



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Telstra's Structural Separation Undertaking

Annual compliance report 2020-21

March 2022

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601
© Commonwealth of Australia 2022

This work is copyright. In addition to any use permitted under the *Copyright Act 1968*, all material contained within this work is provided under a Creative Commons Attribution 3.0 Australia licence, with the exception of:

- the Commonwealth Coat of Arms
- the ACCC and AER logos
- any illustration, diagram, photograph or graphic over which the Australian Competition and Consumer Commission does not hold copyright, but which may be part of or contained within this publication.

The details of the relevant licence conditions are available on the Creative Commons website, as is the full legal code for the CC BY 3.0 AU licence.

Requests and inquiries concerning reproduction and rights should be addressed to the Director, Content and Digital Services, ACCC, GPO Box 3131, Canberra ACT 2601.

Important notice

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

Parties who wish to re-publish or otherwise use the information in this publication must check this information for currency and accuracy prior to publication. This should be done prior to each publication edition, as ACCC guidance and relevant transitional legislation frequently change. Any queries parties have should be addressed to the Director, Content and Digital Services, ACCC, GPO Box 3131, Canberra ACT 2601.

ACCC 03/22_22-22

www.accc.gov.au



23 Marcus Clarke Street
Canberra ACT 2601
GPO Box 3131
Canberra ACT 2601
tel: (02) 6243 1111
fax: (02) 6243 1199
www.accc.gov.au

Executive Office

31 March 2022

The Hon. Paul Fletcher MP
Minister for Communications, Urban Infrastructure, Cities and the Arts
Parliament House
CANBERRA ACT 2600

Dear Minister

ACCC report on Telstra's compliance with its Structural Separation Undertaking for 2020-21

The Australian Competition and Consumer Commission (ACCC) is required under section 105C of the *Telecommunications Act 1997* (the Act) to monitor and report each financial year on breaches by Telstra of an undertaking in force under section 577A of the Act (Telstra's Structural Separation Undertaking).

I am pleased to enclose the ACCC's report for the 2020-21 financial year. Please note that subsection 105C(3) of the Act requires you to table the report in each House of the Parliament within 15 sitting days of that House after receiving the report.

Yours sincerely

Gina Cass-Gottlieb
Chair

Contents

Executive Summary	2
1. Introduction	3
2. Compliance with Part C of the Undertaking	4
2.1 Cease Sale	4
2.2 Order Stability Period	4
2.3 Reconnection of permanently disconnected services	5
2.4 Temporary extension to disconnection requirements	5
2.5 Disconnection deferral due to flooding in NSW	5
2.6 Disconnection in error relating to an Excluded Event – HFC Pause	6
2.7 Disconnection deferral due to insufficient notice resulting from IT issues	6
3. Compliance with the Migration Plan	7
3.1 Failure to apply Soft Dial Tone	7
3.2 Late notification of disconnection schedule	7
3.3 Automatic alerts not working for 2 months for some wholesale customers	7
3.4 ISDN special services for wholesale customers	8
4. Force Majeure Event, Excluded Event and forbearance	9
4.1 Force Majeure and Excluded events reported in 2020–21	9
4.2 Forbearance	9
5. Changes to Required Measures	11
6. Variation to the Migration Plan	12

Executive Summary

The ACCC accepted a Structural Separation Undertaking (the Undertaking) from Telstra in 2012. The Undertaking is an important component of the economic reform of fixed line telecommunications services that is being realised via the progressive migration of fixed voice and broadband services to the National Broadband Network. Amongst other things, the Undertaking gives confidence that Telstra would not favour its own retail businesses, and consumers would have reasonable protections from losing access to legacy services through no fault of their own until the final disconnection date applicable to their area.

Telstra reports to the ACCC quarterly and annually on its compliance with its Migration Plan obligations and other aspects of the Undertaking as part of the compliance monitoring and reporting processes set out in the Undertaking.

