and will not be used by NBN Co.

iiNet submits "it is unclear when it will be necessary to reconnect the copper service after the NBN service has been connected." iiNet sought confirmation of its understanding that the "reconnection of the copper service may only be required as a temporary measure in circumstances where there has been a problem connecting the NBN service and reinstating the copper service is deemed to be the best way to maximise continuity of service."¹⁰⁵

In its submission NBN Co indicated that it would consult industry in order to seek "any necessary feedback in relation to...processes for completing pull throughs at an appropriate time" with a view to developing an operations manual that documents the pull through process.¹⁰⁶

¹⁰⁰ ACCAN submission, February 2013, p. 1.

¹⁰¹ Ibid.

¹⁰² TIO letter to the ACCC, March 2013, pp. 1-2

¹⁰³ Ibid.

¹⁰⁴ ACCAN submission, February 2013, p. 1.

¹⁰⁵ iiNet submission, February 2013, p. 11.

¹⁰⁶ NBN Co submission, February 2013, p. 14.

NBN Co also provided some insight into what these operational processes would seek to achieve. In particular, NBN Co advised that its installer will be obliged to either reinstate the cable used for a pull through or install a temporary cable in order to ensure that the end-user has an active service that is equivalent to the existing communications services prior to the NBN Co installer leaving the premises. Exceptions to this include for complete migration events and certain pull through exception events.

NBN Co also advised that as pull through is an NBN connection process, NBN Co will be subject to existing service regime under the (Service Level Schedule) in the WBA.¹⁰⁷

ACCC Views

The ACCC considers that an effective end-to-end process will help ensure that end-users experience minimal service disruption during migration to the NBN.

An important factor in determining the effectiveness of the end-to end process is that it must be well communicated and understood by NBN RSPs. In this regard, the ACCC welcomes NBN Co's statement that it will develop an operations manual in consultation with industry in order to provide this detailed guidance and encourages NBN Co to develop this material in a timely manner.

This operational manual would appear to be a suitable vehicle for NBN Co to specify the steps that it will take in order to provide assurance that end-users affected by pull through will have an active communications service prior to its installer leaving the property. Further, the ACCC would encourage NBN Co to provide a contractual commitment to this effect.

In response to iiNet, the ACCC can confirm that the copper service is to be reconnected because there may be services that the end-user has not yet decided to migrate over to the NBN, or wishes to continue to acquire until the end of the supply contract or the disconnection date. Telstra is also contractually obliged to continue providing the existing services until the wholesale customer submits a disconnection order for the service.

6.2 Proposed arrangements for end-user consent

Submissions also expressed conflicting views over how responsibilities for obtaining end-user consent and other relevant information should be assigned.

Appropriate processes for obtaining end-user consent will be important to ensuring that end-users are aware of the potential for pull through to be used to connect their premises and to enable them to make arrangements with their service providers to manage the period of the service outage.

¹⁰⁷ NBN Co submission, February 2013, p. 17.

Optus considers that NBN Co should be responsible for obtaining end-user consent to pull through.¹⁰⁸ AAPT submits that a clear commitment on NBN Co to confirm end-user consent to a service outage on the day is needed.¹⁰⁹

ACCAN submits that it is important “for consumers to be adequately informed about all their options and for there to be sufficient warning and accurate information about service outages.”¹¹⁰

iiNet submits that it “assumes that NBN Co will provide sufficiently precise information regarding pull through process...to allow the RSP to obtain an informed consent from the end-user.” iiNet also states that it assumes that lack of end-user consent will mean that “the NBN installer will not need to check with Telstra whether there are any cables that cannot be used for pull through.”¹¹¹

Tunstall Healthcare submits that the list of questions under a code of conduct will assist to promote informed consent to pull through from priority assistance and medical alert customers.¹¹²

NBN Co agreed that end-users must have the opportunity to consent to pull through. However, NBN Co submits that the NBN RSP is best placed to obtain the end-user’s consent as they have the direct relationship with the end-user. NBN Co added that its IT systems have not been designed for NBN Co to obtain and manage such information directly from end-users.¹¹³

