



Australian
Competition &
Consumer
Commission

Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan

Final decision

February 2012

Public version

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Executive Summary

The Australian Competition and Consumer Commission (ACCC) has accepted the structural separation undertaking (SSU) and approved the draft migration plan submitted by Telstra.

Together, the SSU and migration plan implement a form of structural reform to the telecommunications sector that responds to the longstanding competition concerns that have arisen from Telstra's vertical integration.

Due to the adoption of a migration model of structural separation – whereby Telstra will cease to use its own fixed line access networks and will instead use the wholesale-only National Broadband Network to supply downstream services, the structural reform will be progressively implemented as the NBN fibre access network is built.

Given this progressive implementation, the SSU specifies a range of measures that will apply to Telstra's supply of fixed line access services to its wholesale customers during the interim period. These measures are intended to promote equivalence and transparency in Telstra's supply of those services to wholesale customers and its retail businesses. Of particular significance is the commitment that Telstra has given to providing equivalent outcomes for wholesale customers as are achievable by Telstra's retail businesses. The inclusion of this commitment provides additional assurance that the equivalence and transparency measures will remain appropriate and effective for the duration of the migration period.

The SSU also specifies measures that will enable the ACCC to monitor Telstra's compliance with its various commitments.

The ACCC acknowledges the assistance it has received from industry and members of the public throughout this inquiry, and the willingness of the proponents to the transaction to modify the proposed arrangements in response to the legitimate concerns expressed in submissions.

Structural Separation Undertaking

In accepting the SSU, the ACCC is satisfied that:

- the commitment to structural separation given by Telstra is consistent with the legislative requirements for its structural separation
- the transparency and equivalence measures are appropriate and effective
- the compliance measures are appropriate and effective.

Structural separation

In considering the SSU, the ACCC had regard to the effect of the structural reform upon competition and consumer interests. In addition, the ACCC was required to consider a range of other mandatory criteria including having regard to the Government's support for a migration form of separation and elements of the

commercial arrangements between Telstra and NBN Co that would receive the benefit of statutory authorisation.

Importantly, the SSU and the associated commercial arrangements implement the Government's preferred migration form of structural separation – which is a factor that strongly supports the acceptance of the undertaking as a result of the specific criteria to which the ACCC is required to have regard.

The commercial arrangements between Telstra and NBN Co were modified in the following ways as a consequence of issues arising during the ACCC's inquiry:

- Restrictions on Telstra promoting wireless services as substitutable for fibre services were replaced with a requirement that Telstra meet existing *Australian Consumer Law* requirements should it undertake such marketing.
- Any subsequent amendments to the commercial arrangements that would restrict either party from competing will now be subject to ACCC oversight – this is effected by a joint undertaking that NBN Co and Telstra have given to the ACCC.
- Telstra will be able to continue to supply the independent channel provider that currently uses its HFC network to supply end users on the FOXTEL platform.

Interim equivalence and transparency measures and compliance measures

Telstra has engaged in constructive discussions with the ACCC and industry stakeholders around its proposed equivalence and transparency commitments, and has significantly strengthened these measures during the course of the consultation period.

The measures established by the interim equivalence and transparency framework include:

- The delivery of price equivalence through new wholesale access contracts that will specify that, as a default position, the charges set out in ACCC access determinations are to apply.
- Commitments regarding the quality of Telstra's supply of regulated services and the security of wholesale customer information. These commitments are supported by ring fencing arrangements, reporting of key performance indicators and financial accounts.
- New procedures for resolving disputes between Telstra and its wholesale customers including the establishment of an accelerated investigation process and an independent telecommunications adjudicator.

These measures are supported by the inclusion of an overarching commitment to provide equivalent outcomes for wholesale customers as are achievable by Telstra's retail businesses.

The SSU now also includes appropriate and effective compliance arrangements, which is a mandatory requirement.

Migration Plan

The ACCC has approved the draft migration plan as it is satisfied that it complies with all of the mandatory legislative requirements, including the migration plan principles determined by the Minister.

Commencement date

The SSU and the migration plan will come into force once certain conditions have been satisfied. The relevant conditions are that the Minister has exempted Telstra from the requirement to give undertakings regarding its subscription television broadcasting licence (i.e. its interest in FOXTEL) and its hybrid fibre-coaxial (HFC) network.

Following the SSU coming into force, there will be an additional two month period for Telstra to implement specific interim equivalence and transparency measures before they become enforceable.

The ACCC's approval of the draft migration plan means that it is now a final migration plan. That final migration plan will come into force when the SSU comes into force.

1 Introduction

1.1 Overview

This paper sets out the ACCC's final decision on the assessment of Telstra's Structural Separation Undertaking (version dated 23 February 2012) (SSU) and draft Migration Plan (version dated 24 August 2011) (draft Plan).

This final decision document is structured as follows:

- Part A – reasons for the ACCC's final decision regarding Telstra's SSU
- Part B – reasons for the ACCC's final decision regarding Telstra's draft Plan

1.2 Timeline and consultation

Telstra lodged an SSU (July SSU) and a draft Plan on 29 July 2011. Telstra subsequently provided a revised draft Plan on 24 August 2011.

On 30 August 2011 the ACCC published its *Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan: Discussion Paper* (August discussion paper). The August discussion paper set out the ACCC's preliminary view that the July SSU could not be accepted as it did not fully comply with the mandatory legislative requirements in that it did not include a compliance plan for Telstra's primary commitment to structurally separate after the designated day. The August discussion paper also set out a number of other matters which the ACCC considered would be likely to militate against acceptance of the July SSU, including the lack of a clear and enforceable commitment to an 'equivalence of outcomes' that would support the interim equivalence and transparency measures.

The ACCC commenced its first public consultation on 30 August 2011 when the August discussion paper was released. Submissions on the issues raised in the August discussion paper were sought from interested parties by 27 September 2011. Following receipt of submissions, the ACCC engaged in further consultation with Telstra and industry stakeholders in relation to amendments to the SSU.

On 9 December 2011, Telstra lodged a revised SSU (December SSU) with the ACCC which replaced the July SSU. In response to the revised SSU, on 16 December 2011 the ACCC issued a second discussion paper, *Telstra's Structural Separation Undertaking: Discussion Paper* (December discussion paper) and commenced a second consultation process. Submissions on the issues raised in that paper were sought from interested parties by 13 January 2012.

Following that further round of public consultation, Telstra submitted a further revised version of the SSU on 23 February 2012.

A list of submissions received by the ACCC throughout the consultation process is included at Attachment A1. All public versions of the submissions are available on the

ACCC website.¹ The ACCC thanks all submitters for their contributions to the consultation processes.

The ACCC has had regard to all relevant submissions in forming its views on whether to accept the SSU and approve the draft Plan.

1.3 ACCC's acceptance of the SSU

The ACCC has decided to accept the SSU, for the reasons further outlined in Part A of this paper.

The Telco Act provides that the ACCC's acceptance of an undertaking about structural separation must be subject to the occurrence of particular events, if Telstra elects to nominate those events in a document that accompanies the SSU.²

Telstra has nominated a number of permitted events in Attachment A to the SSU which must occur before the SSU can come into force in accordance with section 577AB of the Telco Act. Section 577AA of the Telco Act provides that the ACCC must nominate a period of 6 months (unless another period is specified by the Minister) for those events to occur.

The ACCC's decision to accept Telstra's SSU is subject to the occurrence of the following events within 6 months from 27 February 2012:

- the approval of the draft migration plan by the ACCC under section 577BDA or 577BDC of the Telco Act;
- the making of a declaration under section 577J(3) of the Telco Act;³ and
- the making of a declaration under section 577J(5) of the Telco Act.⁴

The ACCC notes that, following its acceptance of the SSU, the ACCC approved Telstra's draft migration plan, meaning that the first condition precedent has been satisfied.

The ACCC notes that pursuant to section 577AA(6) of the Telco Act, Telstra must notify the ACCC in writing of the occurrence of these remaining events as soon as practicable after the occurrence. The ACCC will publish these notifications on its website as they are received.

¹ See: <http://www.accc.gov.au/content/index.phtml?itemId=1003999>.

² Telco Act, s 577AA.

³ Telco Act, s 577J(3) provides that the Minister may declare, in writing, that Telstra is exempt from the requirement to have an undertaking under s 577C (i.e. with respect to its HFC network).

⁴ Telco Act, s 577J(5) provides that the Minister may declare, in writing, that Telstra is exempt from the requirement to have an undertaking under s 577E (i.e. with respect to subscription television broadcasting licences).

1.4 ACCC's approval of the draft Migration Plan

Following its decision to accept the SSU, the ACCC decided to approve the draft Plan for the reasons outlined in Part B of this paper. The draft Plan is now a final migration plan pursuant to section 577BE(1) of the Telco Act.

Pursuant to section 577BE(3) of the Telco Act, the Plan will come into force once the SSU comes into force. The draft Plan will then form a part of Telstra's SSU.

PART A: STRUCTURAL SEPARATION UNDERTAKING

2 Overview

The structure of this Part A is as follows:

- **Section 3 Background** – This section provides an overview of the structural reform of the telecommunications industry and the existing regulatory regime.
- **Section 4 Structural Separation Undertaking** – This section provides an overview of Telstra’s SSU and the relevant legislative framework.
- **Section 5 ACCC decision in relation to the SSU** – This section provides a summary of the ACCC’s decision.
- **Section 6 Telstra’s structural separation** – This section discusses the scope of Telstra’s structural separation and Telstra’s ongoing vertical and horizontal integration.
- **Section 7 Consolidation of fixed-line access networks** – This section discusses the implications for competition and consumers of the disconnection of Telstra’s copper access network and the deactivation of the broadband capability of Telstra’s HFC network.
- **Section 8 Other matters relating to the Definitive Agreements** – This section discusses a number of key matters arising from the Definitive Agreements that are not directly related to the consolidation of fixed-line access networks.
- **Section 9 Interim equivalence and transparency** – This section discusses the ACCC’s consideration of the interim equivalence and transparency measures.
- **Section 10 Monitoring of compliance with the obligation to structurally separate** – This section discusses the ACCC’s consideration of Telstra’s compliance measures that are to operate after the designated day.

3 Background

3.1 Structural reform of the telecommunications industry

In 2009 the Government issued a discussion paper, *National Broadband Network: Regulatory Reform for 21st Century Broadband*, seeking views on various reform options that the Government was considering to reform the telecommunications regulatory framework in the transition to the NBN.

Following this review, the CACS Act was passed in November 2010, which introduced a suite of amendments to the Telco Act and the CCA that created a framework to address Telstra's vertical and horizontal integration.

The Explanatory Memorandum to the CACS Bill states that the legislative package was, among other things "aimed at enhancing competitive outcomes in the Australian telecommunications industry."⁵ The Explanatory Memorandum cited Telstra's vertical and horizontal integration and stated:

Partly because of this integration, it has been able to maintain a dominant position in virtually all aspects of the market, despite more than 10 years of open competition. It is the Government's view that Telstra's high level of integration has hindered the development of effective competition in the sector.⁶

Key features of the new framework were provisions for the vertical and horizontal separation of Telstra and reforms to the telecommunications regulatory regime including the telecommunications specific sections of the CCA.

Under the framework introduced by the CACS Act, Telstra may elect to either submit a voluntary structural separation undertaking or be subject to mandatory functional separation.

The Telco Act was amended to provide that Telstra may be prevented from acquiring designated spectrum, which is anticipated to be required for advanced wireless broadband services, unless it submits an SSU and:

- an undertaking that it will not be in a position to control an HFC network;
- an undertaking that it will not be in a position to control a subscription television broadcasting licence (i.e. that Telstra divests its FOXTEL interest);

and the ACCC accepts those undertakings.⁷

However, the Minister may exempt Telstra from the requirement to have an undertaking about HFC networks or subscription television broadcasting licences if the

⁵ Explanatory Memorandum, CACS Bill, p 1.

⁶ Explanatory Memorandum, CACS Bill, p 1.

⁷ Telco Act, Part 10, Sch 1.

Minister is satisfied that Telstra's SSU is sufficient to address concerns about the degree of Telstra's power in telecommunications markets. These exemptions are both nominated conditions precedent to the SSU coming into force (see section 1.3).

If an SSU does not come into force, Telstra will be required to functionally separate.⁸

3.2 Existing regulatory framework

3.2.1 Parts XIB and XIC of the CCA

Part XIB of the CCA establishes a specific regime for addressing anti-competitive conduct in the telecommunications industry. It operates in addition to the general competition provisions in Part IV of the CCA. At the time of its introduction, the Government considered that total reliance on Part IV to constrain anti-competitive conduct in telecommunications might be ineffective as:

Telecommunications is an extremely complex, horizontally and vertically integrated industry and competition is not fully established in some telecommunications markets. There is considerable scope for incumbents to engage in anti-competitive conduct because competitors in downstream markets depend on access to networks or facilities controlled by the incumbents.⁹

Broadly, the competition provisions in Part XIB prohibit a carrier or carriage service provider from engaging in anti-competitive conduct.¹⁰

Part XIC establishes an industry specific regime for regulated access to carriage services. At the time of its introduction, the Government considered that there was a need for an industry-specific regime, in addition to the essential facilities access regime in Part IIIA of the CCA, which would reflect particular policy interests in promoting any-to-any connectivity; promoting diversity and competition in the supply of carriage services, content services and other services supplied by means of carriage services; and ensuring access to carriage services is established on reasonable terms and conditions and includes necessary ancillary services.¹¹ Part XIC has its own specific objective "to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services."¹²

Part XIC provides for the ACCC to declare carriage services and related services (declared services).¹³ Telstra supplies a number of declared services to its wholesale customers and competes against these wholesale customers in downstream retail markets.

⁸ Telco Act, Part 9, Sch 1.

⁹ Explanatory Memorandum, *Trade Practices Amendment (Telecommunications) Bill 1996*, p 6.

¹⁰ Defined as taking advantage of a substantial degree of power in a telecommunications market with the effect or likely effect of substantially lessening competition in that or any other telecommunications market; or contravening ss 44ZZRJ, 44ZZRK, 45, 45B, 46, 47 or 48 of Part IV of the CCA where that conduct relates to a telecommunications market.

¹¹ Explanatory Memorandum, *Trade Practices Amendment (Telecommunications) Bill 1996*, p 38.

¹² CCA, s 152AB.

¹³ Currently declared services are listed on the ACCC's declared services register:
<http://www.accc.gov.au/content/index.phtml/itemId/777921>.

Providers of a declared service must comply with the standard access obligations (SAOs) set out in Part XIC,¹⁴ unless an exception or exemption applies. Among other things, the SAOs require a provider of a declared service (the access provider), if requested by an access seeker to:

- supply an active declared service in order that the access seeker can provide carriage services and/or content services;
- take all reasonable steps to ensure that the technical and operational quality of the active declared service is equivalent to that which the access provider provides to itself; and
- take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the access seeker, fault detection handling and rectification of technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

The CACS Act amended the CCA to change the operation of Part XIC from a negotiate/arbitrate access regime to a regime which requires the ACCC to make access determinations for all declared services. Access determinations set default price and non-price terms, which apply in the absence of a privately negotiated access agreement between the service provider and access seeker. Compliance with access determinations is a condition of a carrier licence and a service provider rule.

Elements of Telstra's fixed-line telecommunications networks continue to represent enduring bottlenecks and are therefore an important focus of current regulation under Part XIC of the CCA. Notwithstanding the regulation of access to Telstra's fixed-line networks, Telstra has endured as the dominant fixed-line service provider in Australian telecommunications markets.

The current state of competition in relevant markets is discussed in Attachment A2.

3.2.2 Operational separation regime

In 2005, the Department of Communications, Information Technology and the Arts conducted a review of telecommunications competition regulation and introduced an operational separation regime to Telstra. This regime was intended to support greater equivalence and transparency in services provided by Telstra to its wholesale customers and its retail operations.¹⁵ At the time, the Government noted that:

Telstra is a vertically integrated firm which retains a dominant market position in many telecommunications markets. Telstra also owns infrastructure which its competitors need to access and interconnect with in order to compete against it. Telstra's control over this infrastructure, combined with its market position, creates an incentive and the ability for it to favour its own retail business in the provision of access to this important

¹⁴ CCA, s 152AR.

¹⁵ Department of Communications, Information Technology and the Arts, *Telecommunications Competition Regulation – Issues Paper*, April 2005.

infrastructure. Telstra's vertical integration also creates a lack of transparency that makes it harder for the ACCC to effectively enforce the competition regulations.¹⁶

The current operational separation regime is governed by an operational separation plan (OSP) which was proposed by Telstra and approved by the Minister in June 2006. It sets out procedures and commitments aimed at promoting equivalence in the standard of delivery of eligible services¹⁷ by Telstra between its wholesale customers and its retail customers. These include measures relating to Telstra's organisational arrangements, processes for providing information to wholesale customers about changes to Telstra's network, measures requiring Telstra to protect wholesale customers' confidential information and processes for the resolution of complaints from wholesale customers.

Telstra's OSP also provides for a price equivalence framework (PEF) which seeks to provide ongoing assurance that Telstra is not favouring its retail arm by supplying services to itself at prices which are unjustifiably lower than those offered to its downstream competitors. The PEF requires Telstra to conduct imputation testing of material price changes (as defined by Telstra). The PEF imputation testing is intended to assess whether there is sufficient margin for an efficient retail competitor to compete with Telstra in the relevant retail market(s) given the wholesale costs or costs of self supply that are, or would be, faced by an efficient competitor and the costs of transforming wholesale products or inputs that are self supplied into retail products.

The role of the ACCC with respect to the OSP is essentially to investigate and report matters to the Minister as appropriate.

The ACCC considers that the operational separation regime is ineffective. In its submission to the Government's 2009 *National Broadband Network: Regulatory Reform for 21st Century Broadband* discussion paper (ACCC Regulatory Reform Submission), the ACCC stated:

The ACCC's experience is that the current operational separation regime aimed at promoting equivalence is ineffective and does not address Telstra's incentive and ability to discriminate against its competitors. Therefore any measures to improve at the margins the operational separation regime would just be an attempt to develop upon a framework that is, at its core, unable to promote its fundamental objectives.¹⁸

In the same submission, the ACCC noted that:

The current operational separation regime is not an appropriate structural arrangement for Telstra during the transition to the NBN. Furthermore it is inconsistent with the structural framework envisaged for the future NBN environment and will not assist in facilitating opportunities for competitive outcomes in the transition period.¹⁹

¹⁶ Department of Communications, Information Technology and the Arts, *Telecommunications Competition Regulation – Issues Paper*, April 2005, p 3.

¹⁷ Eligible services are defined in section 152AL of the CCA and include listed carriage services (as defined in section 16 of the Telco Act) and services which facilitate the supply of listed carriage services.