This annual compliance report covers the period between 1 July 2020 and 30 June 2021. For the year, Telstra reported:

- seven matters that were non-compliant with both Part C of the Undertaking and the Migration Plan
- four matters of non-compliance with the Migration Plan only
- an Excluded Event due to NBN Co's Hybrid-Fibre Coaxial (HFC) pause and a Force Majeure Event due to the COVID-19 pandemic
- one matter of non-compliance with its reporting obligations in Part E of the Undertaking.

Telstra's compliance with its obligations in 2020–21 has been good overall, continuing the trend in recent years. The matters of non-compliance should be seen in the context of the scale of the migration process and the logistical and other challenges created by the COVID-19 pandemic and several natural disasters over the 2020 and 2021 period.

In addition to reported breaches of the Undertaking, Telstra was prevented by Force Majeure Events or Excluded Events outside its control from complying with the Undertaking on some occasions.

Telstra also sought forbearance, which the ACCC provided, concerning its intention to not comply with the Undertaking on certain other occasions where this would have placed end-users at risk of losing their telecommunications service. These matters are outlined in this report and include instances where, for example, Telstra notified us that strict compliance with its obligations to disconnect customers would put end-users in an unacceptable situation through no fault of their own.

While compliance with the Undertaking is an important part of Telstra's structural separation and the migration of services to the NBN, the ACCC did not consider any of these matters required enforcement or compliance action. Generally, the non-compliance was either justified in the circumstances, out of Telstra's control, or inadvertent and of low impact. Further, where non-compliance was due to error on Telstra's part, Telstra advised us of the action it would take to meet its obligations and reduce the likelihood of reoccurrence.

1. Introduction

The Structural Separation Undertaking was provided as part of implementation of the economic reform of fixed line telecommunications services. Telstra's Migration Plan is a part of the Undertaking and together they specify Telstra's commitments to progressively migrate its fixed line voice and broadband customers to the wholesale only NBN. These commitments are fundamental to promoting competitive outcomes during this period.

Section 105C of the *Telecommunications Act 1997* (the Act) provides that each financial year, the ACCC must monitor and report to the Minister for Communications on any breaches by Telstra of its Undertaking. The Minister must table the report in the Parliament within 15 sitting days of receiving it.

The Migration Plan provides details of the commitments Telstra has agreed to in its Undertaking. A key objective of these commitments is to protect customers and end-users from the risk of losing service continuity through no fault of their own as a consequence of their migration to the NBN.

Following the Minister for Communications, Cyber Safety and the Arts setting the 'Designated Day' marking the end of the initial NBN rollout on 1 July 2020, Telstra's equivalence and transparency requirements in Part D of the Undertaking have ceased to operate. New requirements to not supply non-exempt services over a non-exempt network under Part C of the Undertaking came into effect at the same time.¹ Generally, this change:

- sets Telstra's obligations to not supply certain services over specified types of fixed line networks, which are specified in Part C of the Undertaking
- ceases the commitments that Telstra gave to respond to competition concerns that arose from its residual control over the ubiquitous fixed access networks while the migration to the NBN was being implemented. These commitments were to provide transparency and equivalence and are contained in Part D of the Undertaking.

During 2020-21 Telstra provided the ACCC with a notice to replace three of its Required Measures (procedural documents relating to disconnection) and developed a new Required Measure under the Migration Plan. Telstra also submitted a variation to its Migration Plan, which the ACCC has approved. Although the variation falls outside the 2020-21 period, we have included details of the variation in this report for completeness.

¹ Many of the obligations of Part C overlap with requirements under the Migration Plan.

2. Compliance with Part C of the Undertaking

This chapter sets out the matters relating to compliance with Part C of the Undertaking. This is Telstra's obligation to not supply any Non-Exempt Services² to retail customers in Australia using a Non-Exempt Network³ over which Telstra is in a position to exercise control. Generally, this refers to areas within the NBN fixed line footprint.

As Part D of the Undertaking has now ceased, this report, unlike previous years, does not report on Telstra's transparency and equivalence metrics.