NBN Co confirmed that it is developing WBA provisions that will require all NBN RSPs “to use reasonable endeavours to obtain end-user consent to enable NBN Co to conduct a pull through.”¹¹⁴

These provisions will also seek “a consent and acknowledgement that a pull through has the potential to disrupt the supply of their existing telecommunications services whilst it is being performed.”¹¹⁵

ACCC Views

While there could potentially be a number of models by which end-user consent could be collected or confirmed, it appears that as a general rule NBN RSPs are best placed to collect end-user authorisations and other information. This is because of the direct relationship between NBN RSPs and their end-users that will exist at point of sale of

¹⁰⁸ Optus submission, February 2013, p. 9.

¹⁰⁹ AAPT submission, February 2013, p. 10.

¹¹⁰ Ibid.

¹¹¹ iiNet submission, February 2013, pp. 4-5.

¹¹² Tunstall Healthcare submission, February 2013, p. 2.

¹¹³ NBN Co submission, February 2013, p. 14.

¹¹⁴ NBN Co submission, p. 9.

¹¹⁵ Ibid, p. 9.

NBN services. Consequently, NBN Co's proposal to require NBN RSPs to obtain end-user consent to the use of pull through (in those circumstances where the premise is not already physically connected to the NBN) would appear reasonable.

That said, it is likely that RSPs will need support in efficiently performing this role. As noted earlier, this will include clarity from NBN Co about how pull through will be conducted, including likely outage times, contingency measures should difficulties be encountered and how the connection will be made should consent be withheld, so that the collected consents will have been provided on an informed basis.

It is also likely that NBN Co will need to clearly specify how end-user consents or instructions are communicated to it during the ordering process in order to make sure that this information is adhered to during the connection process.

The ACCC also considers that in operational processes such as pull through, the success of which relies upon cooperation between different parties, it is important that the contractual materials clearly assign both responsibilities and accountabilities. As a rule, responsibility and accountability should attach to the party best placed to perform the particular task.

In this context, it will be important that where pull through is used in the absence of the end-user's consent as a result of the RSP not accurately gathering or communicating the end-user's instructions, the RSP would be liable for any losses suffered. However, as that is the limit of the RSPs involvement in conducting pull through, it appears reasonable that RSPs not otherwise be liable for losses that arise where pull through is undertaken.

In this regard, and in light of the submissions received in this consultation, the contractual materials (i.e. the draft deed poll) that have been developed to date will require further consideration to ensure that accountabilities as and between RSPs, Telstra and NBN Co will be appropriately assigned.

There is also the potential for educational materials to be developed to assist end-users to understand the pull through process and the potential implications for end-users where consent is withheld. This could potentially be done as part of existing initiatives such as NBN Co's end-user guide, or as part of its "public information on migration" (PIM) campaign.

6.3 Priority assistance and medical alert services

Priority assistance services are designed to provide people with diagnosed life-threatening medical conditions with a more reliable, fixed-line home telephone service. Priority assistance customers are entitled to faster connection and fault repair of their telephone service. The industry code specifies that timeframes for priority assistance are

24 hours in urban and rural areas and 48 hours in remote areas.¹¹⁶ Where providers are unable to meet these timeframes they are obliged to provide interim services, such as a mobile phone.¹¹⁷

Telstra is the only carrier obliged to provide priority assistance under the terms of its carrier licence.¹¹⁸ In the December discussion paper, the ACCC stated that “Telstra has up to 600,000 priority assistance customers, with other service providers supplying a smaller number of such services.”¹¹⁹ This figure is not correct and reflects a miscalculated cumulative total of the priority assistance and medical alert services provided across Australia.

Telstra has indicated to the ACCC that, as at February 2013, the number of priority assistance services provided by Telstra is around 250,000 which includes a relatively small number of Telstra wholesale priority assistance services.¹²⁰ The ACCC also understands that other RSPs provide services that commit them to meet comparable service levels for fault rectification, but are not “priority assistance services” for the purposes of the code. That said, the number of non-Telstra network (ULLS based or otherwise) priority assistance services in operation is likely to be small.