¹⁸ ACCC Regulatory Reform Submission, p 8.

¹⁹ Ibid, p 9.

Upon the coming into force of an SSU, the current operational separation regime will cease to operate.²⁰

3.3 National Broadband Network

On 7 April 2009 the Government announced that it intended to establish a company, NBN Co, to build and operate a wholesale-only, open access NBN.²¹

The key features of the NBN including its rollout and operation are outlined by a number of documents and legislative provisions including:

- the NBN Implementation Study;
- the Government's Statement of Expectations;
- NBN Co's Corporate Plan;
- the NBN Companies Act; and
- the NBN Access Act.

The key features of the NBN framework are set out in Attachment A3 to this paper.

3.4 Definitive Agreements

On 23 June 2011, Telstra announced the execution of commercial agreements with NBN Co, known as the Definitive Agreements. The Definitive Agreements govern, among other things, the terms on which Telstra will disconnect its fixed-line customers and provide services and access to key infrastructure to NBN Co.

The Definitive Agreements primarily comprise the following documents:

- Implementation and Interpretation Deed;
- Subscriber Agreement;
- Infrastructure Services Agreement; and
- Access Deed.

The Definitive Agreements are highly complex commercial documents that were negotiated between NBN Co and Telstra over some time. Telstra has made some public disclosure regarding the content of the agreements in its announcement to the Australian Stock Exchange, however the parties have elected not to publicly disclose the content of the Definitive Agreements more fulsomely at this time.²²

²⁰ CACS Act, s 65.

²¹ Prime Minister, Treasurer, Minister for Finance, Minister for Broadband, 'New National Broadband Network,' (joint media release, 7 April 2009).

²² See Telstra's announcement to the ASX on 23 June 2011.

The Definitive Agreements and their relevance to the assessment of Telstra's SSU are discussed in further detail in sections 7 and 8. Provisions in the Definitive Agreements that the ACCC considered most relevant to its assessment of Telstra's SSU are outlined in Attachment A4.

4 Telstra's SSU

4.1 Summary of the SSU

The proposed structural reform is to be implemented by:

- An SSU that includes:
 - commitments by Telstra to cease the supply of specified services over networks under its control from the designated day—which is expected to be the day on which the construction of the new wholesale-only national broadband network will be concluded; and
 - equivalence and transparency measures regarding access to Telstra's key wholesale services (that is, the Regulated Services) in the period leading up to the designated day.
- A migration plan under which Telstra will cease supplying copper and most HFC services—including wholesale services (where they are supplied)—as part of the migration to the national broadband network.

4.2 Legislative framework

Section 577A(1) of the Telco Act allows the ACCC to accept a written SSU from Telstra.

On 24 June 2011, following a public consultation period, the Minister published the following instruments relating to the scope and criteria for assessment of the SSU:

- *Telecommunications (Structural Separation – Networks and Services Exemption) Instrument (No. 1) 2011* (Networks and Services Instrument) – this determines the networks and services that will be exempt from the scope of Telstra's SSU. The scope of the SSU is discussed further at section 6 of this paper.
- *Telecommunications (Regulated Services) Determination (No. 1) 2011* (Regulated Services Determination) – this specifies which services will be subject to interim transparency and equivalence measures, discussed further at section 9 of this paper.
- *Telecommunications (Acceptance of an Undertaking about Structural Separation – Matters) Instrument 2011* (Ministerial Criteria Instrument) – this sets out matters to which the ACCC is to have regard in assessing the SSU in addition to those specified in section 577A of the Telco Act. This is discussed further in Attachment A5.

These instruments and further detail on the consultation process, including stakeholder submissions, are available at:

http://www.dbcde.gov.au/broadband/national_broadband_network/telecommunications_regulatory_reform.

4.3 The SSU and the Competition and Consumer Act

The CCA provides that if Telstra has engaged or is required to engage in conduct in order to comply with an SSU, then, in performing a function, or exercising a power under Part XIB or Part XIC in relation to Telstra, the ACCC must have regard to the conduct to the extent that the conduct is relevant.²³

The CCA provides that the ACCC must not perform a function or exercise a power under Part XIC so as to prevent Telstra from complying with the undertaking.²⁴ For example, the ACCC could not make an access determination where a term of that access determination would prevent Telstra from complying with its SSU.

Section 152AR in Part XIC of the CCA sets out the SAOs that apply to a provider of declared services. Section 152AR(3)(a) provides that an access provider must, if requested to do so by a service provider, supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services.

The obligation on Telstra to supply an active declared service is limited by section 152AR(4)(e) which provides that it does not apply to the extent (if any) to which the imposition of the obligation would have the effect of preventing Telstra from complying with, among other things, an SSU.

4.4 Section 577BA authorisation

Section 577BA of the Telco Act specifies a range of different contracts, arrangements and understandings (CAUs) and conduct relating to the agreements between NBN Co and Telstra and relating to Telstra's SSU that are authorised for the purposes of section 51(1) of the CCA.

Section 51(1) of the CCA relevantly provides that in deciding whether a person has contravened Part IV of the CCA, anything specified in, and specifically authorised by an Act must be disregarded.

The section 577BA legislative authorisation is extended to Part XIB by section 151AJ(9) of the CCA, which provides that a person does not engage in anti-competitive conduct for the purposes of Part XIB if, under section 577BA of the Telco Act, the conduct is authorised for the purposes of section 51(1) of the CCA.

A number of the legislative authorisation provisions in section 577BA only come into effect once an SSU is in force. The ACCC's decision to accept Telstra's SSU triggers the benefit of various limbs of the legislative authorisation, providing protection for:

- NBN Co and Telstra "giving effect to" provisions of contracts, arrangements or understandings (CAUs) between NBN Co and Telstra (that is, the Definitive Agreements) once the SSU comes into force;²⁵

²³ CCA, ss 151CQ(2), 152ER(2).

²⁴ CCA, s 152ER(3).

²⁵ Telco Act, s 577BA(3).

- Telstra engaging in conduct if that conduct is required in order for Telstra to comply with the SSU,²⁶ and
- NBN Co and Telstra entering into or giving effect to provisions of future CAUs where Telstra has entered into that CAU in order to comply with the SSU.²⁷

The ACCC is required, by the Ministerial Criteria Instrument, to have regard to conduct that would be authorised under section 577BA as a consequence of the ACCC's acceptance of the SSU or of the SSU coming into force when deciding whether to accept an SSU.²⁸ The ACCC's approach to this criterion is outlined in Attachment A5.

The ACCC is not required to conduct an authorisation process under Part VII of the CCA in its consideration of the SSU and the Definitive Agreements. However, in the August discussion paper, the ACCC foreshadowed that its assessment of Telstra's SSU would involve a consideration of the impact of the conduct that would be authorised if the SSU is accepted and comes into force, as part of its overall decision.

This aspect of the ACCC's assessment of the SSU is discussed in sections 7 and 8 of this paper.

²⁶ Telco Act, s 577BA(6).

²⁷ Telco Act, s 577BA(8).

²⁸ Ministerial Criteria Instrument, para 4(d).

5 ACCC decision in relation to the SSU

5.1 Legislative requirements

The legislative framework for the ACCC's assessment of Telstra's SSU imposes a bespoke statutory test which specifies a number of mandatory requirements that the SSU must meet, as well as a range of matters to which the ACCC must have regard in deciding whether or not to accept an SSU that satisfies the mandatory requirements.

Section 577A of the Telco Act sets out the mandatory requirements and the broad statutory criteria that the ACCC is required to apply in assessing the SSU. The legislation requires that the ACCC must be satisfied that the SSU:

- provides for structural separation within the scope set by the Networks and Services Instrument;
- provides for appropriate and effective transparency and equivalence in relation to Telstra's supply of regulated services to its wholesale customers and retail business units during the interim period;²⁹ and
- contains appropriate and effective mechanisms for the ACCC to monitor Telstra's compliance with the SSU.³⁰

Section 577A(6) of the Telco Act then sets out a number of matters to which the ACCC is to have regard in making its decision whether to accept an SSU that meets the mandatory requirements set out above.

The application of these mandatory criteria to the ACCC's decision is set out in more detail at Attachment A5 of this paper.

5.2 ACCC decision

In having regard to all of the mandatory criteria, the ACCC has decided to accept the SSU subject to the occurrence of the nominated events within 6 months, as outlined in section 1.3.

The ACCC has set out its reasons for its decision in relation to the SSU in the following sections of this final decision:

- section 6 Telstra's structural separation;
- section 7 Consolidation of fixed-line access networks;
- section 8 Other Definitive Agreement matters;

²⁹ Telco Act, s 577A(3).

³⁰ Telco Act, s 577A(5).

- section 9 Interim Equivalence and Transparency; and
- section 10 Monitoring of compliance with the obligation to structurally separate.

The ACCC has considered each of the mandatory criteria where relevant, as indicated throughout this decision document.

The ACCC considers that the SSU satisfies all of the mandatory requirements prescribed by section 577A of the Telco Act. That is, the ACCC is satisfied that:

- the commitment to structural separation given by Telstra in Part C of its SSU is consistent with the requirements of section 577A(1)(a) of the Telco Act;
- the SSU provides for appropriate and effective transparency and equivalence in relation to Telstra's supply of regulated services to its wholesale customers and retail business units during the interim period; and
- the SSU contains appropriate and effective mechanisms for the ACCC to monitor Telstra's compliance with the SSU.

The ACCC has also considered whether or not it should accept the SSU against the other mandatory criteria to which the ACCC is to have regard (as outlined further in Attachment A5). The ACCC notes that the mandatory criteria do not require the ACCC to undertake a net public benefit assessment, as the ACCC is required to do in some other processes. Rather, the mandatory criteria in this context require the ACCC to have regard to a diverse range of considerations, including the criteria prescribed by the Minister in the Ministerial Criteria Instrument.

In having regard to all of those considerations, the ACCC has made a decision to accept the SSU.

6 Telstra's structural separation

6.1 Overview

- The scope of the requirement for Telstra to structurally separate in accordance with the Telco Act is specified in the Networks and Services Instrument, which allows Telstra to remain vertically and horizontally integrated in relation to some networks and services.
- Access seekers raised a concern that arrangements for NBN Co to lease Telstra's infrastructure in the Definitive Agreements could lead to access seekers being evicted from ducts that may be space constrained, in favour of NBN Co. The ACCC considers that the lease arrangements in the Definitive Agreements are consistent with the operation of the facilities access regime and provide sufficient assurance in relation to those concerns.
- Access seekers raised some concerns in relation to Telstra's ongoing ownership of passive infrastructure and horizontal integration, however these issues are beyond the scope of the ACCC's remit for the assessment of the SSU.

6.2 Introduction

The coming into force of the SSU will result in the progressive separation of Telstra's upstream and downstream functions as services are disconnected from Telstra's copper and HFC networks and migrated to the NBN.

Consequently, following the rollout of the NBN to a particular area, Telstra and other service providers will purchase wholesale access services from a provider that is not vertically integrated (NBN Co).

6.3 Scope of the SSU

The scope of the requirement in section 577A(1)(a) regarding Telstra's commitment to structurally separate is narrowed by the application of the Networks and Services Instrument. This instrument exempts certain networks and services from the requirement to structurally separate. Telstra is not required to commit to structurally separating in relation to services provided over exempt networks or in relation to the provision of exempt services.

The ACCC is confined to assessing whether Telstra has provided an SSU which meets the requirements of section 577A(1)(a) of the Telco Act, within the scope set by the Networks and Services Instrument.

The Networks and Services Instrument exempts the provision of fixed-line carriage services in any areas that are not passed by NBN fibre by the designated day or in relation to any area outside the NBN fibre rollout region. Telstra's structural separation is therefore limited to the geographical area that will be defined by the footprint of NBN Co's access network. The Government's objective is that the NBN fibre footprint

will extend to 93 per cent of Australian premises, with minimum fibre coverage of 90 per cent of Australian premises.³¹

Within the NBN fibre footprint, the Networks and Services Instrument permits Telstra to operate and supply some networks and services after the designated day, including:

- pay TV services delivered over the HFC network, other than IP-based services;³²
- all fibre networks and services delivered over those networks to the extent that they do not contain copper or form part of a HFC network;³³
- services required by law to be supplied over a HFC or copper network;³⁴
- any network used to connect international networks;³⁵ and
- backhaul networks.³⁶

Part C of the SSU states that Telstra undertakes that, at all times after the designated day:

- (a) Telstra will not supply Non-Exempt Services to retail customers in Australia using a Non-Exempt Network over which Telstra is in a position to exercise control; and
- (b) Telstra will not be in a position to exercise control of a company that supplies Non-Exempt Services to retail customers in Australia using a Non-Exempt network over which Telstra is in a position to exercise control.

The ACCC considers that the commitment to structural separation given by Telstra in Part C of its undertaking is consistent with the requirements of section 577A(1)(a) of the Telco Act.

6.4 Telstra's ongoing vertical integration

6.4.1 Background

The Networks and Services Instrument does not require Telstra to structurally separate in relation to the passive infrastructure that will be relevant to the supply of NBN-based services. Passive infrastructure that Telstra will own and operate that will be relevant to connection to the NBN includes:

- 111 of the 121 NBN POI sites which will be located in Telstra exchange buildings;³⁷ and

³¹ SOE, p 1.

³² Networks and Services Instrument, Sch 1, item 5.

³³ Networks and Services Instrument, Sch 2, item 2.

³⁴ Networks and Services Instrument, Sch 1, items 8-9.

³⁵ Networks and Services Instrument, Sch 2, item 12.

³⁶ Networks and Services Instrument, Sch 2, item 1.

³⁷ NBN Co, *Facilities Access, Overview of the NBN Co facilities access product*, 2011, p 4.

- underground facilities including ducts leading into those POI exchanges and associated duct infrastructure (such as pits and manholes).

Under the Definitive Agreements, NBN Co has acquired rights to access, occupy and use:

- rack spaces in Telstra’s exchanges, including for its points of interconnect;
- duct sections and associated duct infrastructure (such as pits and manholes); and
- dark fibre links for the provision of NBN Co’s core transit network.

NBN Co’s use of Telstra’s ducts and dark fibre links is intended to assist NBN Co to build its network, but it is not intended that NBN Co could resell access to this infrastructure.

Accordingly, access seekers to the NBN will require:

- Access to space within Telstra exchanges in order to interconnect with the NBN. Access seekers will be able to obtain access to this space from either NBN Co or Telstra.
- Access to ducts or external interconnection cables in order to interconnect transmission facilities at the NBN POIs, where these POIs are located in Telstra exchange buildings. Access seekers will be required to seek either regulated or commercial access to this facility directly from Telstra.

Access to Telstra’s passive infrastructure is a regulated service, governed by the Telco Act, with access terms to be agreed between the parties. The Telco Act provides carriers’ general rights to request access to the facilities of other carriers, pursuant to Parts 3 and 5 of Schedule 1 (the ‘facilities access regime’).

The August discussion paper noted that there is potential for Telstra to continue to engage in discrimination in relation to access to exchange facilities and that Telstra may also retain a competitive advantage in relation to its ongoing ownership of infrastructure.

The August discussion paper noted that the view taken as to whether these matters are likely to be a concern would depend upon a number of factors. The August discussion paper invited submissions relating to whether Telstra’s ongoing ownership and control of passive infrastructure that may be required by other access seekers to interconnect with the NBN would be likely to impede the realisation of any of the benefits to competition that are expected to arise from the structural reform.

6.4.2 Summary of submissions received

The ACCC received submissions on the issue of Telstra’s ongoing vertical integration in relation to passive infrastructure and related facilities access issues from the Competitive Carriers’ Coalition (CCC), Optus, Vocus, Herbert Geer (on behalf of Adam Internet, iiNet and Internode) and the Communications Law Centre (CLC).

The submissions broadly addressed two main issues:

- Telstra’s continued vertical integration and equivalence issues; and
- the effect of Telstra’s lease arrangements with NBN Co on access seekers.

Continued vertical integration and equivalence issues

Submissions relating to Telstra’s ongoing ownership of passive infrastructure raise issues both with the current facilities access regime and with the potential for ongoing equivalence issues under the SSU.

Submissions from the CCC, Vocus, Optus and the CLC raise concerns about Telstra’s ongoing vertical integration. The submissions raise a clear concern that Telstra will have ongoing incentives and ability to discriminate against access seekers.³⁸

Submissions from the CCC, Vocus and Herbert Geer indicate a level of dissatisfaction with the current access regime and terms of access. In particular, the CCC submits that “there are many shortcomings with the current arrangements” and notes a number of issues relating to the application process and procedures, and relating to terms of access.³⁹ The CCC considers that the “regime operates under a sub-optimal ‘negotiate-arbitrate’ model and is subject to even more weaknesses and scope for gaming/delay than the previous Part XIC regime. It does not contain an adequate equivalence test to ensure that there is a level playing field for competition with Telstra.”⁴⁰

Telstra’s lease agreements with NBN Co

The ACCC received submissions from the CCC, Vocus and Herbert Geer in relation to Telstra’s infrastructure lease agreements with NBN Co, and how these may affect access seekers’ existing lease arrangements with Telstra.

Vocus and Herbert Geer submit that, to the extent to which Telstra’s duct space is limited, priority of access may be given to NBN Co. They express concerns that, although NBN Co has not publicly indicated that it would seek to have Telstra “evict” other access seekers, Telstra has strong financial interest to do so. In support of this, Vocus and Herbert Geer cite high access fees paid by NBN Co and their understanding that there are financial penalties in the Definitive Agreements for Telstra failing to make infrastructure available.⁴¹

Vocus submits that unless the ACCC is satisfied that the existing infrastructure of competitive carriers is protected under the SSU and the terms of agreements between Telstra and NBN Co, then the ACCC should not accept the SSU.⁴²

³⁸ CCC submission, September 27 2011, p 9; Vocus submission, September 2011, p 2; Optus submission, pp 9-10; CLC submission, September 2011, p 2.

³⁹ CCC submission, September 27 2011, p 24.

⁴⁰ Ibid, p 25.

⁴¹ Vocus submission, September 2011, p 3; Herbert Geer submission, September 2011, pp 24-5.

⁴² Vocus submission, September 2011, p 4.

The ACCC notes that the details of NBN Co's lease agreements with Telstra in the Definitive Agreements were not fully disclosed at the time and that submissions were therefore based on limited publicly available information.