Telstra reported seven matters that were non-compliant with both Part C of the Structural Separation Undertaking and the Migration Plan in its annual report to the ACCC for the 2020–21 period. In most cases non-compliance with Part C of the Undertaking relating to delayed disconnection or inadvertent reconnection will also raise non-compliance with similar terms in the Migration Plan.

2.1 Cease Sale

Telstra reported that there were instances in 2020–21 where Telstra connected services that were not permitted under cease sale⁴ requirements. Telstra attributed these to system and data quality issues, and to a lesser extent human error associated with the use of manual processes. These non-compliant orders represented 0.23% of total orders completed by Telstra.

Telstra advised that it remains focused on promoting compliance with this obligation by regularly monitoring copper and HFC orders provisioned at premises subject to cease sale, making manual and automated process improvements where required, and conducting ongoing staff education and awareness activities. The ACCC considers that appropriate remediation steps are being applied by Telstra to improve and maintain compliance with this obligation in the future.

2.2 Order Stability Period

Telstra reported that for 5.9% of total orders completed in 2020–21, it provisioned orders that were not permitted under the Order Stability Period⁵ under the Migration Plan.

Telstra advised that many of these orders were as a result of errors in processes. However, a substantial contributing factor was services remaining active for longer than usual during the Order Stability Period as a flow-on effect from extensions to the managed disconnection arrangements due to events related to COVID-19 and the NBN HFC Pause.⁶ Telstra explained that the longer premises remain subject to the Order Stability Period, the more likely that requests are raised for those active services resulting in non-compliant requests being inadvertently permitted. In addition, Telstra reported that some reactivations prohibited during the Order Stability Period were granted in the interests of promoting service continuity, to avoid unfortunate end-user circumstances due to events outside of their control.

2 According to the SSU, Non Exempt Services means a fixed-line carriage service other than an Exempt Service which is supplied by Telstra to retail customers in Australia.

3 According to the SSU, Non Exempt Network means a telecommunications network other than an Exempt Network over which Telstra is in a position to exercise control.

4 Clause 17 of the Migration Plan requires Telstra to stop selling (cease sale) any copper or HFC service once a premise becomes NBN serviceable within the NBN fixed line footprint.

5 Under the Migration Plan, Telstra can apply an Order Stability Period in a rollout region immediately prior to and after a disconnection date for that rollout region. This is intended to facilitate migration to the NBN in an orderly and robust manner and also allows Telstra time to clear any pending order or modification before the managed disconnection date.

6 On 10 March 2021 Telstra notified the ACCC of an Excluded Event under the Migration Plan arising from NBN Co's inability to install HFC in-premises connection units due to semiconductor shortages. As a consequence, Telstra and NBN Co have agreed to revised disconnection arrangements to ensure that customers are not disadvantaged and to maintain service continuity.

The ACCC notes that the number of instances of non-compliance in this category is not insubstantial and considers that Telstra should continue to work to improve any data quality issues and non-compliance caused by human error. However, the ACCC also notes that these were not ordinary circumstances due to the events caused by COVID-19 and the NBN HFC pause, which were outside of Telstra's control.

2.3 Reconnection of permanently disconnected services

Telstra reported that in 2020–21 there were 65 cases where Telstra staff used incorrect processes to reconnect services that were previously permanently disconnected. These services were disconnected again once the errors were identified.

Telstra advised that these breaches were due to lack of awareness and understanding of the relevant processes by Telstra staff. Telstra provided subsequent feedback to impacted business areas to provide coaching to its staff to improve their awareness of correct processes for requesting reconnections. The ACCC considers that appropriate steps were taken by Telstra to ensure that these breaches do not occur in the future.

2.4 Temporary extension to disconnection requirements

In 2020–21 Telstra reported that it granted a small percentage of services (less than 1 per cent of the total volume of disconnections performed) a temporary extension from disconnection beyond the required date under the Migration Plan.