Medical alert services are used by aged and at-risk persons to enable them to contact emergency services should the need arise. They operate over the top of an existing phone service and can take a variety of different forms, including back to base alarm services or by way of an automatic dialling device (such as pendant worn by the user). If in distress, the user is able to trigger the device to automatically dial a monitoring centre and/or send out a short data message. If necessary, the monitoring centre will then contact emergency services.

A definitive measure of medical alert services is not available. However, the ACCC estimates, based on information from the industry body, the Personal Emergency Response Services Association (PERSA), that there are at least 250,000 medical alert services installed and monitored by its members.¹²¹ The ACCC understands that there are also between 30,000 to 50,000 self monitored medical alarms in operation and possibly up to 100,000 privately monitored alarms in aged care facilities. This provides for a total of up to 400,000 services in operation in Australia.

¹¹⁶ Australian Communications Industry Forum, *Industry Code ACIF 209:2007 – Priority Assistance for Life Threatening Medical Conditions*, para. 4.4.

¹¹⁷ ACIF 209:2007, paras. 4.5 and 4.6.

¹¹⁸ *Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997 (Amendment No. 1 of 2002)*.

¹¹⁹ The December discussion paper, p. 13.

¹²⁰ Telstra has indicated that total priority assistance services in operation fluctuates from time to time and therefore the figure of 250,000 is only accurate as at mid February 2013.

¹²¹ Submission 10 to the Joint Committee on the National Broadband Network, *Six Monthly Review of the National Broadband Network – Fourth Review*; p. 2; available on the Australian Parliament house website; accessed 13 March 2013.

Due to the fact that priority assistance is provided for medical reasons, some, but not all of the customers for medical alerts would also be priority assistance customers.

Pull through on lines used to provide these services

A service outage on a line that provides medical alert and priority assistance services has the potential to prevent the end-user from contacting emergency services. Due to the general vulnerability of end-users of these services, the potential consequences of service outage are very serious and potentially life threatening.

As a result, use of pull through would pose obvious risks on lines used to provide medical alert or priority assistance services.

NBN Co has stated in its submission that “it will not conduct a pull through using a cable which it has been advised is being used to support the provision of a Priority Assistance or medical alarm service.”¹²²

This underscores the need for a robust process by which RSPs are obliged to collect and pass on relevant information to NBN Co at the point of sale, and for NBN Co to act appropriately on this information when received.

Review of current contractual arrangements relevant to pull through

Telstra’s draft required measure 1(a) seeks an undertaking from Telstra’s wholesale customers to provide information on priority assistance and medical alert service customers, when requested to do so by NBN Co (see discussion at 4.3.3 of this paper).

In addition, the following is a brief overview of other existing contractual requirements concerning the provision of this information to NBN Co.

Clause C10.2 of NBN Co’s Wholesale Broadband Agreement (WBA) provides:

- (a) If Customer orders a Product in respect of a Premises, and it:
 - (i) is the sole provider of Carriage Service to that Premises using ULLS; and
 - (ii) wishes to discontinue all Carriage Service supplied by it to that Premises using ULLS,

Customer consents irrevocably to the ULLS being disconnected in respect of that Premises and must:

- (iii) take all reasonable steps to assist NBN Co to deliver, install and connect any part of the NBN Co Network in respect of that Premises; and
- (iv) upon ordering a Product in respect of that Premises, provide information to NBN Co as to whether there is a priority assistance service, medical alert service, alarm service or any other service with similar service levels.

¹²² NBN Co submission, p. 8.

- (b) Customer must obtain all valid consents and approvals from Downstream Customer or end-user as may be required to comply with clause C10.2(a).¹²³

Clause 3.9 of the NBN Co *WBA Product Catalogue* requires NBN Access Seekers to inform NBN Co when they intend to use NBN fibre access service (NFAS) components as inputs to the supply of downstream priority assistance services.¹²⁴

Clause 4.13 of the NBN Co *Operations Manual* also provides that when ordering a NBN fibre access service that is to be used to supply a priority assistance service, the customer must go through a specific ordering process.¹²⁵ This process includes selecting an appointment timeframe that is suitable for their end-user and contacting the NBN Co 24/7 Priority Assistance Contact Centre in order to validate the order.¹²⁶

Submissions received

The ACCC's discussion paper sought feedback from interested parties on whether regulatory measures beyond those proposed under the required measures might be necessary to provide assurance that priority assistance and medical alert service customers will be identified to NBN Co. The submissions from ACCAN, the TIO, Tunstall Healthcare, Optus, AAPT, Telstra and NBN Co all addressed this issue.