6.4.3 Assessment

The ACCC is not required to directly consider Telstra's ongoing vertical integration, however it is one of several considerations that could be relevant to the impact of the SSU on competition. In this context, the ACCC noted in the August discussion paper that:

... there is potential for Telstra to continue to engage in discrimination in relation to access to exchange facilities. Telstra may also retain a competitive advantage in relation to its ongoing ownership of facilities...It is not yet clear whether these matters would, in practical terms, be likely to impede the development of competition in downstream markets following the SSU coming into effect.⁴³

The ACCC notes that equivalence of access to infrastructure is only covered by the SSU in the interim equivalence and transparency measures by reference to TEBA space, as defined in the Regulated Services Determination. Access seekers will need to continue to gain access to Telstra's other passive infrastructure under the current access regime.

In the August discussion paper, the ACCC noted that the extent to which Telstra's ongoing ownership of facilities would pose a concern depended on factors including:

... whether commercial or regulatory arrangements can give adequate assurance that appropriate access rights to relevant facilities will be available on reasonable terms and conditions.⁴⁴

Submissions from access seekers questioned the adequacy of existing regulatory arrangements to provide assurance that access rights to relevant facilities will be available on reasonable terms and conditions.

In this regard, the ACCC considers that its regulatory powers under Part XIC of the CCA provide some assurance, should the existing access regime prove to be inadequate, of timely access to Telstra's ducts and associated facilities on reasonable terms and conditions. The ACCC will retain its role in scrutinising and monitoring the effectiveness of these arrangements, particularly during the rollout of the NBN.

In relation to Telstra's lease agreements with NBN Co, the ACCC notes the concern from access seekers that the terms of the lease agreements could incentivise Telstra to seek to evict current access seekers to make space for NBN Co.

The ACCC notes that the concerns raised are inconsistent with the operation of the facilities access regime, under which Telstra cannot revoke existing access rights provided sufficient space remains available. In addition, under the Definitive Agreements, NBN Co will only be able to access ducts that have sufficient capacity to

⁴³ August discussion paper, p 39.

⁴⁴ Ibid, p 41.

meet NBN Co's requirements, taking into account third party access rights and Telstra Reservations in place prior to the date of NBN Co's order. Further, under the Definitive Agreements, Telstra is expressly required to maintain its queue for duct access—which is used to manage pending duct access orders from different access seekers, including NBN Co—in accordance with the law.

6.5 Telstra's ongoing horizontal integration

6.5.1 Background

The particular type of structural reform provided by this SSU will not result in any changes to Telstra's partial ownership interest in FOXTEL. The ACCC continues to have concerns that Telstra's continuing interest in FOXTEL creates significant risk to competition in fixed voice and broadband services over the NBN. Competition may be hindered by Telstra having an exclusive ability, or significant advantage in its ability, to bundle its services with FOXTEL's subscription TV content, to the extent that such bundling becomes important to a retail service provider's ability to compete for telephony and broadband subscribers.

To this end, in the August discussion paper the ACCC called for submissions in relation to whether Telstra's ongoing ownership interest in FOXTEL is likely to impede the realisation of any of the expected benefits to competition from the structural reform.

6.5.2 Summary of submissions received

The ACCC received two submissions which addressed the issue of Telstra's ongoing horizontal integration, from Herbert Geer (on behalf of Adam Internet, iiNet and Internode) and Optus.

Herbert Geer considers that the SSU is not providing for structural separation because it does not address Telstra's horizontal integration.

Optus has concerns regarding Telstra's ownership stake in FOXTEL and its effect on the Australian pay TV market and associated effects on the telecommunications fixed-line services market. Optus considers that "control of content will become increasingly critical"⁴⁵ and that Telstra will have a competitive advantage due to its ownership stake in FOXTEL. Optus notes that the ACCC has had long-standing concerns with respect to Telstra's ownership interest in FOXTEL and exclusive content rights. In this regard, Optus acknowledges that "the ACCC has limited if any ability to address these concerns in the context of its review of the SSU".⁴⁶

6.5.3 Assessment

The ACCC has held a long-standing view that there would be competition benefits from horizontal separation in the telecommunications industry and has previously noted

⁴⁵ Optus Submission, September 2011, p 48.

⁴⁶ Ibid, p 50.

specific concerns in relation to Telstra's ownership of FOXTEL and in relation to content markets.⁴⁷

However, the role of the ACCC in this process is to consider whether the SSU is capable of acceptance with respect to the overall scope of the structural reform and statutory criteria that has been established. In this regard, the SSU can meet these requirements without Telstra committing not to supply subscription TV (or other content services) over its fixed line networks, or ceasing to hold equity interests in retail subscription TV businesses.

Hence, Telstra's horizontal integration across subscription TV and other content markets is only directly relevant to this current process to the extent that it informs the ACCC's assessment of the SSU against the legislative criteria. In having regard to the effect of the SSU on some of the criteria, particularly the effect on consumers and on competition, the ACCC has conducted its analysis on the basis that Telstra will continue to be horizontally integrated.

The ACCC notes that there are a range of remedies that could address competition concerns relating to access to content and content markets flowing from Telstra's ownership of FOXTEL.

⁴⁷ ACCC Regulatory Reform Submission, p 37.

7 Consolidation of fixed-line access networks

7.1 Overview

- Telstra's commitment to structural separation and many of the provisions of the Definitive Agreements will result in structural reform of the telecommunications industry through the progressive decommissioning and deactivation of Telstra's fixed line access networks as the NBN fibre access network is rolled out.
- This structural reform responds to the longstanding competition concerns that have arisen from Telstra's vertical integration across fixed line access networks and downstream service provisioning. Consumers are expected to benefit from the changes to market conditions that are likely to arise from the removal of this vertical integration.
- This consolidation of networks is consistent with a number of factors to which the ACCC is required to have regard in considering the SSU, including the national interest in structural reform and the Government's support for a migration form of structural separation.
- Submissions raised an alternative industry structure for consideration, under which Telstra would remain vertically integrated across its existing fixed line access networks and downstream service provision. This outcome would be inconsistent with the migration form of structural separation.

7.2 Introduction

The structural reform that will be implemented by Telstra's SSU and the Definitive Agreements will essentially result in a migration of customers from Telstra's multiple fixed-line access networks to the wholesale only NBN.

In the explanatory statement for the Networks and Services Instrument the Government noted that:

Undertaking structural separation in this manner will lead to a national outcome where there is a wholesale only network operating across the country which is not controlled by any retail company.⁴⁸

In particular, as a result of the Definitive Agreements with NBN Co, Telstra's HFC and copper networks (located within the NBN fibre footprint) will effectively cease to be available for use by Telstra or other service providers for the supply of broadband or voice services. Subject to limited exceptions, Telstra will also be prevented by the Definitive Agreements from building or operating a fibre access network for a 20 year period.

⁴⁸ Networks and Services Instrument, Explanatory Statement, pp 1-2.

The ACCC's view is that the following criteria are of most relevance to an assessment of this network consolidation:

- the national interest in structural reform;
- impact on competition in telecommunications markets;
- impact on consumers;
- the Government's policy objective of improving accessibility of broadband services;
- the Government's support for a migration form of structural separation;
- the expected distribution of the long-term economic benefits as a result of the SSU; and
- the conduct that would be authorised under section 577BA of the Telco Act.

The SOE, the NBN Co Corporate Plan, the NBN Access Act and the NBN Companies Act, together with further information provided by the parties, are all matters which have informed the contextual matrix of the ACCC's assessment.

7.3 Submissions received

During the consultation process the ACCC received a number of submissions from interested parties expressing various views on the implications of the SSU.

The CCC, ACCAN and DigEcon Research made submissions in support of the network consolidation. These parties separately submit that the deactivation of broadband services over the HFC network will enhance competition, prevent cherry picking and allow NBN Co to provide national pricing and promote competitive neutrality for downstream markets.⁴⁹ DigEcon Research also submits that in the future with the NBN the extent of infrastructure based competition would be less than what it is today, even without the deactivation of the HFC network.⁵⁰

Optus submits that there are a number of efficiency benefits that can be gained from the network consolidation as it prevents potential diseconomies of scale from having competing last mile networks in operation.⁵¹ Optus further submits that in order to compensate for this loss of competition at the infrastructure level, downstream competition will need to be facilitated by regulatory arrangements such as effective interim equivalence and transparency measures in the SSU and the regulation of the

⁴⁹ CCC submission, September 2011, pp 1-2; ACCAN submission, September 2011, p 5; DigEcon Research submission, October 2011, p 5.

⁵⁰ DigEcon Research submission, October 2011, pp 4-8.

⁵¹ Optus submission, September 2011, p 46.

NBN.⁵² Optus also submits that this network consolidation supports the rollout of the NBN.⁵³

ACCAN submits that network consolidation would allow retail service providers to compete fairly across larger geographic areas and differentiate their service and product offerings.⁵⁴

The Communications Law Centre, UTS submits that the SSU will improve the accessibility and quality of broadband services, whilst outside of the NBN footprint Telstra will directly compete with the NBN by continuing to provide HFC and copper services.⁵⁵

In contrast, Geraldine Carter, Joshua Gans and Jerry Hausman submit that there is a risk that the network consolidation to be implemented through the SSU may lead to anti-competitive effects in telecommunications markets.⁵⁶ Geraldine Carter submits that rejecting the SSU could lead to a preferable industry structure that would include multiple access networks, which could strengthen competition and lower total production costs.⁵⁷ Gans and Hausman and Ken Curry also submit that the deactivation of broadband services over Telstra's HFC network may have anti-competitive effects in telecommunications markets.⁵⁸

7.4 Conduct that would be authorised under section 577BA of the Telco Act

In assessing this issue, the ACCC has had regard to the provisions of the Definitive Agreements that directly facilitate the network consolidation. The conduct in the Definitive Agreements that is most relevant to the consolidation of fixed-line access networks includes:

- the infrastructure sharing arrangements where Telstra will grant rights to NBN Co to access its passive infrastructure and parts of its network;
- restrictions regarding Telstra's use of its copper and HFC network within the NBN fibre footprint;
- restrictions regarding Telstra's ability to dispose of either its copper or HFC networks (or grant a third party rights to use those networks);
- commitments by Telstra to exclusively use the NBN for fixed-line access within the NBN fibre footprint; and

⁵² Optus submission,, September 2011, p 47.

⁵³ Ibid.

⁵⁴ ACCAN submission, September 2011, p 5.

⁵⁵ Communications Law Centre, UTS submission, September 2011, pp 2-3.

⁵⁶ Geraldine Carter submission, September 2011, pp 2,8,10 ; Joshua Gans and Jerry Hausman submission, September 2011, pp 1-2.

⁵⁷ Geraldine Carter submission, September 2011, pp 2, 8.

⁵⁸ Ken Curry submission, November 2011, p. 2; Gans and Hausman submission, September 2011, p 2.

- restrictions regarding Telstra’s ability to use or operate fibre networks within the fibre footprint.

The relevant provisions of the Definitive Agreements are outlined in further detail in Attachment A4.

NBN Co has noted that these provisions in the Definitive Agreements are likely to have the following consequences:

- NBN Co will have greater assurance that it will be able to achieve its target rollout timeframe of 9.5 years.⁵⁹ NBN Co has stated that without the Definitive Agreements, the rollout would take [C-I-C]. The ACCC notes that the more expedient timeframe will bring forward the structural reform of fixed line telecommunications markets, as the wholesale only NBN becomes available and Telstra progressively disconnects and deactivates its access networks (i.e. before the designated date mandated by the SSU).

- The NBN would have a lower risk profile and NBN Co would therefore have the ability to potentially raise private sector funds at lower cost and/or sooner than otherwise. NBN Co has noted that the Definitive Agreements:

...lower the risk profile of the NBN. As a consequence, NBN Co’s future cost of debt will be lower. This will mean lower access prices for NBN Co’s services.⁶⁰

- The infrastructure sharing arrangements in the Definitive Agreements are expected to significantly reduce the costs for NBN Co to build the NBN, by approximately [C-I-C]. The ACCC notes that in order to calculate the net effect of this transaction upon the costs faced by NBN Co, the reduction in the costs for NBN Co to build the NBN would be at least partially offset by the ongoing lease payments to Telstra for the use of that infrastructure.
- NBN Co has noted that if it did not have access to the infrastructure that Telstra has committed to make available under the Definitive Agreements it would be likely that a higher proportion of its network would need to be built aurally.⁶¹ NBN Co notes in its Corporate Plan that with the Definitive Agreements, 25 per cent of premises in the local network will be passed aurally,⁶² and that in the event that the Definitive Agreements did not proceed that percentage would be higher.⁶³ NBN Co estimates that without the Definitive Agreements, the percentage of homes connected aurally would be [C-I-C].

7.5 National interest in structural reform

The structural separation of Telstra is a part of the Government’s envisaged structural reform of the telecommunications industry to establish a wholesale-only open access

⁵⁹ NBN Co Corporate Plan, p 77.

⁶⁰ NBN Co section 577BA submission, p 32.

⁶¹ NBN Co section 577BA submission, p 37.

⁶² NBN Co Corporate Plan, p 4.

⁶³ NBN Co section 577BA submission, p 37.

market that is delivered through the NBN.⁶⁴ The Government has stated that the structural reform of the telecommunications sector will deliver outcomes which are in the interests of consumers, business and the economy more broadly and will promote greater competition.⁶⁵

The Government's objective to address Telstra's vertical integration arises from the premise that:

Telstra's integrated position across all the telecommunications platforms has led to long-standing and widespread concerns that the existing telecommunications structure is failing consumers, businesses and the economy in general.⁶⁶

The Government has expressed a preference for Telstra to voluntarily structurally separate in the transition to the NBN as it is consistent with the wholesale-only, open access market structure to be delivered through the NBN.⁶⁷ The Government considers structural separation to be an effective regulatory tool within the telecommunications sector to separate bottleneck upstream assets, so that the control of access to those assets cannot be used to lessen competition in the downstream markets.⁶⁸

The structural reform proposed by the SSU is intended to:

[A]ddress concerns created by Telstra's vertical integration by reducing Telstra's ability and incentive to discriminate against other service providers and to promote greater equivalence and transparency which will encourage greater competition across the telecommunications industry.⁶⁹

The SSU and Definitive Agreements provide for the progressive disconnection of services from Telstra's copper and HFC networks to facilitate migration to the new wholesale-only fibre network to be built and operated by NBN Co.

The ACCC considers that the proposed network consolidation, to be effected by the SSU and the Definitive Agreements, will implement the Government's intended structural reform. This structural reform is likely to significantly reduce the extent of Telstra's control over relevant fixed-line facilities. That is, provided that NBN Co meets its coverage objectives in those areas where Telstra's control of fixed-line networks has given rise to competition concerns, then the proposed network consolidation will implement the intended structural reform.

This outcome is also consistent with a view expressed by NBN Co that the commitments made by Telstra in the Definitive Agreements will enable NBN Co to deliver an NBN that meets the Government's policy objectives.⁷⁰ Further, the Government has expressed its support for the implementation of the SSU and

⁶⁴ Explanatory Memorandum, CACS Bill, p 10.

⁶⁵ Second Reading Speech, CACS Bill, pp 1-2.

⁶⁶ Explanatory Memorandum, CACS Bill, p 10.

⁶⁷ Ibid.

⁶⁸ Ibid, p 15.

⁶⁹ Ibid, p 25.

⁷⁰ NBN Co section 577BA submission, p 22.

Definitive Agreements between Telstra and NBN Co as it considers that these will deliver the Government's structural reform objectives.⁷¹

The ACCC is of the view that the proposed network consolidation is a means by which to implement the intended structural reform of the telecommunications sector. In the event that the proposed network consolidation is not effected in accordance with the Government's SOE and NBN Co's Corporate Plan (to which the ACCC is required to have regard), adjustments to existing regulatory settings will be required in order to ensure that a form of structural reform that is in the national interest is still achieved.

7.6 Impact on competition in relevant markets

7.6.1 Overview

Considering the impact of network consolidation on competition requires relevant markets to be identified, and for views to be reached on a range of matters that would potentially influence market structure and behaviour. In considering this criterion, the ACCC has had regard to the difference between the likely future with and future without the SSU, which was more fulsomely outlined in section 6 of the August discussion paper.

The ACCC has set out its views regarding the relevant markets in Attachment A2. The following discussion assesses the likely effects on each of these markets separately, although the ACCC notes that these markets form part of a vertical supply chain and hence are interdependent.

In summary, the ACCC is of the view that the SSU implements a form of structural reform that responds to the longstanding competition concerns that arise from Telstra's vertical integration across fixed line access networks and downstream service provisioning.

7.6.2 Impact on competition in fixed-line access markets

A consequence of Telstra's commitment to structurally separate in the SSU and the relevant provisions in the Definitive Agreements is that there will be a consolidation of the upstream access layer for the provision of telecommunication services. This will result in the disconnection and deactivation of existing fixed line access networks—Telstra's HFC and copper networks—that may otherwise have been available to compete with the NBN in the provision of telephony and broadband services.

While the closure of the Telstra copper network will also result in the removal of the ULLS-based networks operated by access seekers, these networks will be replaced by fibre-based networks that will arguably provide for an equivalent degree of competition.

State of competition

⁷¹ Letter from DBCDE and NBN Co to ACCC, 22 August 2011.

The network consolidation will effectively foreclose an opportunity for full facilities based competition at the upstream layer in the telecommunications supply chain, as without the SSU multiple access networks might be available. Those networks would be likely to comprise the NBN and Telstra’s copper and HFC networks. As a result of the amendments to the CCA arising from the NBN Access Act (to which the ACCC is required to have regard), it would seem unlikely that Telstra would invest further to upgrade its copper network or extend the geographical footprint of its HFC network even if the SSU did not proceed.

Should the SSU be accepted and the proposed network consolidation occur, then NBN Co, as the operator of the dominant fixed line access network, will possess significant market power. This degree of market power has obvious potential to lead to negative outcomes in terms of competition and efficiency if it is unrestrained. However, regulation can provide some safeguards regarding NBN Co’s ability to exercise that market power through the use of mechanisms such as price regulation. NBN Co will be a highly regulated entity, as is further described in section 7.7 and Attachment A3.

Whilst regulation provides some safeguards and restraints regarding the use of market power, direct competition at this layer of the market (i.e. full facilities based competition) would be likely to provide additional constraints and protection against monopolistic behaviour.

The ACCC has previously noted that full facilities-based competition has not resulted in the level of competitive constraint, and the flow-on benefits, initially envisaged.⁷² This has meant that wholesale regulation has continued to be a significant mechanism used to restrain market dominance of Telstra and to improve efficiency even in areas where intermodal competition has emerged. However, this historical consideration may be of limited utility in considering the magnitude of the potential benefits that could be derived from competition between two national fixed-line access networks that will be lost as a result of the network consolidation. The likely benefits from competition between two competing network providers are likely to be significant, however those benefits are difficult to quantify with any degree of certainty.