Telstra advised that this was mainly due to the potential for risks to the customer's wellbeing if their legacy service was disconnected before they had a working NBN service. Telstra also advised that in each instance it sought to ensure that the disconnection deferral was for as short a period as possible and was applied on an equivalent basis across its own retail division and wholesale customers. The ACCC supports the approach taken by Telstra in these cases to promote service continuity and a smooth migration process for end-users, particularly where the wellbeing or safety of customers is at risk. We do not have concerns with non-compliance with disconnection obligations in these circumstances for the small percentage of disconnections where these issues arise.

2.5 Disconnection deferral due to flooding in NSW

On 15 April 2021 Telstra notified the ACCC that due to ongoing impacts of floods in New South Wales in March 2021, Telstra and NBN Co had agreed to pause imminent managed disconnection activities in flood affected areas. Telstra wrote that this would minimise the risks to frontline staff in those areas, as well as protecting existing lines (to 1,400 premises) and service continuity for affected customers where possible.

Telstra did not advise the ACCC that this was a Force Majeure Event or formally seek forbearance in this instance. While this raises an issue regarding compliance with the Migration Plan, the ACCC considers that it was appropriate for Telstra and NBN Co to defer migration and disconnection timeframes under the circumstances to minimise risks to staff and affected customers.

2.6 Disconnection in error relating to an Excluded Event - HFC Pause

On 8 July 2021 Telstra notified the ACCC that it reactivated eight services of a Wholesale Customer that were disconnected in error and the customer did not have operational services available due to HFC semiconductor shortages. Telstra advised that its small business customer service team had been in contact with the Wholesale Customer to apologise for the incident.

While Telstra acknowledged that its processes should have prevented disconnections occurring, it advised the ACCC that there were a number of changes introduced to the standard managed disconnection arrangements, to promote service continuity in response to the prevailing circumstances and risk, that had impacted this particular customer's services. Telstra further noted that those changes were a result of underlying matters that were not within Telstra's direct control including: COVID-19 restrictions, NBN Co's pause on accepting new HFC connection orders and the continuing non-serviceability of some premises for the NBN. The ACCC considers that this matter was inadvertent, applied to a very small number of services, and that Telstra took appropriate action to address the error.

2.7 Disconnection deferral due to insufficient notice resulting from IT issues

On 30 September 2020 Telstra wrote to the ACCC stating that a Wholesale Customer (i.e., a retail service provider providing services through the Telstra network) had an IT issue when mailing out notifications⁷ to its customers. The IT issue resulted in errors in the customers' postal addresses. Consequently, some of the customers did not receive appropriate notification of their Disconnection Date under the Migration Plan.

Telstra advised it had delayed the disconnection process for affected customers at the request of the Wholesale Customer. The ACCC notes that although the IT error resulted in non-compliance with the Migration Plan, this issue was not the fault of Telstra and delaying the disconnection process was appropriate in the circumstances.

⁷ Refers to DD-3 notifications, which is an obligatory notification under the Migration Plan to be provided to customers prior to three months of the scheduled Disconnection Date.

3. Compliance with the Migration Plan

This chapter sets out the matters relating to compliance with Telstra's Migration Plan obligations.

In 2020–21 Telstra reported four matters of non-compliance with its Migration Plan (that were not also breaches of Part C of the SSU) in its annual report to the ACCC.

3.1 Failure to apply Soft Dial Tone

On 10 March 2021 Telstra advised the ACCC that it failed to apply a Soft Dial Tone⁸ to 2,150 wholesale services that were scheduled to be disconnected in February 2021. This means those services were kept active for a short additional time instead of the disconnection process commencing.

Telstra explained that this was due to human error and because an old service directory was utilised. To prevent such a breach occurring in the future, the Telstra staff involved were made aware of their error, the old directory was moved to a less accessible location, written procedures for applying Soft Dial Tone for wholesale customers were updated, and additional controls were implemented.

Telstra explained that impacted end-users gained up to an additional week of uninterrupted service. Telstra confirmed that they did not receive any customer complaints relating to this matter. The ACCC considers that non-compliance with the Migration Plan in this instance did not have a negative impact on end-users and appropriate action was taken by Telstra to prevent or limit reoccurrences of this error.