ACCAN considers that existing arrangements are inadequate to provide assurance that proper information on priority assistance and medical alert services provided over a particular copper line will be available to NBN Co. ACCAN considers that RSPs should be incentivised to be vigilant in complying with obligations to supply this information.¹²⁷

The TIO also emphasised the need for clear processes for identification of customers using priority assistance or medical alert services.¹²⁸

Tunstall Healthcare, a provider of over 40,000 medical alert/alarm services across Australia, submits that a code of conduct should be developed. The code of conduct should require RSPs to collect specified priority assistance and medical alert related information from their end-users. Tunstall Healthcare suggests that the code should set out a list of clear and easily understandable questions for RSPs to ask end-users in order that they may provide consistent and clear responses. The code of conduct should prohibit a RSP from offering a service upgrade or platform change at the point of contact with the end-user.¹²⁹

¹²³ NBN Co's *Wholesale Broadband Agreement*, accessed via the NBN Co website on 12 March 2013.

¹²⁴ *NBN Co WBA Product Catalogue – 11 February 2013*, clause 3.9; accessed 12 March 2013.

¹²⁵ *NBN Co Operations Manual – 4 March 2013*, accessed 12 March 2013.

¹²⁶ *Ibid*, clause 4.13.2.

¹²⁷ ACCAN submission, February 2013, p. 2.

¹²⁸ TIO letter to the ACCC, March 2013, pp. 1-2.

¹²⁹ Tunstall Healthcare, February 2013, p. 2.

Tunstall Healthcare also suggests that provision be made for a free national consumer help line for people wanting to understand the risks of the pull through process and to seek independent advice regarding their NBN service. The hotline should be designed for use by non-English speakers and the elderly. Tunstall Healthcare also submits that an industry standard on minimum technical specifications for medical alert systems is needed.¹³⁰ Further, Tunstall Healthcare considers that RSPs should be required to provide temporary mobile phones to end-users in situations of pull through.¹³¹

AAPT and Optus submit that it would be feasible for wholesale customers to request information about a customer's priority assistance and medical alert services at the time of sale of a NBN service.¹³² However, AAPT submits that it "should not have to provide, indemnify nor guarantee that the information is correct or accurate."¹³³

Optus submits that there should be some capacity for RSPs to indicate on the NBN connection order that the end-user believes that they do not have priority assistance service or medical alert services.¹³⁴

Telstra agrees that "extensive service outages could have serious consequences for customers with priority assistance (PA) or medical alert services."¹³⁵ However, Telstra considers that existing arrangements allow for appropriate management of any risks to these customers that may arise from pull through. Telstra lists a number of reasons for this position, including:

- As with all connections, most priority assistance customers will be connected at the build drop stage.
- Status as a "service class 1" premises in the NBN service qualification system should alert the NBN RSP to the possibility of service interruption on the installation date because pull through may need to be used. Telstra considers that this will in effect place the NBN RSP "on notice to investigate whether these customers have special needs which could be adversely affected".¹³⁶
- RSPs are already obliged to inform a prospective customer whether they offer priority assistance or provide them with a list of RSPs that do.¹³⁷
- Timeframes for NBN Co to restore service should be "well within the minimum timeframes...under priority assistance requirements" and in most cases, NBN Co field personnel will remain onsite until the copper is restored. If the service is not restored in time, the priority assistance provider may have to provide an interim service.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Optus submission, February 2013, p. 10.

¹³³ AAPT submission, February 2013, p. 10.

¹³⁴ Ibid, p. 10.

¹³⁵ Telstra's first supplementary submission, February 2013, p. 6.

¹³⁶ Ibid, p. 6.