Economies of scale and scope

At the upstream layer of the provision of telecommunications services, there are inherent productive efficiencies which have implications as to whether facilities-based competition at this layer could be efficient.

Typically, this layer possesses strong economies of scale. Economies of scale can arise for various reasons but a prevalent source of economies of scale is the presence of fixed costs. Fixed costs represent expenses that must be incurred no matter how many units of output are produced—therefore, the higher the output the greater the ability to

⁷² As noted in the ACCC Regulatory Reform Submission, “... whilst HFC networks have the capability to provide substitutable services to the CAN, they currently do not have the coverage to provide a competitive constraint in all regions to the ubiquitous CAN, and their geographic coverage has not increased since their initial rollout.” (p 54). Also, see ACCC, *A strategic review of the regulation of fixed network services—ACCC position paper*, p 13; reiterated in ACCC, *Telstra’s exemption application in respect of the Optus HFC network—final decision*, November 2008, p 28.

distribute those costs across more units. In these circumstances, demand can be satisfied at significantly lower average cost by one firm.

Economies of scope may also be a characteristic at this upstream layer in telecommunications markets. Economies of scope may be achieved if there are shared or common facilities which produce several goods together in a more efficient manner than producing them separately. In this regard, the NBN fibre network is likely to achieve greater economies of scope than the existing copper network due to its enhanced technical capability (i.e. it can deliver voice, high speed broadband and Pay TV services over the one medium).

The ACCC's position has been that it would seek to promote full and partial facilities-based competition but only where it is economically efficient to do so.⁷³ This is because, if the provision of a service possesses inherent productive efficiencies such as significant economies of scale or scope, it may be more efficient to have one provider supply the service versus several. The ACCC has previously found that:

[T]here are enduring features of telecommunications markets, in particular fixed-line networks, which suggest that full-facilities based competition across all elements of this infrastructure is not likely to be a realistic, or even a technically feasible goal in the foreseeable future.⁷⁴

Due to the vertical nature of telecommunications provisioning, the overall efficiency outcome of full facilities-based competition upstream is not clear cut. Thus, while on the one hand, significant competition between multiple upstream competitors generally facilitates greater differentiation of downstream services, on the other hand, duplicative networks may be socially wasteful if there are significant inherent productive efficiencies from economies of scale and scope.

Here, some factors will moderate the extent to which the SSU will allow economies of scale and scope to be exploited. In particular, the SSU will only avoid the duplication of the network elements that are not already fixed and sunk. For instance, the SSU will not avoid the duplication of fixed and sunk investments in existing copper and HFC cables, and the additional infrastructure which is used to transport communications over them (i.e. at Layer 2). Further, it is likely that Telstra will continue to operate some services, such as Pay TV carriage services and PSTN services (e.g. special services and services in areas outside the NBN fibre footprint), over its existing access networks over a longer term, and hence the complete potential economies of scale and scope will not be realised.

Production cost savings

Network consolidation may also have implications for total production costs incurred to supply fixed line services in the future. Firstly, the resulting sharing of passive infrastructure (ducts and pipes) will reduce the total capital cost and ongoing total

⁷³ See FSR 2nd Position Paper, p 21. "The Commission considers that an approach to regulation that encourages competitors to invest in their own infrastructure, where it is economically efficient, is likely to promote the LTIE."

⁷⁴ Ibid.

maintenance cost involved in providing these services. In addition, this network sharing can avoid expenditures that would likely be socially wasteful.

The sharing of passive infrastructure is widely advocated and is increasingly being adopted by network operators internationally.⁷⁵ Several benefits arising from the sharing of passive infrastructure include:⁷⁶

- Reducing duplication network costs if there is capacity to share trenches or poles with competing telecommunications facility providers.⁷⁷ Passive infrastructure is a significant sunk fixed cost, which the ITU estimates accounts for about 40 per cent of total capital costs of surveyed countries' networks.⁷⁸ Sharing of Telstra's ducts and pipes account for a significant percentage of the total capital costs of its access network [C-I-C] which is reflective of the geographical scale of the access network in Australia compared to other countries.⁷⁹

In the Implementation Study, it was noted that NBN Co could potentially use 100,000 to 140,000 kilometres of Telstra's underground ducts to deploy its fibre.⁸⁰ [C-I-C].

- Innovation is unlikely at the passive infrastructure level as it is not affected by technological changes. Therefore, there are no or little dynamic efficiency benefits that are likely to outweigh the cost of duplicating infrastructure.⁸¹
- Allowing operators to focus on areas where dynamic efficiency is most likely to develop such as the active layer and/or retail competitive offerings, as infrastructure sharing alleviates the pressure of network deployment from a financial and operational perspective.⁸²

⁷⁵ The ITU estimates that approximately 56 per cent of countries have mandated infrastructure sharing. See ITU (2008), *Trends in Telecommunications Reform 2008 – Six degrees of sharing*, November, p 10.

⁷⁶ The ITU distinguishes between passive and active infrastructure sharing. Passive infrastructure sharing includes the sharing of rights of way or easements, ducts, pylons, masts, trenches, towers, poles, equipment rooms and related power supplies, air conditioning and security systems, ITU (2008), p 10. The sharing of active infrastructure would appear to be a more contested issue as it relates to the value-producing elements (intelligence of the network) of the business, ITU (2008), p 11.

⁷⁷ Productivity Commission (2001), *Telecommunications Competition Regulation*, 21 December, p 23.

⁷⁸ <http://www.ictregulationtoolkit.org>.

⁷⁹ [C-I-C]

⁸⁰ Implementation Study, p 22.

⁸¹ As noted in the Implementation Study: 'Costs per customer at Layer 2 are around one fifth of Layer 1, and the investments have a 5-7 years life rather than a 40+ year life. More importantly, Australian consumers and businesses will benefit from innovation from competition in active equipment where technology is improving and rapidly changing.' (p 49). Also see Booz Allen Hamilton (2007), *Telecom Infrastructure Sharing, Regulatory Enablers and Economic Benefits*, p 3.

⁸² Booz Allen Hamilton (2007), *Telecom Infrastructure Sharing, Regulatory Enablers and Economic Benefits*, p 3.

- As passive infrastructure costs increase in real terms, the sharing option becomes more valuable. While telecommunications expenditure is spread evenly across active and passive components, this is likely to change over time with the declining cost of active infrastructure and increase of passive infrastructure with increased property prices and construction materials/labour.⁸³

Network consolidation can also result in the avoidance of future ongoing expenditure on duplicative infrastructure. In particular, by only having one active local access network, this avoids the duplication of ongoing capex related to the passive infrastructure of the additional network.⁸⁴ [C-I-C]. Booz Allen Hamilton argue that reduced investment spend through infrastructure sharing can contribute to better sustainability of telecom operators and may justify higher investments in the long term, given the lower risk. They estimate that sharing may reduce infrastructure costs for operators by as much as 40 per cent.⁸⁵

It is unlikely that NBN Co would be able to gain access to an equivalent amount of infrastructure, or obtain access within the same timeframe, in the absence of the SSU being accepted and the Definitive Agreements coming into effect. This in turn would likely delay the benefits of structural reform, as well as preventing the economic benefits that can be realised from facilities sharing being fully exploited.

This is because, firstly, Telstra is incentivised by the Definitive Agreements to cooperate in the provision of access to as much infrastructure as possible, including by conducting remediation and augmentation works to increase the capacity and availability of its facilities.⁸⁶

On the other hand, should the SSU not be accepted, NBN Co would be required to seek regulated access to Telstra's facilities, Telstra would have a strong incentive not to cooperate with NBN Co, as in that scenario Telstra would remain vertically integrated across the passive facilities and downstream (layer 2 and beyond) service provision. That is, in that scenario Telstra would be the facilities access provider to its direct competitor in fixed line access markets, which would be likely to have implications for the extent, cost and timeliness of NBN Co gaining access to those facilities.

NBN Co has provided an estimate of the minimum time to build its access network in the scenario where the facilities access agreements (i.e. the Definitive Agreements) were implemented and where they were not. These estimates indicate that implementing the infrastructure sharing provided by the Definitive Agreements will shorten the timeframe required to build the NBN and therefore reduce the timeframe for the implementation of structural reform.

⁸³ Ibid, p 4.

⁸⁴ Future saving for ongoing CAN operating expenditure is unlikely as the CAN will continue to operate for some time even following migration to the NBN for the provision of special services and for services in areas outside the NBN fibre footprint.

⁸⁵ Booz Allen Hamilton (2007), *Telecom Infrastructure Sharing, Regulatory Enablers and Economic Benefits*, p 4.

⁸⁶ See Letter from Telstra to Australian Stock Exchange "Telstra signs NBN Definitive Agreements", 23 June 2011.

It is difficult to reach a firm view in quantifying the length of the potential delay. Notwithstanding, the ACCC considers it likely that the delay would not be less than the minimum time that NBN Co has estimated, and that there is potential for the length of the delay to extend beyond that estimate.

NBN Co has estimated that the infrastructure sharing arrangements in the Definitive Agreements are expected to significantly reduce the costs for it to build the NBN,⁸⁷ by [C-I-C].

This provides an indication of the likely upper bound of the potential productive efficiencies that would be at risk should the SSU not be accepted.

It is also possible that competition between multiple access networks could result in ongoing cost efficiencies as network operators seek out more efficient systems and processes to lower their cost base over time. It is difficult to quantify what these potential savings might be, however this potential is limited to a proportion of the overall cost base. This is because, as noted above, a significant proportion of the relevant cost base of fixed line access networks is of a fixed and sunk nature.

7.6.3 Impact on transmission markets

The future state of competition in transmission markets is likely to be more greatly influenced by the design of NBN Co's network (which was considered by the ACCC in its advice to government regarding the NBN points of interconnect⁸⁸) than the SSU itself.

Telstra is currently the dominant owner of transmission facilities and provider of transmission services, particularly in relation to transmission facilities that serve less densely populated areas of Australia. The proposed network consolidation is unlikely to lead to competing transmission facilities becoming available between the end-user and the NBN point of interconnect, due to interconnection with the NBN only being made available at particular points of interconnect. However, the Definitive Agreements will mean that the wholesale only NBN Co will acquire rights of use over Telstra's existing dark fibre facilities. Further investment in those particular routes may not be desirable, as it may be inefficient to have duplicative networks on these routes where demand is low. As for other access rights acquired by NBN Co under the Definitive Agreements, the sharing of the infrastructure is likely to result in production cost savings and it is unclear if regulated access would achieve the same magnitude of saving.

Investment in transmission routes beyond the NBN Co point of interconnect is less likely to be inefficient and is likely to be encouraged by NBN Co's network structure which aggregates demand at these points of interconnect. Efficient investment in transmission services may be more likely to occur beyond the POI with the SSU coming into force as the network consolidation provides greater assurance that the structural reform will be delivered and that the form of sabotage that can arise from vertical integration will be removed.

⁸⁷ NBN Co section 577BA submission, p 37.

⁸⁸ ACCC, *Advice to Government: National Broadband Network Points of Interconnect*, November 2010.

7.6.4 Impact on downstream markets

Downstream telecommunications markets are a relatively more contestable component in the supply of telecommunication services. These markets do not all possess significant barriers to entry such as very high fixed costs, and the requirement to achieve significant economies of scale and/or scope to compete in the market. Promoting competition is important at this layer of telecommunications provision, especially the maintenance of relatively low barriers to entry for this contestable market, as competitive tension ensures sufficient pass through of upstream efficiency gains (as reflected in the wholesale price) to consumers in the form of better price and product service offerings.

The network consolidation arising from the SSU and the Definitive Agreements may affect competition in the downstream markets for telephony and broadband services in a number of ways. The key features of how retail service providers are likely to compete using the NBN is outlined in Attachment A3.

The magnitude of the effect on downstream competition will depend on how the upstream market structure that arises following the structural reform:

- affects retail service providers' incentives to invest in retail value-add services and competing facilities at the core network and transmission level;
- maintains retail service providers' scope and opportunity to compete with each other at both a price and non-price level; and
- affects barriers to entry for new retail service providers.

Although there is likely to be some reduction in competition in downstream markets due to the reduction in upstream competition, this is likely to be balanced by improvements to the competitive behaviour demonstrated by downstream competitors.

However, whilst the way in which retail service providers will compete will change with the transition from the legacy copper network to the new fibre network, overall it is expected that the degree of competitive tension in downstream markets is unlikely to significantly change than if Telstra's structural separation did not come into force.

Retail service providers' investment incentives

The coming into force of the SSU and the Definitive Agreements is likely to reduce investment risk for existing and potential retail service providers as it provides greater assurance that the wholesale-only open access NBN will meet its rollout objectives (see discussion at section 7.6.2).

Existing and potential retail service providers are also more likely to commit to investing in their own infrastructure with the SSU in place, as a more competitively neutral environment is likely to be established sooner. The earlier removal of Telstra's ability to discriminate on a non-price basis (due to the earlier rollout of the NBN) will reduce barriers to entry in those particular markets in the short term (than what would otherwise occur without the SSU). This short term benefit may have a significant effect

on downstream competition as it will enable retail service providers to migrate new and existing customers onto the NBN and achieve an ‘on-net’ business case sooner.

As has been explained by NBN Co, investment by retail service providers is also likely to continue to be directed at improving service quality and diversity:

....the significant investment by Internet Service Providers (**ISPs**) in Digital Service Line Access Multiplexers (**DSLAMs**) and other equipment in order to provide broadband services over copper is expected to be redirected to content, service differentiation and value added services over the NBN, fuelling the development of new applications and innovation that will drive consumer demand.⁸⁹

If the SSU was not implemented, there may be some risk that existing and new operators would be unwilling to sink investment and thus commit to compete if they perceive Telstra’s continued vertical integrated status over its fixed line access networks as a threat.⁹⁰

Retail service providers’ ability to compete

Following the network consolidation there is likely to be sufficient scope and opportunity for retail service providers to differentiate their products and therefore compete at both a price or non-price level. Whilst the potential scope of differentiation is likely to be less than if there were multiple access networks and therefore more differentiated wholesale inputs, the wholesale inputs provided by the NBN are likely to be sufficient to ensure that service providers can differentiate their downstream products. NBN Co’s product offerings are summarised in Attachment A3.

Relevantly, NBN Co’s Layer 2 bitstream service is expected to provide retail and wholesale service providers with sufficient scope to differentiate their end-to-end product offering by investing in their own transmission and core network facilities. As was noted in the NBN Co Corporate Plan:

NBN Co will provide Layer 2 wholesale services only, providing flexibility to support a range of wholesale and retail business models. Larger RSPs are expected to acquire Layer 2 products from NBN Co and use their own infrastructure to provide retail services to their End-Users. Smaller RSPs may opt to use a Layer 3 intermediary for incremental wholesale services. The diversity of possible business models is expected to result in lower barriers to entry for RSPs and to open up competition both in the major population centres and in regional areas.⁹¹

The Implementation Study also found that whilst an active layer monopoly is appropriate in the short term, it did not recommend an enduring monopoly given the innovation possibilities at Layer 2.⁹² That is, the Implementation Study noted the potential in the future for an ‘unbundled’ Layer 1 (passive infrastructure including use

⁸⁹ NBN Co Corporate Plan, p 30.

⁹⁰ As described in the Hilmer Report “Where a firm has greater financial staying power than actual or potential rivals, and there are high barriers to market entry, it may be feasible to temporarily sell below cost, driving competitors out of the market. The firm can then recoup its losses through unconstrained monopoly pricing which may continue for an extended period or even indefinitely.” (p 63).

⁹¹ NBN Co Corporate Plan, p 30.

⁹² Implementation Study, p 49.

of the fibre optic cables) access service, which would allow access seekers to use their own active network components over the fibre access network.

If Layer 1 unbundling were to be available over the NBN in the future, this would be likely to enable service providers to engage in further product differentiation. In that context, if it were appropriate and efficient for that layer to become contestable, unbundling would maximise the ability of competition to deliver differentiated and enhanced services, without the need to duplicate the significant capital investment in passive network elements.

Barriers to entry for new retail service providers

The SSU is unlikely to raise barriers to entry into the downstream market and may encourage entry in some cases.

The SSU may result in a reduction in barriers to entry in the short term as potential competitors may be more willing to enter the market due to the earlier removal of Telstra's ability to discriminate on a non-price basis (due to the faster delivery of structural reform). This short term benefit would be likely to better enable retail operators to migrate customers onto the NBN and achieve an on-net business case sooner.

Barriers to entry may also be reduced by the market structure resulting from NBN Co's product offering which appears to be capable of satisfying a number of different business models at the downstream layer that might attract new entrants into the market.

However, the network consolidation may also result in a reduced number of wholesale options (including self-supply) available to downstream operators. The likely effectiveness of any competitive tension between upstream providers (vertically integrated and wholesale only) is difficult to ascertain. In particular, it is unclear whether upstream competitors would effectively compete at a price level for customers or whether oligopolistic or duopolistic outcomes would result.

7.7 Impact on consumers

The coming into effect of the structural reform to be implemented through the SSU is likely to impact consumers in a number of different ways.

Efficient delivery of services

In general terms, consumers benefit when services are produced and provided efficiently. As has been discussed above however, in order for consumer benefits to be maximised those efficiency benefits need to be passed on through the prices that consumers are offered for those services.

The distribution of productive efficiency benefits to consumers could be impeded by:

- monopolistic behaviour by the supplier of the wholesale access service including the extraction of monopoly rents through charging as close to the

- monopoly price as possible, inefficient investment and low quality of service;
and
- insufficient competition in the downstream market, leading to downstream retail service providers being able to engage in oligopolistic behaviour.

Regulation of NBN Co

The risk of monopolistic behaviour by NBN Co at the wholesale supply layer may be able to be mitigated by the regulatory regime that the Government has established through the NBN Access Act and NBN Companies Act. These are both matters to which the ACCC is required to have regard. Under this regime, NBN Co will be regulated in a manner which should provide some safeguards to prevent NBN Co exercising its market power.

A key part of the regulatory regime is the regulation of the terms and conditions upon which NBN Co will offer services to access seekers. Services supplied by NBN Co will be regulated under Part XIC of the CCA. Under Part XIC, regulated terms and conditions for access to NBN Co's services can be established through a number of instruments – access agreements, special access undertakings, binding rules of conduct and access determinations.