3.2 Late notification of disconnection schedule

Telstra advised in its 2020–21 report that it had complied with its obligation to publish the disconnection schedule and relevant updates for wholesale and retail customers within five business days after the disconnection date for a rollout region, in accordance with the Definitive Agreements. However, Telstra noted one instance where the data was updated one business day outside of the required timeframe. While the ACCC considers that timely publication of this information is important for wholesale and retail customers and notes that it is a Migration Plan obligation, the ACCC does not have concerns with this instance of late notification.

3.3 Automatic alerts not working for 2 months for some wholesale customers

Telstra reported in 2020–21 that for approximately two months commencing in February 2021, some wholesale customers did not receive automated alerts in association with new data having been uploaded to Telstra's wholesale customer portal, as required under the Migration Plan. However, any data uploaded to its wholesale customer portal during this time remained accessible to wholesale customers, and Telstra advised that wholesale customers regularly access the information as part of their operational processes.

Telstra advised that this matter was an inadvertent consequence of an IT update and has since introduced new controls to prevent similar breaches in the future. Telstra's quarterly Migration Plan report to the ACCC showed that there were no disputes raised by wholesale customers regarding this matter. The ACCC considers that appropriate remediation steps were taken by Telstra to prevent non-compliance in the future.

⁸ Under the Migration Plan, Telstra is required to apply a Soft Dial Tone to applicable services within the NBN fixed line footprint that are disconnected. This allows those phones to dial emergency numbers if required until final disconnection is implemented.

3.4 ISDN special services for wholesale customers

Telstra reported that in 2020-21, its quarterly Migration Plan reports to the ACCC have been omitting volumes of orders for ISDN Special Services by wholesale customers from the reports' cease sale metrics. Telstra advised that this was caused by an anomaly in the reporting logic and was specific to orders for ISDN services from wholesale customers. Telstra advised that it was not in a position to restate those cease sale metrics due to its IT system's archiving limitations. As a remediation step, Telstra advised in its 2020-21 report that it would include wholesale ISDN volumes within its cease sale metrics in future quarterly Migration Plan reports. The ACCC considers that the remediation step is appropriate.

4. Force Majeure Event, Excluded Event and forbearance

4.1 Force Majeure and Excluded events reported in 2020-21

Telstra reported that disconnection activity was impacted by two significant ongoing events during 2020-21 that gave rise to the need for extensions to the standard managed disconnection timeframes set out in the Migration Plan.

4.1.1 Force Majeure Event due to the COVID-19 pandemic

The ongoing impacts of the COVID-19 pandemic continued to be a Force Majeure Event, which Telstra managed under the arrangements initially notified to the ACCC during the previous reporting period when the pandemic commenced.⁹ A Force Majeure Event under the Migration Plan has the same meaning as in the Migration Plan Principles¹⁰ and generally relates to an event beyond the reasonable control of Telstra.

4.1.2 Excluded Event due to NBN Co's HFC network migration pause

On 10 March 2021 Telstra notified the ACCC of an Excluded Event under the Migration Plan arising from NBN Co's decision to pause its HFC network migration due to a worldwide shortage of semiconductors.¹¹ An Excluded Event under the Migration Plan is defined to include a matter which falls outside Telstra's responsibilities under the Migration Plan that prevents Telstra from meeting its obligations.

As a consequence of the migration pause, Telstra and NBN Co agreed to revised disconnection arrangements to ensure that customers were not disadvantaged and to maintain service continuity. The ACCC advised Telstra on 18 March 2021 that it agreed that Telstra's Migration Plan obligations will not be contravened to the extent that the Excluded Event causes Telstra to delay or fail to perform its obligations.¹²

4.2 Forbearance

In some cases, Telstra becomes aware of situations in advance where strict compliance with the Migration Plan would not be in the interests of its customers or end-users who may have been affected by external circumstance through no fault of their own, and seeks the ACCC's agreement to take a different course of action in the circumstances.

4.2.1 Disconnection deferral due to bushfires and COVID-19

On 18 December 2020 Telstra notified the ACCC that it had deferred the disconnection of approximately 3,000 premises because customers did not receive adequate messaging due to a Force Majeure Event.