¹³⁷ Under Part 6 of Schedule 2 of the Telecommunications Act.

- High mobile penetration means that “virtually all end-users will have an alternative means of placing emergency calls”.

In relation to medical alert services, Telstra stated that back to base medical alert services are likely to rely on a telemetry service, which is a special service, and therefore the line cannot be used for pull through.¹³⁸ However, Telstra has provided the ACCC with further clarification on this statement, indicating that use of remote telemetry services for the provision of medical alert services is likely to be low. Further, Telstra has indicated that it does not collect information on the purpose for which a remote telemetry service is used.¹³⁹

In regards to medical alert services that are provided via specific customer premises equipment (e.g. an automatic dialling device) using the copper phone service, Telstra suggests that “the global consents (sought under draft required measure 1(a)) provide a direct avenue of notification by wholesale customers to NBN Co.”¹⁴⁰ Telstra also notes that these medical alert services are offered independently of the provider of the telephony or other connectivity service to the premises and therefore RSPs “will not know about the existence of a medical alert service on a given line.”¹⁴¹

Telstra suggests that the most effective way to address concerns in relation to medical alert services is through “education of end-users and the suppliers of these services such as the public education campaign undertaken by NBN Co.”¹⁴²

NBN Co makes the following points in response to points raised by Optus, AAPT and iiNet:

- NBN Co does not intend to undertake pull through on a line that it knows is being used to supply priority assistance or medical alert services.
- Information on existing of priority assistance or medical alert services is best obtained by the NBN RSP and/or the Telstra wholesale customer, as they have a direct relationship with the end-user.¹⁴³
- Pull through is only a “possibility” for premises classified as ‘SQ 1’ (service class 1) as these premises may also be connected to the NBN via a new underground LIC or an aerial cable.¹⁴⁴

¹³⁸ Ibid, p. 7.

¹³⁹ Telstra’s second supplementary submission, 12 March 2013.

¹⁴⁰ Ibid, p. 7.

¹⁴¹ Ibid, p. 7.

¹⁴² Ibid, p. 8.

¹⁴³ Ibid, p. 15.

¹⁴⁴ Ibid, p. 12.

ACCC views

The success of the end-to-end pull through process will depend in part on the adequacy of arrangements to protect the interests of vulnerable consumers, such as customers of priority assistance and medical alert services.

The ACCC acknowledges that due to the fact that medical alert services are provided by over-the-top providers, RSPs will not often know whether an end-user is receiving medical alert services unless they expressly ask. However, as both Optus and AAPT submit, the point of sale of NBN services provides a good opportunity for NBN RSPs to collect this information from end-users, which they could provide to NBN Co via a connection order.¹⁴⁵

In the December discussion paper, the ACCC noted that it understands that NBN Co intends to seek an undertaking from NBN RSPs to use “reasonable endeavours” to provide NBN Co with information on the existence of priority assistance and medical services at premises on behalf of which they are lodging a connection order.¹⁴⁶ The ACCC supports such an initiative.

The ACCC notes that existing operational requirements in the WBA provide some assurance that NBN Co will have information on priority assistance services that it can provide to an NBN Co contractor fulfilling a connection order.¹⁴⁷ Clause C10.2 of the WBA also provides assurance that, when there is a complete migration of services by the sole provider of ULLS based services, information on priority assistance and medical alert services will be provided to NBN Co.

However, the ACCC considers that these arrangements should be reviewed to ensure that they adequately “cover the field” of migration scenarios in which pull through may be used at premises that acquire priority assistance and medical alert services. For example, outside of a complete migration of the existing services provided by the sole ULLS based service provider, there do not appear to be any requirements on NBN RSPs to collect information on medical alert services and provide this to NBN Co.

The ACCC considers that in combination, these mechanisms should produce the following outcomes:

- Only in instances in which the NBN RSP indicates that there is not a medical alert or priority assistance service present should NBN Co be able to undertake pull through.

¹⁴⁵ Optus submission, February 2013, p.10; AAPT submission, February 2013, p. 10.

¹⁴⁶ The December discussion paper, p. 13.