On 5 December 2011, NBN Co submitted a special access undertaking (SAU) to the ACCC. The ACCC is required to assess the SAU and must either accept or reject it based on the criteria for accepting an undertaking set out in Part XIC of the CCA.⁹³ The SAU and other supporting documents, together with the ACCC's consultation documents are available on the ACCC website.⁹⁴

In the SAU, NBN Co has proposed price control mechanisms to regulate increases to the price of its basic services. NBN Co has submitted that it will not increase the price of its basic access offer and other key product components (Connectivity Virtual Circuit and Network-network Interface services) before 30 June 2017.⁹⁵ NBN Co has also submitted that the prices it has proposed for its basic offering “will facilitate the transition from legacy networks to the NBN because they will allow Access Seekers to serve their existing base of End Users at a wholesale cost of supply that compares favourably to that which they currently face (this includes serving voice-only End Users)”.⁹⁶

Whilst the ACCC is still considering the appropriateness of these measures in the context of the SAU, measures such as these would provide some assurance that access seekers (and therefore consumers) would be protected from price rises in relation to the basic service during the transition from the legacy network.

The Government has also expressed its expectation in the SOE (to which the ACCC is required to have regard) that:

⁹³ CCA, s 152AH.

⁹⁴ <http://www.accc.gov.au/content/index.phtml/itemId/1020185>.

⁹⁵ NBN Co SAU, schedule 5.

⁹⁶ NBN Co, Supporting Submission: NBN Co Special Access Undertaking, 20 December 2011.

...NBN Co's approach to pricing will recognise the importance of maintaining affordability to drive take-up rates.⁹⁷

In addition to the regulatory regime provided by Part XIC, NBN Co will be subject to additional bespoke regulation through the NBN Companies Act. For example, the Minister may require NBN Co to supply particular services to meet the demands of access seekers or consumers.⁹⁸ This mechanism provides some assurance that NBN Co may be required to innovate and keep pace with developments in the industry.

Competition in downstream markets

As discussed in section 7.6, under the SSU competition in downstream markets is likely to benefit from the more expedient delivery of structural reform. However, the consolidation of wholesale access networks and the removal of competing infrastructure could also remove the potential for greater product differentiation and innovation in the supply of those inputs. Notwithstanding this, the ACCC's view is that there will be sufficient levels of competition in downstream telecommunications markets so that the productive efficiencies arising from the network consolidation will be passed onto consumers as long as those efficiencies are reflected in NBN Co's wholesale prices.

In light of NBN Co's entry level offerings and proposed pricing framework, some retail service providers have announced their product and price offerings over the NBN, including iiNet, Internode, Exetel, iPrimus and Optus.⁹⁹ These offers include different price points and service levels for broadband, voice and bundled services. The plans range from speeds of 12/1 Mbps to 100/40 Mbps, and monthly data quotas ranging from 15 GB to 1 TB.

Other effects on consumers from the consolidation of fixed-line access networks

There are other potential benefits and detriments for consumers that may flow from the SSU coming into force. In particular, consumers are likely to benefit from the earlier realisation of structural reform that will occur with the SSU.

In addition to those benefits, NBN Co has also noted that consumers will also benefit from the Definitive Agreements coming into force as:

In the absence of the Definitive Agreements, NBN Co would need to undertake extensive trenching in streets, with the resultant disruption and inconvenience to communities.¹⁰⁰

⁹⁷ SOE, p 10.

⁹⁸ NBN Companies Act, s 41.

⁹⁹ Internode, *Internode revamps NBN broadband plans for launch*, media release, Internode, 30 September 2011; LeMay, Renai, *iPrimus confirms commercial NBN pricing*, Delimiter, 30 September 2011; iiNet, *iiNet dares to be different with simple, flexible NBN plans*, media release, iiNet, 19 Sept 2011; LeMay, Renai, *Exetel's NBN pricing: cheap as chips*, iTWire, 3 May 2010; Optus, *New era of competition as Optus reveals NBN pricing*, media release, Optus, 9 November 2011.

¹⁰⁰ NBN Co section 577BA submission, p 38.

Consumers may incur detriment from the disconnection of the copper and HFC networks due to the need for a new connection for the NBN to be installed and the loss of any existing services that may be valued. However, in order to minimise disruption to consumers from the disconnection of existing services during the migration process, the Government has established a public education campaign to be provided by NBN Co, Telstra and the wider industry.¹⁰¹ As part of the campaign, to the maximum extent practicable, consumers will receive advance notice of the planned migration.¹⁰² The campaign will focus upon end-users who have not taken any action to migrate to the NBN in order to make sure that those consumers are fully informed.

There are also certain services that are currently only capable of being provided over the copper network. These ‘special services’ are currently provided commercially and innovations are yet to be developed in order to enable them to be provided over the new fibre network. However, both the Definitive Agreements and the draft Migration Plan provide that NBN Co must consult with industry when choosing to develop functionality to enable access seekers to migrate certain special services to the NBN.¹⁰³ Telstra has no obligation to disconnect those services until an appropriate migration solution has been identified.¹⁰⁴

7.8 Improving the accessibility and quality of broadband services, including those in regional, rural and remote areas

The ACCC is required to have regard to the following matter in assessing the SSU:

The government’s policy objective of improving the accessibility and quality of broadband services for consumers in Australia, including those in regional, rural and remote areas.¹⁰⁵

The ACCC considers that this criterion requires it to consider whether the coming into force of the SSU would be likely to facilitate or hinder the government being able to achieve this policy objective. The ACCC considers that any improvement to competition or efficiency in the provision of telecommunications services would be likely to facilitate the government’s policy of improving the accessibility and quality of broadband services.

The Government has made a number of policies related to the NBN that are directed to ensuring that regional, rural and remote areas receive improved telecommunications services. This reflects that these areas have generally not benefited from competition in telecommunications markets to the same extent as metropolitan areas. In the SOE (to which the ACCC is to have regard) the Government noted that “the NBN will be a significant piece of Australian critical infrastructure that will underpin the provision of a range of essential services to the Australian community”.¹⁰⁶

¹⁰¹ NBN Co Migration Guide, p 18.

¹⁰² Ibid.

¹⁰³ NBN Co Migration Guide, p 29; draft Plan, clause 21.

¹⁰⁴ NBN Co Migration Guide, p 29.

¹⁰⁵ Ministerial Criteria Instrument, para 4(a).

¹⁰⁶ SOE, p 2.

In particular, the Government has announced the following policies:

- The prioritisation of the rollout of NBN fibre network to regional areas.¹⁰⁷
- A price commitment whereby the Government committed to “put in place a cross subsidy to achieve a uniform national wholesale price so that regional areas can pay the same price as people in the city” (uniform national wholesale pricing). This was reflected in the SOE (to which the ACCC is required to have regard), where the Government noted that “NBN Co will be required to charge access seekers uniformly for services across its network for all technologies and for the basic service offering”.¹⁰⁸

Telstra has noted that the Government’s policy objective of uniform national wholesale pricing may further encourage competition in regional and rural areas.¹⁰⁹ NBN Co has also noted that, in its view, uniform national wholesale pricing will lead to greater levels of retail competition in rural and regional areas.¹¹⁰

NBN Co has noted that the SOE commitments “assume the entry into and giving effect to the package of arrangements constituting the Definitive Agreements”.¹¹¹ In this way, the coming into force of this SSU, which is a condition precedent to the Definitive Agreements, would appear to facilitate the implementation of Government policies that are directed to improving the accessibility and availability of broadband services.

The SSU is likely to assist in the more expedient rollout of the NBN (see section 7.6.2) which will deliver on the Government’s objective of progressive structural reform throughout different areas in Australia as Telstra subsequently decommissions its copper network and deactivates the broadband capability of its HFC network. That structural reform is likely to bring some improvements to competition in the provision of downstream telecommunications markets compared to the status quo, as the incumbent vertically integrated provider (Telstra) will be replaced by a wholesale only provider (NBN Co).

There are also likely to be cost savings for the rollout of the NBN as a result of this particular SSU and the Definitive Agreements coming into force. As has been noted by NBN Co, this may result in lower wholesale prices over the NBN which, if there is sufficient competition in the downstream markets, should be passed onto consumers. Lower prices are a factor that can assist in improving the accessibility of broadband services. However, these benefits might have been realised in any case through network competition if NBN Co were to proceed in its intended form without the SSU.

¹⁰⁷ Reflected in the Government’s Commitment to Regional Australia, entered into by the Government on 7 September 2010 with the Independent Members Mr Tony Windsor MP, the member for New England and Mr Rob Oakeshott MP, the member for Lyne. See Annexure B, section 3.1 (National Broadband Network). Also reflected in the SOE, p 7.

¹⁰⁸ SOE, p 7.

¹⁰⁹ Telstra supporting submission, July 2011, p 44.

¹¹⁰ NBN Co section 577BA submission, p 22.

¹¹¹ Ibid, p 10.

7.9 Government's support for a migration form of structural separation

The ACCC must have regard to:

The Government's support for a form of structural separation whereby Telstra will progressively migrate fixed-line carriage services that it supplies to retail customers to the national broadband network as that network is rolled out.¹¹²

The Government has stated that it supports a migration form of structural separation because "it delivers the government's structural reform objectives of a wholesale-only network operating across the country which is not controlled by any retail provider".¹¹³

NBN Co has submitted that provisions in the Definitive Agreements:

[P]rovide for and maximise the migration of customers to the NBN Co fibre network, through Telstra's voluntary structural separation by means of disconnection obligations supported by restrictions on Telstra's use and disposal of its copper or HFC network, network preference commitments and restrictions on marketing wireless substitution.¹¹⁴

The ACCC is of the view that the SSU and the Definitive Agreements will implement the Government's preferred form of structural separation whereby Telstra will progressively migrate its fixed-line carriage services to the NBN Co fibre network as that network is rolled out. The Government has welcomed the signing of the Definitive Agreements between Telstra and NBN Co as it is consistent with Government policy and an important step in the reform of the telecommunications sector.¹¹⁵

The ACCC also considers that if the SSU was not accepted, it is unlikely that a migration form of structural separation would occur to the same extent or within the same timeframes. The Government has also stated that the structural reform of the telecommunications industry:

[E]mbodied within the SSU (the construction of the NBN, decommissioning of Telstra's customer access network and migration of customers to the NBN) is the only viable model for achieving this reform presently available.¹¹⁶

In terms of practical support for this form of structural separation, the Government has provided NBN Co with a funding agreement to enable NBN Co to enter into the long term commercial arrangements with Telstra (including the Definitive Agreements).¹¹⁷ In addition, the Government has provided guarantees in respect of NBN Co's financial commitments to Telstra.¹¹⁸

¹¹² Ministerial Criteria Instrument, para 4(b).

¹¹³ Explanatory Memorandum, Ministerial Criteria Instrument, p 4.

¹¹⁴ NBN Co Section 577BA submission, p 11.

¹¹⁵ Letter to ACCC from Department of Finance and Deregulation, 28 August 2011.

¹¹⁶ Letter to ACCC from DBCDE and NBN Co, 22 August 2011, p 1.

¹¹⁷ J Gillard (Prime Minister), S Conroy (Minister for Broadband, Communications and the Digital Economy), P Wong (Minister for Finance and Deregulation), *Government - Telstra - NBN Co deal Delivers Historic Telecommunications Reform*, media release, DBCDE, 23 June 2011.

¹¹⁸ Ibid.

Furthermore, in recognising the importance of an available and appropriately trained workforce for the successful rollout of the NBN, the Government has agreed to provide funding of up to \$100 million to Telstra to undertake retraining of relevant employees to enable their transition to employment in deploying and supporting a fibre network.¹¹⁹ NBN Co will enter into arrangements with Telstra to access the services of this retrained workforce.¹²⁰

In addition to the SSU and Definitive Agreements, the practical support provided by the Government provides further assurance that this form of structural separation will be able to be implemented to the extent envisaged.

7.10 Expected distribution of long-term economic benefits

The ACCC is required to have regard to:

[The] expected distribution of the long-term economic benefits to different types of consumers in different geographic areas that would occur as a result of the [SSU] coming into force.¹²¹

With implementation of the SSU (and the Definitive Agreements), structural reform and the long term benefits that can be derived from such reform will be achieved sooner. Improvements in the communications sector can increase the productivity capabilities of an economy over time in a number of ways.¹²² These can include growth flowing directly from the investment in communications infrastructure,¹²³ businesses that use that communications infrastructure being able to engage in new and enhanced activities that may potentially reduce transaction costs and inherent positive network externalities where the network becomes of increasing value to users as more users subscribe to the network.

A number of studies have attempted to quantify the beneficial effect of structural reform on the economy.¹²⁴ For instance, ACIL Tasman estimated that telecommunications structural reform contributed about 0.24 per cent to Gross State Product in 2003-04 to 2004-05, which is substantial compared with overall national

¹¹⁹ DBCDE, NBN policy statements, 20 June 2010, accessed at http://www.dbcde.gov.au/funding_and_programs/national_broadband_network/nbn_policy_statements.

¹²⁰ Ibid.

¹²¹ Ministerial Criteria Instrument, para 4(c).

¹²² For example, see ACIL Tasman, Prepared for the Australian Communications and Media Authority, *Consumer Benefits Resulting from Australia's Telecommunications Sector*, 3 November, 2005 (ACIL Tasman (2005)) p xv, Crandall, R et al., The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data, The Brookings Institution, 2007 and Röller, L-H and Waverman, L, Telecommunications Infrastructure and Economic Development: A Simultaneous Approach, *The American Economic Review*, Vol. 91, No. 4 (Sep., 2001), pp 909-923.

¹²³ Due to its products, such as cable and switches, leading to increases in the demand for the goods and services used in their production and deployment.

¹²⁴ Although quantitative analysis of this type can be subject to conjecture and is to be treated with caution, the ACCC believes in this instance that it is useful to consider the analysis proposed by these studies.

growth at that time of two to three per cent per annum.¹²⁵ This growth was attributed to advances in technology, enhanced competition and the interaction of these two factors.¹²⁶

For this structural reform, a key determinant to the extent of benefits is NBN Co's pricing and products which will influence the scope, extent and shape of downstream competition. This was noted in Telstra's supporting submission which also stated that the NBN Co non-discriminatory obligation will at least ensure that all service providers are in equivalent positions on the NBN.¹²⁷

In terms of the distribution of long term benefits from the structural reform, this is likely to depend on the effect that the reform has on supply side constraints (barriers) to competition at the downstream layer of the market and, in turn, how retail offerings to consumers are affected.

The level of competition across geographical areas has varied for a number of reasons, such as access seekers' reliance upon Telstra's wholesale services to provide retail services in areas where it may be inefficient for access seekers to compete using their own infrastructure. For instance, in metropolitan areas, competition is more vigorous as it is conducted amongst DSL network operators who use their own DSLAMs installed in Telstra's exchanges with ULLS or LSS wholesale services to supply broadband and voice services to consumers. In non-metropolitan areas, service providers acquire and resell Telstra's wholesale ADSL or do not participate at all due to the lack of access to competitive backhaul or other factors. Consequently, Telstra's retail market share in these areas remains persistently high. In the non-metropolitan areas where the network consolidation will occur, conditions are likely to change such that service providers will enter additional geographic markets, thereby increasing competition in those areas. This is consistent with the view reached in the Implementation Study which found that structural reform could mean an increase in the number of competitors in these areas.¹²⁸ Thus, non-metropolitan areas are likely to benefit more from the proposed structural reform than metropolitan areas.

As a consequence of increased competition, customers in these areas are likely to benefit from an increase in retail broadband service offerings. Further, implementation of the SSU will mean that these retail offerings are provided sooner (than they would be should the SSU not be accepted), as it ensures a smoother transition to an on-net migration strategy onto the NBN for access seekers that are currently reliant upon Telstra's network.

The proposed method of implementing structural reform may result in both businesses and consumers obtaining long term benefits sooner. Businesses are likely to experience

¹²⁵ ACIL Tasman (2005). This result is similar to that found by the Allen Consulting Group, which estimated that the 1997 reforms to the telecommunication industry had resulted in a net increase in GDP by 1.25 per cent in 2003-2004 (Allen Consulting Group, *Benefits resulting from changes in telecommunications services*, 20 August 2004, p v).

¹²⁶ ACIL Tasman (2005), p 1.

¹²⁷ Telstra supporting submission, p 45.

¹²⁸ There are around 300 Telstra exchanges (serving approximately 2 million premises) that are capable of supporting competitive DSL based on the number of customer premises they each service, but in which no competitive DSL has been installed. (Implementation Study, p 27).

more competitive offerings as they represent a higher value customer than residential customers, and in particular, would be more likely to take up the higher speed broadband services. Empirical evidence suggests businesses have benefited from structural reform in the past through lower prices, increase in volume of services purchased and improved service quality. This has been estimated to increase gross operating surplus by \$2.4 billion in 2004-05, than if the reform did not occur.¹²⁹ Previous empirical evidence also indicates that residential households have benefited from structural reform through price reductions and increased availability of internet services. This has been estimated to increase real household consumption by almost \$1.3 billion in 2004-05 than if structural reform did not occur.¹³⁰

¹²⁹ ACIL Tasman estimates this as aggregate gross operating surplus for small businesses from telecommunication services (ACIL Tasman (2005) pp 57-58). ACIL Tasman calculated the gross operating surplus caused by the telecommunications service and multiplied this with Australian small business profits (p 57).

¹³⁰ The increase in the ability to purchase goods and services, indicated by the increased in household consumption relative to the reference case, is a proxy for an increase in welfare.

8 Other matters relating to the Definitive Agreements

8.1 Overview

- There are a number of matters arising from the Definitive Agreements that are not directly related to the achievement of network consolidation and therefore require separate consideration against the relevant criteria. These matters were identified in the August discussion paper.
- Since the August discussion paper, the parties have agreed to vary the relevant provisions of the Definitive Agreements (in the case of the wireless marketing restriction) or provide assurance that mitigates the concerns raised with those provisions (in the case of the Substantial Adverse Events clause and restrictions relating to the provision of carriage services to independent Pay TV channel operators).
- In relation to the restraints relating to Optus' HFC network and the BSO price commitments, the ACCC has reached a view that these provisions would not be likely to lead to such a significant detriment for competition or consumers that would outweigh the benefits associated with the SSU.

8.2 Introduction

8.2.1 Definitive Agreements

The ACCC has discussed the consolidation of networks in section 7 above, which is a key matter arising from Telstra's commitment to structurally separate and related provisions in the Definitive Agreements.

There are a number of further important matters arising from the Definitive Agreements that are not directly related to the achievement of network consolidation. These matters include:

- (a) the Substantial Adverse Events (SAE) clause;
- (b) restrictions regarding Telstra's wireless services;
- (c) the restrictions regarding future use of the HFC network for the provision of Pay TV services;
- (d) the provisions relating to Optus' HFC network; and
- (e) the commitments NBN Co has made to Telstra in relation to the price of its BSO service.

The ACCC has considered each of these matters against the relevant criteria, as a part of the requirement that it have regard to the conduct that is likely to receive the benefit of the authorisation in section 577BA.