9 See <https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/telstras-migration-plan/force-majeure-event-nsw-qld-vic-and-sa-bushfires-deferral-of-disconnection-of-customnet-spectrum-services> for details.

10 https://www.infrastructure.gov.au/sites/default/files/Telecommunications-Migration-Plan-Principles-Determination-2015_0.pdf.

11 <https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/telstras-migration-plan/excluded-event-due-to-hfc-network-migration-pause>.

12 Details are available at <https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/telstras-migration-plan/excluded-event-due-to-hfc-network-migration-pause>.

The ACCC had previously agreed that the 2019-20 bushfires and COVID-19 pandemic were both Force Majeure Events under the Migration Plan.

Telstra explained that the deferrals in December 2020 were necessary in the interests of customers, as it would provide customers with adequate and timely communications relating to migration of their services to the NBN prior to disconnection.

Telstra did not seek forbearance to defer the disconnections; however we considered that the additional time period for migration and disconnection provided to affected customers was necessary to ensure they were informed of the migration process in order to minimise disruption of their services.

4.2.2 Other deferrals of managed disconnection

On 15 September 2020 Telstra requested forbearance to begin implementation of new Managed Disconnection arrangements for premises that were going through ongoing NBN serviceability issues.¹³ The ACCC agreed to Telstra's request for forbearance on the condition that a formal variation to the Migration Plan was submitted as soon as practical. This variation was later submitted as part of the variation described in chapter 6.

On 10 December 2020 Telstra wrote to the ACCC requesting forbearance regarding the deferral of disconnection arrangements during the 2020-21 Christmas and New Year holiday period. The ACCC agreed to Telstra's request consistent with forbearance provided in previous years to maintain service continuity for customers during this period.

¹³ Details are available at <https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/telstras-migration-plan/disconnection-arrangements-for-premises-not-nbn-serviceable-and-premises-affected-by-covid-19-lockdown-arrangements>.

5. Changes to Required Measures

Telstra's Migration Plan requires it to develop six Required Measures that relate to the operating processes Telstra will follow when disconnecting customers from its copper and HFC networks.

On 20 April 2021 Telstra notified the ACCC that it was amending certain procedural measures that it is required to apply when disconnecting certain business grade services including private payphone services.¹⁴ These measures are collectively referred to as Required Measure 5.

Telstra consulted its customers on the new procedural measures and advised the ACCC that it did not receive any objections.¹⁵

The ACCC was satisfied that the new measures were consistent with the Migration Plan Principles and so did not object to them coming into effect.

14 Details are available at <https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/telstras-migration-plan/replacement-required-measures-5a-5c-and-5d>.

15 Details are available at <https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/telstras-migration-plan/required-measure-5f-private-payphones-elq-products>.

6. Variation to the Migration Plan

The first Migration Plan was approved by the ACCC in 2012. The ACCC has since considered and approved a number of variations.

On 13 August 2021 Telstra submitted to the ACCC a proposed variation to the Migration Plan. Telstra submitted a replacement of this proposal on 20 December 2021 in response to three submissions received by the ACCC on the original proposal. The replacement proposal included an in-train order (ITO) arrangement for Multi Dwelling Unit Common Areas and fire and lift telephone services scheduled for disconnection in March 2022.

The variation covered amendments:

- to the managed disconnection arrangements for services to premises that are Multi Dwelling Unit Common Areas and fire and lift telephone services
- to the timeframe for managed disconnection of premises that are not currently NBN serviceable
- to allow for public and private payphone services to be differentiated in the Migration Plan to enable Telstra to proceed with a national product exit of private payphone services
- to expand the current authority within Telstra for the reconnection of copper and hybrid fibre coaxial services in accordance with the standard conditions within the Migration Plan.

Following consideration of public submissions and the Migration Plan Principles, the ACCC approved the variation and published its decision on 23 February 2022. Further details are available on the ACCC's website.¹⁶

¹⁶ <https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/telstras-migration-plan/variation-approved-2>.



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