¹⁴⁷ In particular, clause 3.9 of the *WBA Product Catalogue* and clause 4.13 of the *NBN Operations Manual*.

- Where a NBN RSP fails to indicate whether there is or is not a priority assistance or medical alert service at the premises, then NBN Co should not undertake pull through.
- Where information on the existence of these services is provided, NBN Co should act on the basis of the information and not undertake pull through.

The ACCC also recognises that other arrangements could potentially be established by which providers of medical alert or priority assistance services could identify the lines over which they are supplying services. Such arrangements could serve to complement the collection of that information by the NBN RSP at point of sale.

The ACCC also supports Tunstall Healthcare's proposal for the development of a list of questions to assist NBN RSPs with the collection of information from end-users on priority assistance and medical alert services.

The ACCC strongly encourages NBN Co to engage with industry on these matters in order that arrangements, at least on the provision of the relevant information to NBN Co, can be finalised before pull through connections commence.

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

Required measure 1(a)

Draft required measure 1(a) could be amended to ensure that Telstra has in place reasonable policies and business practices that require Telstra to facilitate, to the extent that it is Telstra's control, the management by wholesale customers of the migration of their end-users in a way that minimises the period of the service outage. In particular, draft required measure 1(a) could include a consent from wholesale customers that is subject to any notes or instructions included in a connection order.

Draft required measure 1(a) could be amended to ensure that it does provide for arrangements that minimise the period of the service outage to the extent that it is Telstra's control to do so. In particular, draft required measure 1(a) could be amended to remove releases that limit the liability of parties for losses resulting from pull through where those parties are best placed to manage the risks resulting from the service outage.

Draft required measure 1(a) could be amended to ensure that the releases sought from wholesale customers are equivalent to the releases that Telstra has provided to NBN Co. In particular, the releases sought from wholesale customers in favour of Telstra should be removed because Telstra has not sought equivalent releases from its retail customers.

Draft required measure 1(a) could be amended to provide greater assurance that accurate information on priority assistance and medical alert services will be provided to NBN Co. In particular, the existing undertaking sought from wholesale customers to provide information on special needs customers to NBN Co on request could be complemented by a mandatory obligation on a wholesale customer that is also the NBN RSP to provide that information to NBN Co on a connection order.

Required measure 1(b)

Draft required measure 1(b) could be amended to provide sufficient detail for the ACCC to be satisfied that Telstra's proposed advice to wholesale customers of notification events include sufficient detail regarding the nature of the notification event and rectification timeframe, to allow wholesale customers to manage the migration of their customers in a way that minimises the period of any service outage.

Draft required measure 1(b) could be amended to provide sufficient detail for the ACCC to be satisfied that the timeframe, form and content of notifications of notification events will be equivalent as between wholesale customers and Telstra's retail business units. This is because the draft required measure is silent on the timeframe, form and content of the notifications that Telstra will be providing to its own retail business units. Draft required measure 1(b) could be amended to include a metric relating to the

timeframe in which Telstra advises affected wholesale customer(s) of notification events. This is because the Determination requires that Telstra develop a reporting mechanism to enable the ACCC to monitor Telstra's compliance with, and the effectiveness of the draft required measure.

Attachment B: Overview of pull through

The following is an updated version of the overview included in the ACCC's December discussion paper. This version reflects comments provided by NBN Co in its 25 February 2013 submission.

Update: NBN Co has also provided its own overview of the division of responsibilities between the parties involved in the pull through process at page 7 of its submission. NBN Co has indicated that its operational processes used for pull through will be subject to industry consultation.

NBN rollout: build drop phase

NBN Co fibre and Premises Connection Device will be installed to the premises at the time of the local network construction. NBN Co has indicated that it will not undertake pull through activities at this stage. *Update: However, NBN Co installers will perform a preliminary test to determine whether the LIC could be used for pull through.*

- Where it is apparent that the existing lead-in-conduit (LIC) cannot be used, even for pull through, the premises will be connected using aerial fibre or by installation of a new LIC.
- Where it is determined that the LIC *could* be used for pull through, the end-user will receive a notice indicating that the NBN connection could not be completed on the day and that the NBN connection can still occur but at a later date when the end-user submits an order for NBN service(s).