The relevant provisions of the Definitive Agreements are described in more detail in Attachment A4.

8.2.2 Submissions

In the August discussion paper, the ACCC noted the above matters and invited submissions as to whether there are any other matters set out in the Definitive Agreements that are likely to receive the benefit of the legislative authorisation that may have detrimental impacts upon competition in telecommunications markets or on consumers, or when viewed against any other of the mandatory considerations.

The ACCC did not receive any submissions on this point.

The August discussion paper also posed individual questions about each of the above matters. Submissions in response to these questions are considered below.

At the ACCC's request, on 23 August 2011, NBN Co provided a public submission about the Definitive Agreements and section 577BA of the Telco Act (the NBN Co section 577BA submission).

8.3 Substantial Adverse Events Clause

8.3.1 Overview

The Subscriber Agreement includes a variation mechanism that may be triggered if an SAE occurs in relation to either NBN Co or Telstra within 20 years from the Commencement Date. The party which is affected by the SAE may initiate the variation procedure.

The SAE mechanism will be triggered if either party engages in competition with the other party in particular markets and that conduct has the effect (or is highly likely to have the effect) of substantially adversely affecting the other party's relevant business. The parties have also agreed particular types of conduct that will not constitute an SAE.

8.3.2 Submissions

In the August discussion paper, the ACCC asked whether the operation of the SAE clause could have a detrimental impact upon competition in telecommunications markets or consumers, or when viewed against other of the mandatory considerations.

The ACCC received submissions from Optus and Herbert Geer (on behalf of Adam Internet, iiNet and Internode) both of which consider that the provision would be a factor that militates against acceptance of the SSU. Both submissions expressed the view that an SAE variation should be subject to regulatory oversight by the ACCC.¹³¹

In its section 577BA submission, NBN Co states that the "Substantial Adverse Events mechanism is no wider than required to effectuate the policy and legislative settings set

¹³¹ Optus submission, September 2011, p 51; Herbert Geer submission, September 2011, p 26.

by the Government for structural reform of the telecommunications industry”¹³² and considers that the test:

...sets a high threshold that limits the regime to applying only where a party acts in a manner that is fundamentally inconsistent with the commercial assumptions on which the Definitive Agreements were based and only where that conduct has a substantial adverse effect on the core business of the other party.¹³³

Further, NBN Co considers that the Subscriber Agreement “provides clear boundaries as to the scope of the changes that can be made” as a result of the operation of the SAE clause:

Specifically, the variation must only be a modification or deletion of existing provisions in the Subscriber Agreement which puts the affected party in a position to more effectively compete with the other party and/or the imposition of restrictions which have the effect of putting each party in the same position in which it would have been had the SAE not occurred.

Further, in all circumstances, the overall effect of the variation must be proportionate to the competitive activities of the party which gave rise to the SAE.¹³⁴

8.3.3 Assessment

As noted in the August discussion paper, the ACCC considers that variations under the SAE clause, including any competitive restraints thereby imposed, could receive the benefit of the legislative authorisation. The variation could be authorised without ACCC consideration as to whether those restraints would be appropriate when viewed against the mandatory considerations to which the ACCC must have regard in considering the SSU.

In particular, the broad nature of the variations that could be agreed in the event of an SAE would mean that the conduct that the parties could potentially engage in under the Definitive Agreements over the next 20 years could not be known by the ACCC at the time of making its decision regarding Telstra’s SSU.

Consequently, the ACCC considered that it would be difficult to properly fulfil the requirement that it have regard to the conduct that would be likely to receive the benefit of authorisation under section 577BA of the Telco Act in making its decision on the SSU.

The August discussion paper stated that:

In short, acceptance of the SSU could give rise to the risk that the parties will give effect to commercial agreements that are inappropriate when viewed against the mandatory considerations. As a result of the legislative framework, those commercial agreements could not be prevented or subsequently unwound through the operation of competition laws.¹³⁵

¹³² NBN Co section 577BA submission, p 33.

¹³³ Ibid, p 34.

¹³⁴ Ibid.

¹³⁵ August discussion paper, p 61.

The August discussion paper noted that the absence of a mechanism for regulatory assessment to provide assurance that any varied agreement would be appropriate is a factor that would militate against acceptance of Telstra's SSU. In response to concerns raised about the SAE variation process and the absence of a regulatory oversight mechanism, Telstra and NBN Co have given the ACCC a joint undertaking pursuant to section 87B of the CCA, which is discussed in further detail below. The ACCC considers that the undertaking mitigates the previous concerns expressed by the ACCC in relation to future SAE variations.

The August discussion paper also noted that the coming into force of the SAE clause would be likely to have the effect that the parties would be less likely to engage in conduct that may be classified as an SAE for the other party, and hence could further discourage competitive behaviour by the parties, as it will trigger a right for the other party to request amendment to the Subscriber Agreement. The ACCC considers that, on the evidence before it, it is unclear whether this would be likely to result in significant competition issues.

8.3.4 Undertaking in relation to SAE variation

On 27 February 2012 the ACCC accepted an undertaking under section 87B of the CCA jointly given by Telstra and NBN Co (the SAE undertaking).¹³⁶ The SAE undertaking establishes a process for the parties to notify the ACCC of any proposed variations (Proposed SAE Change) pursuant to the SAE clause in the Subscriber Agreement and for the ACCC to conduct a review of the Proposed SAE Change. Telstra and NBN Co have undertaken not to vary the Definitive Agreements to implement or otherwise give effect to a Proposed SAE Change unless the following process has been completed.

The key features of the review process are:

- Prior to the implementation of any variation to the Definitive Agreements pursuant to the SAE Clause, the parties will notify the ACCC of the Proposed SAE Change and the associated SAE.
- The ACCC will conduct a confidential pre-assessment to determine whether a full review is required, according to the criteria set out in the SAE undertaking.
- If the ACCC determines that a full review is required, a full review will be conducted in accordance with the process and criteria set out in the SAE undertaking. The Proposed SAE Change will be assessed on the basis of a "no net detriment" test. The process may include a public consultation if the ACCC considers it necessary.
- The ACCC will provide the parties with a statement of reasons for its decision and will publish this statement of reasons.

¹³⁶ This undertaking will be made available on the ACCC's public register, at: <http://www.accc.gov.au/content/index.phtml?itemId=815599>.

- If no full review is required, or the ACCC accepts the Proposed SAE Change following a full review, the parties are released from the obligation in the SAE undertaking not to vary the Definitive Agreements to implement or otherwise give effect to the Proposed SAE Change.

[C-I-C]

The ACCC considers that the undertaking provides a transparent review process for Proposed SAE Changes and mitigates the concerns expressed in the August discussion paper about the potential for SAE variations receiving the benefit of legislative authorisation without ACCC oversight.

8.4 Wireless restrictions

8.4.1 The initial restriction

The Definitive Agreements that were provided to the ACCC prior to the issuing of the August discussion paper contained the following restrictions relating to Telstra's wireless services:

- For a period of 20 years from the Commencement Date Telstra will not promote wireless services as substitutable for fibre services (the Wireless Promotion Restriction).
- Telstra is not entitled to any fee for disconnecting a premises if that premises is not connected to the NBN within six months after the Disconnection Date and an individual at that premises contracts with Telstra for a wireless service (the Wireless Substitution Provision).

The ACCC noted in the August discussion paper that, notwithstanding the contrary views of Telstra and NBN Co that:

...there remains the potential for these provisions to be detrimental to competition in the markets for the supply of wireless voice and broadband services. Similarly, these provisions may also reduce a potential source of restraint upon NBN Co's supply of voice only services and potentially very basic broadband services. If so, these provisions could lead to detrimental outcomes for consumers.¹³⁷

The August discussion paper noted that whether these restrictions would result in detrimental impacts for competition or consumers and, if so, the extent of the detriment, would appear to depend upon a number of factors, including the extent to which the wireless promotion restriction would prevent Telstra from engaging in marketing activities that would otherwise be lawful.

The ACCC invited submissions in response to this issue.

¹³⁷ August discussion paper, p 65.

8.4.2 Submissions

In the August discussion paper, the ACCC asked whether the wireless restriction provisions would be likely to result in any negative outcomes for competition in relevant telecommunications markets or for consumers. The ACCC also asked whether any of the mandatory considerations either support or militate against the proposed restrictions coming into effect.

Both ACCAN and Gans and Hausman submit that wireless and fibre are not necessarily complementary and may be substitutable, particularly as LTE speeds improve.¹³⁸ ACCAN submits that existing laws against misleading and deceptive conduct are a sufficient way to address NBN Co's concern and that the wireless restraint is likely to have a negative effect on consumers.¹³⁹ Gans and Hausman also submit that the wireless restrictions are anti-competitive and will lead to lower innovation and higher prices for consumers.¹⁴⁰

In contrast, DigEcon Research submits that wireless is a complement and not a substitute to fibre.¹⁴¹ DigEcon Research also submits that the wireless restraint will not have an anti-competitive effect on the market as other providers will still be able to offer wireless services to consumers.¹⁴² Further, DigEcon Research submits that the wireless restraint is a limitation on how Telstra can promote its wireless services and not a restraint on its supply of wireless services.¹⁴³

NBN Co, in its section 577BA submission, states that the wireless provisions:

[S]upport the migration of customers to the NBN and are integral to the viability of NBN Co's business case.

...

Telstra's dominant position in retail markets means it is in a position to influence the migration choice of many customers. The disconnection payments are made to Telstra upon disconnection of premises in accordance with the Definitive Agreements, rather than upon migration of Telstra's customers to the NBN. Accordingly, appropriate limitations on Telstra's ability to migrate customers to another Telstra platform are integral to the viability of the NBN Co business case. The ability of NBN Co to roll out the NBN in accordance with the Government's objectives depends upon the viability of the NBN Co business case. In essence, Telstra required certain value to its shareholders in exiting its access network business. NBN Co required sufficient confidence that Telstra would provide business to NBN Co (rather than Telstra migrating customers to another Telstra platform). The terms agreed in the Definitive Agreements reflect the balance struck between these objectives.¹⁴⁴

¹³⁸ ACCAN submission, September 2011, p 6; Gans and Hausman submission, September 2011, pp 3-4.

¹³⁹ ACCAN submission, September 2011, p 7.

¹⁴⁰ Gans and Hausman submission, September 2011, p 4.

¹⁴¹ DigEcon Research submission, October 2011, pp 8-9.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ NBN Co section 577BA submission, p 26.

Telstra has indicated that, in its view, the wireless provisions are a very limited constraint on its business activities, and that it intends to continue to market and provide wireless services as complementary to a fixed-line service, even over the NBN.¹⁴⁵

8.4.3 Revised wireless promotion restriction

Following the consultation period, Telstra and NBN Co revised the Wireless Promotion Restriction. The restriction has been amended to provide that Telstra must not promote wireless services as substitutable for fibre services where such promotion would be misleading or deceptive, or includes a false or misleading representation. The wording of the restriction now largely mirrors the relevant provisions of the Australian Consumer Law (ACL).

The provision states that Telstra will not be prevented from promoting a wireless service as complementary to a fibre service.

8.4.4 Assessment

The ACCC considers that the revised Wireless Promotion Restriction resolves the concerns raised by the original restriction as it merely replicates obligations that Telstra would have under the ACL. Accordingly, the ACCC does not consider that this provision would prevent Telstra from engaging in marketing activities that would otherwise be lawful.

In relation to the Wireless Substitution Provision, the ACCC recognises that this provision has a legitimate role in the Definitive Agreements due to the disconnection model of payments negotiated between NBN Co and Telstra. The ACCC considers that although this provision will affect Telstra's incentives, it is a necessary function of the form of structural separation by migration. It is therefore consistent with the Government's support for form of structural separation whereby Telstra will migrate its fixed-line customers to the NBN, which is a matter to which the ACCC must have regard in this decision.

The ACCC considers that, the revised wireless restrictions would not have a significant effect upon Telstra's competitive activities in the supply of wireless voice and broadband services. The ACCC therefore considers that the provisions will not have any significant detrimental impact on consumers or competition in relevant markets.

8.5 Restrictions regarding the use of Telstra's HFC by independent channel operators

8.5.1 Background

Telstra's ability to provide services over its HFC network in the future is limited by:

- The Networks and Services Instrument (reflected in the SSU) – this Instrument sets the scope of Telstra's required commitment to structurally separate,

¹⁴⁵ *NBN will not stop wireless promotion: Thodey, Technology Spectator, 27 June 2011.*

including Telstra's HFC network but excluding certain television and audio carriage services.¹⁴⁶

- The draft Plan – provisions in the draft Plan require Telstra to disconnect HFC Services and not to supply new HFC services within the NBN Fibre Footprint, excluding HFC Television Services¹⁴⁷ provided to particular parties.¹⁴⁸
- The Definitive Agreements – the Subscriber Agreement restricts Telstra from providing HFC carriage services within the NBN Fibre Footprint, other than HFC Television Services provided to particular parties.¹⁴⁹

The Networks and Services Instrument

Telstra is not required to include in an undertaking given under section 577A of the Telco Act an obligation to structurally separate in respect of certain exempt television and audio HFC services that are not IP-based.¹⁵⁰

Telstra's commitment to structurally separate in the SSU is drafted by reference to this scope. The SSU does not contain any additional restrictions on Telstra's ability to supply these exempt HFC services. There are, however, some additional limitations on Telstra's ability to supply these exempt HFC services in the draft Plan and the Definitive Agreements.

The draft Plan

Clauses 14.1 and 17.2 of the draft Plan require Telstra to cease supplying new services, and to disconnect existing services, over its HFC network as the NBN is rolled out, other than HFC Television Services to:

- FOXTEL; and
- independent channel operators to which Telstra is required to provide these services under specified contracts that were in existence as at 20 June 2010 (that is, Setanta Sports (Setanta) and Ovation Channel).

Under the draft Plan, Telstra will not be restricted from supplying the above services, (subject to any limitations in the Subscriber Agreement) following rollout of the NBN. Telstra is not permitted to supply HFC Television Services to any other party.

The Subscriber Agreement

The Subscriber Agreement provides that Telstra may continue to provide HFC Television Services within the NBN Fibre Footprint to FOXTEL, and to independent channel operators under specified contracts that were in existence as at 20 June 2010

¹⁴⁶ Networks and Services Instrument, Sch 1.

¹⁴⁷ For a description of services that constitute HFC Television Services for the purposes of this paper, see Attachment A4.

¹⁴⁸ FOXTEL, Setanta and Ovation.

¹⁴⁹ FOXTEL and Setanta.

¹⁵⁰ Networks and Services Instrument, Sch 1, item 5.

for the duration of these contracts, or until Telstra can terminate or exit without penalty.¹⁵¹

Setanta is the only independent channel operator which had a specified contract as at 20 June 2010 for the provision of HFC Television Services under which Telstra is still obliged to provide services.¹⁵² Therefore, Telstra is not prevented from supplying Setanta under the Subscriber Agreement for the duration of this contract. The Subscriber Agreement also provides NBN Co with the ability to consent to Setanta's contract being renewed or extended, with the effect that Telstra would be able to continue to supply it with HFC Television Services if such consent were to be granted. Following the consultation period, NBN Co provided its consent that Telstra may continue to supply the relevant HFC carriage services to Setanta. That consent covers the period within which FOXTEL must use Telstra's HFC network for carriage of its subscription television services. Further, if Telstra and Setanta would like to extend their arrangements beyond this period, NBN Co must not unreasonably withhold its additional consent to such an extension.

The Subscriber Agreement, therefore, operates to prevent Telstra from supplying HFC Television Services to all independent channel operators, other than Setanta.

8.5.2 The FOXTEL special access undertaking

Telstra's ability to supply HFC Television Services to independent channel operators is relevant to those channel operators' ability to access FOXTEL's subscribers via a special access undertaking (the FOXTEL SAU). The FOXTEL SAU requires FOXTEL to provide services for the distribution of programming to FOXTEL's customers via FOXTEL's digital set top units. The FOXTEL SAU expires in 2015.

To access a FOXTEL set top unit connected to Telstra's HFC, an access seeker must also carry its content to that set top unit via Telstra's HFC.¹⁵³ This means that in order to gain access to FOXTEL's set top units under the FOXTEL SAU, the access seeker must independently negotiate an HFC carriage service with Telstra. HFC carriage services are not currently regulated.

Telstra and NBN Co have stated that "an access seeker who seeks access to the FOXTEL digital set top unit during the term of the FOXTEL Special Access Undertaking could get access to that set top unit otherwise than over the HFC Network (e.g. by getting access to satellite carriage services)."¹⁵⁴ However, there may be practical limitations as to whether an access seeker could use an alternative connection to supply programming to a set top unit connected to FOXTEL via the HFC and whether it could retain the same functionality.

¹⁵¹ The Subscriber Agreement provides that Telstra may supply HFC Television Services to independent channel operators with the specified contracts *for the duration of the contract*.

¹⁵² Setanta's contract is due to expire in Oct 2012: Setanta Sports submission, September 2011.

¹⁵³ This is a requirement of the SAU, without which, FOXTEL is not required to provide services to set top units connected to Telstra's HFC.

¹⁵⁴ Telstra and NBN Co's responses to questions regarding Definitive Agreements, 16 August 2011, p 5.

In the August discussion paper, the ACCC noted its concern that the restrictions regarding Telstra's supply of HFC Television Services would inappropriately place a limit upon FOXTEL's regulatory obligations under its SAU. The restriction on Telstra's ability to provide HFC Television Services will effectively render the FOXTEL SAU inoperable in Telstra's HFC areas for potential new access seekers, while not affecting in any way the ability of FOXTEL (which is 50 per cent owned by Telstra) to self-supply pay TV services over the HFC.

8.5.3 Assessment

The ACCC considers that the restriction on Telstra providing HFC Television Services could potentially have an effect on competition and consumers in certain markets. Any effect is likely to be due to new access seekers being unable to access FOXTEL's set top unit under the FOXTEL SAU.

In its 2007 decision on the FOXTEL SAU, the ACCC considered access to FOXTEL's set top unit and associated services and systems important to promoting competitive entry of content providers such as independent channel operators.¹⁵⁵ Any limitation on the operation of the FOXTEL SAU has the potential to reinforce the FOXTEL set top unit as a potential bottleneck, as it could limit providers that are able to supply pay TV services independently of FOXTEL's pay TV package. This could have a detrimental effect on consumers and competition if it makes it less likely that content of value to consumers would remain accessible to them.

The ACCC received one submission, from Setanta, which notes that it relies on access to Telstra's HFC network to access the proportion of its subscriber base that receives FOXTEL via Telstra's HFC. Setanta considers that the inability to access these HFC carriage services and, therefore, the FOXTEL SAU, would have an "impact on the profitability of the Setanta business".¹⁵⁶ Setanta also submits that there would be an impact on consumers if it could not get access to HFC as customers who currently receive Setanta via FOXTEL over the HFC would no longer be able to access Setanta's channel.

As noted previously, NBN Co has now provided consent which allows Telstra to continue to supply HFC Television Services to Setanta. In effect, this grandfathers Telstra's ability to continue to provide the existing access seeker with HFC carriage services which enables it to distribute its content to end users using the FOXTEL platform.

The ACCC notes that the Subscriber Agreement still prevents any other independent channel operators from accessing Telstra's HFC Television Services and the FOXTEL platform in Telstra's HFC areas. However, there is no evidence that there are any additional independent channel operators that would seek to utilise the FOXTEL platform in the future.

¹⁵⁵ Assessment of FOXTEL's Special Access Undertaking in relation to the Digital Set Top Unit Service, Final Decision, March 2007, p 94.

¹⁵⁶ Setanta Sports submission, September 2011, p 1.

8.6 Restraints relating to Optus' HFC Network

8.6.1 Overview

The Definitive Agreements are subject to a condition precedent that NBN Co commits to Telstra that it will enter into an arrangement with Optus regarding the closure of its HFC network.

On 23 June 2011, Optus announced that it had entered into an agreement with NBN Co to migrate its customers from its HFC network. Telstra has publicly confirmed that this condition precedent has been satisfied.¹⁵⁷ The ACCC has received applications for authorisation of this transaction which it is currently considering.¹⁵⁸

The parties agreed a provision in the Subscriber Agreement that restrains NBN Co from incorporating Optus' HFC network into the NBN.

8.6.2 Submissions

In the August discussion paper, the ACCC asked whether there are any detrimental impacts to competition or consumers that are likely to arise *directly* as a result of the condition precedent. The ACCC did not receive any submissions in response to this question.

The ACCC also asked whether other mandatory considerations either support or militate against the proposed restrictions coming into effect. The ACCC did not receive any submissions directly in response to this question, but it did receive some submissions indicating that HFC might not be suitable, or likely, for incorporation into the NBN.

In this regard, ACCAN submits that HFC based services are likely to become less appealing over time compared to the capabilities of services offered over the fibre network.¹⁵⁹ DigEcon Research also submits that HFC broadband is not a good substitute for FTTH broadband as the stated peak download of 100 Mbps is shared between all users on a node as opposed to per user.¹⁶⁰ In addition, DigEcon submits that the upload speed over the HFC network is severely limited and the network requires high maintenance costs.¹⁶¹

However, Ken Curry notes that currently, both the Telstra and Optus HFC networks can already deliver 100 Mbps with little or no additional capital investment.¹⁶²

¹⁵⁷ J Stanhope, Analyst Briefing – Telstra's Participation in the NBN, transcript released 2 September 2011, p 12 ("The condition precedent that we had around that was an agreement was entered into between NBN and Optus and it has occurred.").

¹⁵⁸ For further information, see the ACCC website (NBN Co Limited – Authorisations A91290 – A91292).

¹⁵⁹ ACCAN submission, September 2011, p 5.

¹⁶⁰ DigEcon Research submission, October 2011, p 5.

¹⁶¹ Ibid.

¹⁶² Ken Curry submission, November 2011, p 2; Ken Curry submission, February 2012, p 1.

8.6.3 Assessment

Condition Precedent

As the Optus-NBN Co agreement was announced on the same day as the Definitive Agreements were executed, it is unclear if the condition precedent had any effect upon the parties' conduct or whether it relates to conduct that would have occurred irrespective of whether that condition precedent had been agreed.

The ACCC considers that it is therefore not clear that this condition precedent will have any impact upon competition or consumers.

Restriction on incorporation of Optus' HFC into the NBN

The ACCC considers that the restriction that NBN Co will not incorporate Optus' HFC network, or components of it, into the NBN could potentially be a cause of concern when viewed against the criteria to which the ACCC is to have regard. The restraint could be seen as an inappropriate restriction upon NBN Co's commercial freedom, which might not be necessary for the structural separation of Telstra. However, given the migration model of structural separation there is likely to be a commercial rationale for a provision of this type.

In its SOE (to which the ACCC must have regard), the Government has specifically stated that its expectation is that NBN will "connect 93 per cent of Australian homes, schools and businesses with fibre-to-the-premises technology".¹⁶³ NBN Co would be unable meet this expectation by incorporating an HFC network, unless it eventually overbuilt that network with fibre-to-the-premises technology.

There could also be several technical challenges that NBN Co would have to overcome in order for an HFC network to be incorporated into its national network, as was noted by the Implementation Study.¹⁶⁴ In particular, the Implementation Study states:

The challenge of maintaining upgrades in line with FTTP and the difficulty of unbundling on HFC networks however, suggest that NBN Co would need to overbuild HFC networks by the end of the roll-out to provide for future growth.¹⁶⁵

The ACCC considers, based on the material before it, that even in the absence of this restriction, it appears unlikely that NBN Co would incorporate Optus' HFC network, or components of that network, permanently into the NBN. Accordingly, the ACCC considers that the restraints relating to Optus' HFC network would be unlikely to have had an effect on NBN Co's intentions regarding the use of Optus' HFC network. Therefore, this provision is unlikely to have a significant impact upon competition or consumers.

¹⁶³ SOE, p 1.

¹⁶⁴ Implementation Study p 106.

¹⁶⁵ Ibid, p 107.

8.7 BSO price commitments

8.7.1 Overview

The Access Deed limits what NBN Co can advocate in submissions to the ACCC concerning the price it will propose in its Special Access Undertaking (SAU) for its basic service offering (BSO). It further provides that NBN Co must not make any submissions to the ACCC seeking a price for the supply of the BSO that is more than \$24 per service, per month for the period from 5 years from the Commencement Date. In practical terms, this provision would appear to set a maximum price that NBN Co can propose in its undertaking.

NBN Co has submitted an SAU to the ACCC which includes terms relating to the price of its Basic Access Offer (which is essentially the same product as the BSO as defined in the Access Deed).¹⁶⁶ If the SAU is accepted by the ACCC, the price of the Basic Access Offer in the SAU will be the maximum regulated price available to all access seekers.

8.7.2 Submissions

In the August discussion paper, the ACCC asked whether, given that it effectively operates as a price ceiling rather than a price floor, the BSO price commitment is likely to have any adverse impacts upon competition, consumers or any other criteria to which the ACCC is to have regard. The ACCC did not receive any submissions in response to this question.

8.7.3 Assessment

The ACCC notes that it is not clear if this commitment has had any effect on NBN Co's behaviour in relation to BSO pricing. NBN Co publicly indicated its BSO pricing in December 2010 when it published its (non-binding) Product and Pricing Overview for Access Seekers, setting out a monthly charge of \$24 for the BSO equivalent product. NBN Co's SAU also proposes a maximum regulated price of \$24 per month for the Basic Access Offer. NBN Co has also proposed in its SAU that the price of the Basic Access Offer will not increase before 30 June 2017.¹⁶⁷

In relation to the commitments made to Telstra in the Access Deed, NBN Co states that the BSO price commitments:

[G]ive Telstra certainty as to the terms on which NBN Co will provide access to the Basic Service Offering (BSO) (but NBN Co will ensure that those terms do not discriminate between Telstra and other RSPs [Retail Service Providers]).¹⁶⁸

The BSO price commitments establish a maximum price, beyond which NBN Co would be effectively unable to price its product. As the BSO price commitments do not override the ACCC's role in regulating the prices that NBN Co may charge for its

¹⁶⁶ NBN Co SAU, sch 4.

¹⁶⁷ NBN Co SAU, pp 44-45.

¹⁶⁸ NBN Co section 577BA submission, p 12.

services, the BSO price commitments do not appear to have any substantive effect upon the prices that NBN Co will eventually charge access seekers (including Telstra) for its services. The ACCC therefore considers that these provisions are unlikely to result in any competitive detriment or to have any meaningful impact in relation to any other criteria to which the ACCC is to have regard.

9 Interim Equivalence and Transparency

9.1 Overview

- The ACCC is satisfied that the interim equivalence and transparency measures in Telstra's SSU meet the requirements of the Telco Act and the Ministerial Criteria Instrument.
- The ACCC considers that, as a result of improvements Telstra has made to the price equivalence measures in the SSU, as well as the capacity for ACCC price determinations to now be 'pulled through' to the wholesale ADSL rate card, the price equivalence and transparency measures are now appropriate and effective.
- The ACCC has assessed the non-price equivalence and transparency measures in terms of whether they can be expected to provide for equivalence of outcomes. Based on such assessment, the ACCC considers that the SSU provides for non-price equivalence and transparency during the interim period in an appropriate and effective manner.
- The ACCC considers that the overarching equivalence commitment and associated enforcement and compliance mechanisms are important components of the non-price equivalence and transparency measures, in that they provide the additional assurance that the specific measures will remain appropriate and effective over time.
- The ACCC is satisfied that the commitments in the SSU providing for ACCC oversight of Telstra's compliance with its interim obligations meet the requirements of the Telco Act and the Ministerial Criteria Instrument.

9.2 Introduction

The statutory framework for the ACCC's consideration of the interim equivalence and transparency measures contained in Telstra's SSU is established under the Telco Act and the Ministerial Criteria Instrument. This framework requires that the ACCC must not accept an SSU unless it is satisfied that it provides for equivalence and transparency in relation to Telstra's supply of Regulated Services during the interim period, and does so in an appropriate and effective manner.¹⁶⁹

The interim period is a defined period which begins when the SSU comes into force and ends at the start of the designated day.¹⁷⁰ The designated day is expected to be the day on which the construction of the NBN will be concluded. It is currently 1 July 2018, but may be extended by the Minister.¹⁷¹

¹⁶⁹ Regulated Services include the declared services and those services specified by the Minister in the Regulated Services Determination published on 24 June 2011.

¹⁷⁰ Telco Act, s 577A(3).

¹⁷¹ Telco Act, s 577A(10).

The legislative framework provides that in the absence of an SSU coming into effect, Telstra would be subject to a fundamentally different set of equivalence arrangements.¹⁷²

The assessment of Telstra's interim equivalence and transparency measures constitutes a discrete element of the ACCC's decision whether to accept or reject Telstra's SSU.

The ACCC has assessed the interim equivalence and transparency measures in the SSU against this statutory framework and concluded that they meet the relevant requirements. This conclusion is a factor that militates in favour of the ACCC's acceptance of the SSU.

In the August discussion paper, the ACCC raised a number of concerns about the appropriateness and effectiveness of the equivalence and transparency commitments proposed by Telstra in its July SSU. Similar concerns were raised by industry in submissions that responded to the August discussion paper.

Telstra addressed many of these concerns in the December SSU. This version represented a substantial improvement on the commitments in the July SSU. The ACCC considered that it would be otherwise minded to accept the December SSU had it not still had concerns about the effectiveness of certain elements of Telstra's price equivalence commitments, in particular those relating to the supply of wholesale ADSL. The ACCC's December discussion paper stated this position and sought further comment on issues of substance or drafting matters relating to the revised commitments.

The ACCC received a number of submissions in response to the December discussion paper.¹⁷³ The ACCC has considered these submissions in undertaking its assessment of the interim equivalence and transparency measures.

In response to industry concerns, Telstra has strengthened its commitments, including the overarching equivalence commitment, and its commitments concerning information security, price equivalence, key performance indicators and mechanisms by which to enforce the IET measures. Certain drafting errors have also been corrected in the final version of the SSU submitted on 23 February 2012. As a result:

- The overarching equivalence commitment will be benchmarked against services supplied to Telstra's retail business units on a like-for-like basis, and this overarching commitment will be able to amend, as well as supplement, other commitments
- Price equivalence will be implemented sooner, as more wholesale ADSL services move more quickly to common rate card prices

¹⁷² See Part 9 of the Telco Act.

¹⁷³ Submissions were received from Herbert Geer Lawyers (on behalf of iiNet, Internode, TransACT and Adam Internet), Frank Larmour, Optus, the CCC, Macquarie Telecom, AAPT and TPG.

- Price determinations made in ACCC arbitrations will remain binding on the parties.
- Wholesale customer information will be further protected against possible misuse
- Mandated changes to retail service levels will trigger corresponding changes in the equivalence and transparency metrics
- A greater range of contraventions can be the subject of ACCC enforcement action in the Federal Court.

Parts D and E of Telstra's SSU contain Telstra's commitments relating to equivalence and transparency during the interim period. In addition to considering these measures against the appropriate and effective touchstone in the Telco Act, the ACCC has assessed them against the relevant matters in the Ministerial Criteria Instrument to which the ACCC is required to have regard.

This section of the paper provides an overview of the ACCC's assessment of Telstra's price and non-price commitments and its overarching commitment to equivalence contained in clause 9 of the SSU. It also discusses the ACCC's analysis of Telstra's compliance monitoring commitments during the interim period. A list of the submissions, including submissions from Telstra, that the ACCC has considered in the course of making this decision is provided at Attachment A1.

A more detailed summary of the ACCC's assessment of the following equivalence and transparency measures is provided at Attachment A6:

- Price equivalence and transparency measures for declared and non-declared services.
- Non-price equivalence and transparency measures, which comprise:
 - system and process commitments relating to service quality and operational equivalence;
 - metric reporting and the payment of service level rebates;
 - commitments relating to DSL upgrades;
 - commitments regarding wholesale customer facing systems and service qualification; and
 - commitments around the provision of information in respect of network activities, circumstances or events affecting operational quality.
- Measures regarding equivalent access to Telstra Exchange Buildings and External Interconnect facilities.
- Other measures which support equivalence and transparency:
 - organisational measures; and

- information security measures.
- Dispute resolution mechanisms in the SSU.
- Implementation.

The approach that the ACCC will take to enforcing the SSU is outlined in the Statement of Enforcement included at Attachment A7.

9.3 Statutory framework for interim equivalence and transparency measures

Telstra’s vertical integration has led to long-standing and widespread competition concerns in markets for fixed-line communications. As a vertically integrated access provider to the ubiquitous copper network, Telstra has the ability and incentive to engage in both price and non-price discrimination in favour of its retail business units. This can hinder and deter more efficient competitors in retail markets from competing which can result in an overall efficiency loss.

Structural separation is the most effective means of responding to the concerns that the existing structure of the telecommunications industry is failing consumers. However, it will be some time until Telstra’s structural separation takes effect and the industry transitions to a more competitively neutral environment involving a fixed-line access network controlled by a wholesale-only access provider (the designated day is currently 1 July 2018).

Accordingly, the Government has recognised the importance for competition and consumers that access to Telstra’s bottleneck infrastructure be provided on an equivalent and transparent basis during the transition to the NBN—both to promote effective competition in downstream markets throughout this period and to provide a safeguard against existing market power being leveraged onto the new access network.

In this context, section 577A(3) of the Telco Act provides that the ACCC must not accept an SSU unless the ACCC is satisfied that it:

- provides for transparency and equivalence in relation to the supply by Telstra of Regulated Services to Telstra’s wholesale customers and Telstra’s retail business units beginning when the SSU comes into force and ending at the start of the designated day; and
- does so in an appropriate and effective manner.

‘Regulated Services’ are declared services (within the meaning of section 152AL of the CCA) and additional services specified by the Minister.¹⁷⁴ The Regulated Services Determination specifies that Wholesale ADSL Layer 2 and Telstra exchange building access (TEBA) are Regulated Services.

¹⁷⁴ Regulated Services are defined in section 71, Schedule 1 of the Telco Act.

Upon the coming into force of an SSU, the current operational separation regime will cease to operate.¹⁷⁵ The Explanatory Memorandum to the CACS Bill explains that due to this:

Telstra will need to put in place, through the mechanism of its structural separation undertaking, appropriate interim arrangements to apply from that time until the point at which Telstra achieves full structural separation, to ensure that there is equivalence in supply of Regulated Services to Telstra's wholesale customers and Telstra's retail business unit during this interim period.¹⁷⁶

The Ministerial Criteria Instrument sets out in greater detail transparency and equivalence matters for the period Telstra is migrating customer services to the NBN to which the ACCC must have regard in deciding whether to accept Telstra's SSU.¹⁷⁷ The Explanatory Statement to this Instrument notes that:

The measures set out under this paragraph are aimed at providing meaningful improvements to the current transparency and equivalence measures and are planned to complement the recent changes to the telecommunications access regime.¹⁷⁸

The ACCC considers that the equivalence and transparency measures in the operational separation regime have been ineffective and have failed to address Telstra's ability and incentives to discriminate against wholesale customers.

9.3.1 Equivalence and transparency

Subsection 577A(4) states that "equivalence" has the same meaning as in Part 9 of Schedule 1 of the Telco Act, which states that equivalence means:

...equivalence in relation to the terms and conditions relating to price or a method of ascertaining price; and equivalence in relation to other terms and conditions.

The Explanatory Memorandum to the CACS Bill states:

Equivalence is where Telstra provides essential business inputs on equivalent terms and conditions to both its own retail business and its wholesale customers. Equivalence relates to both price and non-price terms and conditions such as service provisioning and availability of information about the network, and is considered an essential factor in promoting effective competition in downstream retail markets.¹⁷⁹

With regard to transparency, the Explanatory Memorandum to the CACS Bill states:

Transparency can be achieved by implementing processes and reporting requirements so that the regulator and Telstra's wholesale customers can be confident that Telstra's wholesale customers are being treated in an equivalent manner to how Telstra supplies its own retail business.¹⁸⁰

¹⁷⁵ See CACS Act, Schedule 1, Part 1, Division 3 (item 67). The effective of this amendment is that section 152EQ of the CCA which relates to operational separation of Telstra, will be repealed once an undertaking comes into force under section 577A of the Telco Act.

¹⁷⁶ Explanatory Memorandum, CACS Bill, p 91.

¹⁷⁷ Ministerial Criteria Instrument, para 4(g).

¹⁷⁸ Explanatory Statement, Ministerial Criteria Instrument, p 5.

¹⁷⁹ Explanatory Memorandum, CACS Bill, pp 15-16.

¹⁸⁰ Explanatory Memorandum, CACS Bill, p 15.

In other words, equivalence in terms and conditions of access that are offered to both wholesale customers and the access provider's own retail divisions promotes an environment where service providers are more likely to compete on their respective merits, as they are more likely to be rewarded for superior efficiency.

Further, transparency measures demonstrate the extent to which equivalence is being achieved. This is important in providing industry with confidence to invest and compete.

9.3.2 Appropriate and Effective

The term "appropriate and effective" has not been defined in the legislation or supporting legislative materials. The meaning of such a term is, however, reasonably well understood as being informed by the subject matter, purpose, and scope of the statute in which it appears. In this case, the relevant statutory provisions were introduced as part of a policy to promote competition and economic efficiency until structural separation is completed, in markets that are dependent upon Regulated Services as key inputs.