End-user places order for NBN connection: demand drop phase

At its discretion, NBN Co may declare a region 'Ready for Service' after 90 percent of premises in the region are passed by NBN fibre. After this date, end-users can contact a retail service provider (RSP) to order an NBN service. When contacted by an end-user, the RSP will:

- Clarify whether the premises is NBN Serviceable by way of NBN service qualification.
- Be required to use reasonable endeavours to ask the end-user to indicate whether they provide consent for NBN Co to perform pull through and so have a temporary outage of their current copper or HFC services. *Update: NBN Co has indicated that it is considering the inclusion of a provision in the WBA to give effect to this and also to seek an acknowledgment that pull through has potential to disrupt the supply of existing communications services.*



Retail service provider places order with NBN Co

When the order is placed with NBN Co, the RSP will:

- Indicate whether the end-user has consented to the performance of pull through/temporary outages on their existing copper and HFC services for the installation of NBN Co equipment.
- Select an available date for the installation from the NBN Co booking system.
- Communicate the installation date to the end-user.
- Make arrangements for the provision of interim call diversion services if necessary.

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NBN Co attends site to connect premise

The NBN Co installer:

- Undertakes an inspection of the LIC to determine whether they believe that pull through can be completed on the day.
- If the installer decides that pull through can be completed they will check *with Telstra* whether there are any cables that cannot be used for pull through.

It is at this point that Telstra will check whether a wholesale customer that provides services to the premises has signed the Deed Poll and therefore provided the necessary consents, releases and undertakings for pull through to occur (required measure 1(a)).

Update: NBN Co has stated that it will use the information provided by Telstra in combination with other information that it may have available to it to determine whether a LIC cable can or cannot be used for pull through). NBN Co has confirmed that it:

- Does not intend to contact any Telstra wholesale customer at this time to confirm consent for pull through.
- Will not need to seek end-user consent for pull through on the day (because this will have been provided at the time the connection order is placed).
- Will not perform pull through at any premises where information provided by the RSP at the time the connection order was placed indicates that there is a priority assistance, medical alert or other comparable service provided to the premises.

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If pull through can be undertaken

NBN Co will:

- Inform the end-user/nominated representative when an outage starts and ends.
- Reinstate the copper or HFC line used for pull through and test whether it works. *Update: NBN Co has indicated that the NBN Co installer will be expected to attempt to reconnect the cable used for pull through except in limited circumstances—for example, a complete migration event.*
- Contact Telstra or a wholesale customer to test whether the reinstated line works.

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If pull through fails

The ACCC understands that NBN Co will:

- Seek to install a temporary cable.
- Notify the end-user that pull through has not been successful.
- Contact Telstra to inform it that a “pull through exception event” has occurred.

It is at this point that Telstra will notify any affected wholesale customer that a “pull through exception event” has occurred. Telstra commits to notify wholesale customers within 4 hours of receipt of a notice from NBN Co in ninety percent of cases and in all other cases within two business days (required measure 1(b))

- Make arrangements to address service outage as soon as possible.
- *Update: NBN Co has emphasised that a pull through exception event may occur other than where pull through fails—for example, where an end-user has withdrawn their consent or where there is a force majeure event that stops the NBN rollout.*

Attachment C: Required Measures and corresponding regulatory requirements

<p>Required Measure 1(a): Process for obtaining consents and releases from wholesale customers for NBN Co to use pull through during the connection process</p>	
<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 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) ▪ Section 24 – Specification of disconnection processes 	<p style="text-align: center;"><i>Migration plan clauses</i></p> <ul style="list-style-type: none"> ▪ Clause 10.1 – Consents for Pull Through Activities
<p>Required Measure 1(b): Process for notifying Wholesale customers that pull through exception events have occurred</p>	
<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 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) ▪ Section 24 – Specification of disconnection processes 	<p style="text-align: center;"><i>Migration plan requirements</i></p> <ul style="list-style-type: none"> ▪ Clause 10.2 – Notification of a pull through exception event