In this context, appropriate and effective measures would result in significant improvements in access to Regulated Services that better allow Telstra's wholesale customers to compete on their respective merits against Telstra's retail business units in converting network access into downstream services during the interim period.

Whether particular measures are appropriate and effective potentially involves questions of degree and judgement. Further, there could be a variety of measures which may be considered as appropriate and effective.

9.3.3 Ministerial Criteria Instrument considerations

In deciding whether to accept Telstra's SSU, the ACCC is required to consider whether the interim equivalence and transparency measures in the SSU include the matters set out in subparagraphs 4(g)(i)-(vii) of the Ministerial Criteria Instrument. These are considered, where relevant, in the discussion of the specific measures. The ACCC also considers that "appropriate and effective" interim equivalence and transparency measures are relevant in the ACCC's assessment of the SSU in respect of these other mandatory consideration:

- The government's policy objective of improving the accessibility and quality of broadband services for consumers in Australia, including those in regional, rural, and remote areas;¹⁸¹
- The expected distribution of the long term economic benefits for different types of consumers in different geographic areas that would occur as a consequence of the ACCC's acceptance of the undertaking or the undertaking coming into force;¹⁸² and

¹⁸¹ Ministerial Criteria Instrument, para 4(a).

¹⁸² Ministerial Criteria Instrument, para 4(c).

- Whether the undertaking requires Telstra to implement a governance framework that has specified attributes.¹⁸³

In reaching its decision to accept the SSU, the ACCC has had regard to whether Telstra's proposed measures are consistent with the above factors and provide for each of the specified matters in paragraph 4(g) of the Ministerial Criteria Instrument and

- if so, has taken that as a consideration that supports acceptance of the SSU;
- if not, has taken that as a consideration militating against acceptance.

9.3.4 Submissions on ACCC assessment of the equivalence and transparency measures

The ACCC received a number of submissions in relation to how it should assess the equivalence and transparency measures in the SSU.

Herbert Geer (on behalf of Adam Internet, iiNet, Internode and TransACT) submit that the first limb of section 577A(2) requires Telstra to provide transparency and equivalence in relation to the supply of Regulated Services, and that this is not qualified by the appropriateness and effectiveness criteria.¹⁸⁴ Rather, they submit that the limb going to appropriateness and effectiveness is a discrete and additional requirement.

Optus¹⁸⁵ and the CCC¹⁸⁶ submit that, in addition to the appropriate and effective requirement of the Telco Act, the ACCC must be satisfied that the measures provide meaningful improvements to, or a "step up" from, the current transparency and equivalence measures, which includes recognition of the failings of the operational separation regime.

The CCC submits the following:

- The ACCC is also required to have regard to additional factors in section 577A(6) of the Telco Act, including the Ministerial Criteria Instrument, the national interest in structural reform, the impact of that structural reform, and other relevant matters. With regard to other relevant matters, Telstra's past conduct must be considered.¹⁸⁷
- A counterfactual, future with and without the SSU (functional separation) test should be applied to assess its impact on the section 577A(6) factors of the Telco Act.¹⁸⁸

¹⁸³ Ministerial Criteria Instrument, para 4(f).

¹⁸⁴ Herbert Geer submission, January 2012, p 4.

¹⁸⁵ Optus submission, September 2011 p 13.

¹⁸⁶ CCC submission, September 2011, p 6.

¹⁸⁷ Ibid, p 5.

¹⁸⁸ Ibid, pp 7-8.

- The equivalence and transparency requirement requires a different and higher standard to that required by the standard access obligations under Part XIC of the CCA. Limitations which apply to the latter do not apply.¹⁸⁹

Herbert Geer emphasised that the requirement applies to all terms and conditions of supply of Regulated Services and hence is very broad.¹⁹⁰

Vodafone Hutchison Australia (VHA) submits that the SSU measures must provide the ACCC and industry with confidence that the commitments will be sustainable and effective. This would stem from an SSU that is self-enforcing.¹⁹¹

Industry also made submissions relating to whether the interim equivalence and transparency measures require Telstra to implement functional separation in the interim period. In this regard, the Minister has stated that the requirement for interim equivalence and transparency measures is not intended to require Telstra to implement functional separation during this period.¹⁹² Functional separation would, at a minimum, require an “equivalence of input” (EOI) standard and require a much stricter form of organisational separation than is intended under the interim equivalence and transparency measures.

The ACCC does not consider that the interim measures necessitate Telstra’s retail business units to use exactly the same access services using the same systems and processes as wholesale customers (EOI) before they could be considered appropriate and effective, but considers that the measures should provide for equivalence of outcomes.

However, although functional separation is a different separation model to the model of structural separation, there should be no implication that any model proposed for the interim measures cannot include similar matters to those envisaged for functional separation.¹⁹³

It follows that the ACCC does not consider that it is required to assess the interim measures with reference to a functional separation counterfactual. This view is supported by the Minister’s statements that the measures:

[A]re intended to provide meaningful improvements to existing arrangements for industry access to Telstra’s copper network.¹⁹⁴

With regard to Herbert Geer’s submission on the test to be applied when considering the SSU, the ACCC considers that the transparency and equivalence limb in section

¹⁸⁹ Ibid, p 11.

¹⁹⁰ Herbert Geer submission, January 2011, p 5.

¹⁹¹ VHA submission, September 2011, pp 3-4.

¹⁹² The Hon Stephen Conroy, *Media Release: Structural reform of telecommunications a step closer*, 24 June 2011 (http://www.minister.dbcde.gov.au/media/media_releases/2011/206).

¹⁹³ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, p. 94.

¹⁹⁴ The Hon Stephen Conroy, *Media Release: Structural reform of telecommunications a step closer*, 24 June 2011 (http://www.minister.dbcde.gov.au/media/media_releases/2011/206).

577A(3)(a) must be read in conjunction with the appropriate and effective limb in section 577A(3)(b).

The ACCC considers that its approach to assessing the interim equivalence and transparency measures in the SSU is otherwise broadly in line with that proposed in response submissions.

9.4 Price equivalence

Price terms are particularly important to achieving the aims of the equivalence and transparency framework.

Telstra has strengthened its proposed price equivalence and transparency measures over the course of the consultation period in response to various concerns that the ACCC and access seekers raised with respect to the originally proposed measures.

A notable feature of these measures is Telstra supplying Regulated Services under a rate card that it publishes, whereby ACCC price determinations (for those Regulated Services that are Declared Services) are ‘pulled through’ to the rate card.

As a consequence of the ACCC’s decision to declare the wholesale ADSL service, this ‘pull through’ mechanism will also apply to that service. This is an important change in circumstance, given that the price equivalence measures for the wholesale ADSL service in the absence of declaration were comparatively weak, and continued to be a source of concern to access seekers.

As a result of these improvements in the terms of the SSU, and this change in circumstance, the ACCC is now satisfied that price equivalence and transparency measures are appropriate and effective.

The ACCC is also of the view that these measures provide sufficient transparency to enable the ACCC to provide assurance to stakeholders that the undertaking provides for equivalence in price terms and conditions, which is a matter to be considered under the Ministerial Criteria Instrument.¹⁹⁵

A more detailed summary of the ACCC’s assessment of the price equivalence and transparency measures is provided at Attachment A6.

9.5 Non-price equivalence

The Explanatory Memorandum to the CACS Bill 2010 states that:

Equivalence relates to both price and *non-price terms and conditions* such as service provisioning and availability of information about the network, and is considered an essential factor in promoting effective competition in downstream retail markets.¹⁹⁶

Non-price terms of access can directly affect the ability of access seekers to compete on the quality of service that they offer. A vertically integrated access provider can

¹⁹⁵ Ministerial Criteria Instrument, sub-para 4(g)(i).

¹⁹⁶ Explanatory Memorandum, CACS Bill, p 15 (emphasis added).

have strong incentives to limit the quality of service it provides to access seekers through non-price terms of access.

The SSU contains a range of specific non-price equivalence and transparency measures, including commitments in respect of operational quality, technical quality, systems support and information in relation to Regulated Services. The ACCC has assessed these measures in terms of whether they can be expected to provide for equivalence of outcomes. Based on such assessment, the ACCC considers that Telstra's specific non-price commitments, in combination with the overarching equivalence commitment and the dispute resolution mechanisms, militate in favour of the view that the SSU provides for non-price equivalence and transparency during the interim period in an appropriate and effective manner.

A more detailed summary of the ACCC's assessment of the non-price equivalence and transparency measures is provided at Attachment A6.

9.6 Overarching equivalence commitment

9.6.1 Overview

In addition to the specific commitments in relation to price and non-price equivalence, Telstra's SSU contains an overarching commitment to equivalence. The overarching equivalence commitment complements the more detailed, specific commitments in the SSU and provides additional assurance that Telstra will be obliged to respond to new issues as they arise, in circumstances where the specific commitments in the SSU do not adequately address those issues.

Telstra undertakes to ensure equivalence in relation to the supply by Telstra of Regulated Services to wholesale customers and Telstra's retail business units in respect of technical and operational quality, operational systems, procedures and processes, information about those measures and price.

Telstra's commitment is subject to a number of qualifications which exclude any requirement for Telstra to implement measures which Telstra views as elements of functional separation, including transfer pricing, self consumption of wholesale Regulated Services and EOI.¹⁹⁷

As summarised in the December discussion paper, the SSU contains detailed enforcement and compliance mechanisms which apply in the event of any possible breach of the overarching equivalence commitment.¹⁹⁸ The primary focus of the enforcement and compliance mechanisms is to provide an effective remedy for possible breaches, by requiring Telstra to change its conduct and/or systems or processes rather than through direct enforcement by the ACCC.

¹⁹⁷ SSU, clause 9(b)(i).

¹⁹⁸ December discussion paper, pp 7-9.

9.6.2 Submissions

Submissions in response to the August discussion paper supported the ACCC view that Telstra should make a clear and enforceable overarching commitment to equivalence of outcomes in relation to the supply of Regulated Services so as to provide additional assurance that the substantive commitments would remain appropriate and effective until Telstra achieves structural separation.

While industry has welcomed the inclusion of the overarching equivalence commitment in Telstra's SSU, response submissions raise a number of concerns regarding the scope of the commitment.

Optus submits that there is a significant drafting flaw in terms of the appropriate comparison for assessing whether Telstra is providing equivalence. Optus submits that the comparison must examine equivalence between the Regulated Services provided by Telstra's wholesale business unit to wholesale customers and comparable retail services provided by Telstra's network services business unit to its retail business units.¹⁹⁹ Further, Herbert Geer consider that tying the obligation to Telstra's comparable retail services which are specified in the SSU could allow Telstra to avoid the commitment by introducing new retail services.²⁰⁰

Optus, AAPT and Herbert Geer submit that the equivalence commitment is ineffective due to the large number of carve-outs from the commitment. In particular, they contend that the carve-out regarding all individual aspects of functional separation is inappropriate. In this regard, Optus raises a specific concern that the carve-outs are expressed to exclude measures which would have the *effect of*, for example, equivalence of input, rather than stating that Telstra is not required to implement equivalence of input. Optus submits that this creates an almost open-ended carve-out as Telstra could argue that measures would have the *effect of* the carve-outs.²⁰¹

Herbert Geer also raise concerns around the apparent exclusion of TEBA, and the need for the overarching equivalence commitment to be given precedence in the event of any inconsistency with other provisions in Part D of the SSU.²⁰²

Optus, Macquarie Telecom and AAPT submit that the enforcement mechanisms are likely to be ineffective as they are convoluted, multi-staged and bureaucratic. Further, AAPT submits that the reporting process is complicated and subject to gaming and Optus submits that Telstra can engage in delay tactics.

In addition, Optus and AAPT submit that the enforcement mechanisms are unduly restrictive in that ACCC directions cannot prescribe retrospective remedies and court orders sought by the ACCC are subject to qualifications. In this regard, Macquarie Telecom and AAPT consider that the enforcement mechanisms provide Telstra with excessive discretion and control over prescribing remedies.²⁰³

¹⁹⁹ Optus submission, January 2012, p 4.

²⁰⁰ Herbert Geer submission, January 2012, p 8.

²⁰¹ Optus submission, January 2012, p 5.

²⁰² Herbert Geer submission, January 2012, p 11-12.

²⁰³ Macquarie Telecom submission, January 2012, p 4; AAPT submission, January 2012, p 3.

9.6.3 Assessment against statutory framework

The ACCC considers that the overarching equivalence commitment and associated enforcement and compliance mechanisms are important components of the non-price equivalence and transparency measures and militate in favour of the view that the SSU provides for equivalence and transparency in an appropriate and effective manner.

The overarching equivalence commitment provides additional assurance that the substantive measures will remain appropriate and effective over time as it will allow adjustments to Telstra's specific commitments in circumstances where they are not delivering on equivalence. In response to Herbert Geer's concern, Telstra has now clarified that the overarching equivalence commitment will prevail to the extent that there is any conflict or inconsistency with the specific commitments in the SSU.²⁰⁴

In addition, Telstra has revised the terms of the overarching equivalence commitment to address concerns raised by Optus and Herbert Geer that, by expressing the comparison as between the supply of Regulated Services to wholesale customers and the Comparable Retail Services Telstra itself provides, there is no real measure of comparative equivalence.

The ACCC considers that the revised drafting in clause 9(a) in conjunction with the list of Equivalent Services²⁰⁵ in Attachment B of the SSU provides assurance that the objective of the overarching equivalence commitment will be met and resolves previous limitations by:

- bringing the technical and operational quality of TEBA, as well as the other equivalence objectives of clause 9(a) for that service, within scope;
- bringing the technical quality of DTCS (domestic transmission capacity service) (throughput rates) within scope and providing additional assurance that equivalent operational quality and the other equivalence objectives of clause 9(a) across the full range of DTCS can be addressed under the overarching equivalence commitment; and
- providing assurance that if Telstra further develops the Regulated Services that are supplied to retail business units (for instance, so as to provide new retail services in future), then they will be available as potential benchmarks for the overarching equivalence commitment.

Similarly, the 'Equivalent Services' list has also been adopted for the purpose of a number of the specific commitments in the SSU that had previously used a 'comparable retail services benchmark' (see for example clause 14.1 of the SSU).

Telstra has also responded to concerns expressed regarding the breadth of the functional separation carve-out and, in particular, the exclusion of measures that would have any of the *effects* of functional separation. The ACCC is satisfied that the

²⁰⁴ SSU, clause 9(e).

²⁰⁵ SSU, clause 9A.

clarification in clause 9(d) of the SSU will ensure that the carve-out cannot be used as a means of excluding things which are not the same, or substantially the same, as the measures listed in clause 9(b) of the SSU.

Although price equivalence ostensibly falls within the scope of the overarching equivalence commitment, the ACCC notes that there are substantial exclusions.²⁰⁶ For example, Telstra cannot be required to supply a wholesale customer with a Regulated Service on price related terms which are inconsistent with any wholesale contract or at a different price to that specified in any relevant access determination or binding rule of conduct.²⁰⁷ Consequently, price equivalence is largely carved out of the overarching equivalence commitment. However, the ACCC has the power to recalibrate price equivalence terms to ensure they remain appropriate and effective over time. The declaration of wholesale ADSL, ensures that this power is available in respect of all Regulated Services, including TEBA services supplied in connection with a declared service.

While there are a number of other qualifications to the overarching equivalence commitment, in the ACCC's view these do not substantially detract from the fundamental commitment. For example, while the commitment does not apply to the extent that it prevents Telstra from obtaining a sufficient amount of a Regulated Service to be able to meet a number of specified statutory and regulatory obligations,²⁰⁸ this exception recognises the potential conflict between Telstra's regulatory obligations and its effect is likely to be minimal.

A number of submissions raise concerns that the process for enforcing the overarching equivalence commitment is overly bureaucratic and convoluted. The ACCC notes that the enforcement and compliance mechanisms in Schedule 11 are quite complex but, having regard to the statutory framework the ACCC considers they provide an appropriate balance between rectifying possible breaches and incentivising Telstra to deliver equivalence by allowing for court enforcement in some circumstances.

The SSU makes different provisions for enforcement of possible breaches of the overarching equivalence commitment depending on whether they are self-reported by Telstra or notified to Telstra by the ACCC. While this "two track" enforcement and compliance process adds complexity, it is designed to encourage Telstra to self-report possible breaches and to take appropriate steps to remedy the possible breach without the need for recourse to potentially lengthy and uncertain court processes.

Response submissions express concern that the reporting process is overly complicated, subject to gaming and would enable Telstra to engage in delay tactics. In particular, submissions question the restriction on the ACCC notifying Telstra of a possible breach in circumstances where the possible breach relates to a complaint made by a wholesale customer, unless the ACCC is satisfied that the wholesale

²⁰⁶ SSU, clauses 9(b)(ii), (iv) (v), (vi), (vii), (viii).

²⁰⁷ SSU, clause 9(b)(viii) and (iv) respectively.

²⁰⁸ SSU, clause 9(b)(x).

customer has raised the complaint with Telstra and Telstra has been given a reasonable opportunity to investigate and take action in relation to the complaint.²⁰⁹

The ACCC considers that, although this has the potential to undermine Telstra's incentive to seek out and self-report instances of non-equivalence, it will ensure that Telstra is made aware of any equivalence concerns that wholesale customers have and should encourage Telstra to respond to them in a timely manner.

Although Macquarie Telecom and AAPT submit that Telstra has excessive discretion over prescribing remedies, the ACCC considers that the SSU provides it with appropriate oversight of Telstra's rectification proposals and sufficient discretion to direct Telstra to take alternative steps to remedy a possible breach where it is satisfied that Telstra's proposal does not provide an effective remedy.²¹⁰

When making rectification directions, the ACCC must be reasonably satisfied that the matters imposed are a proportionate and justified remedy, having regard to whether the benefits outweigh the costs of complying and whether the matters imposed by the rectification direction are the least cost solution.²¹¹ In the ACCC's view, this requirement is not unduly restrictive as the ACCC would typically take such matters into account in many of its regulatory decisions.

Although Telstra can challenge a rectification direction given by the ACCC through application to the Court, until final determination of the application by the Court (and any appeal), Telstra is required to comply with the ACCC's rectification direction (other than to the extent it is stayed by the Court).²¹²

The ACCC can seek direct enforcement of the overarching equivalence commitment in circumstances where the ACCC has notified Telstra of a possible breach and Telstra has failed to provide a rectification proposal.²¹³ In this regard, the December discussion paper expressed the view that it was inappropriate, in circumstances where the ACCC seeks orders for pecuniary penalties and compensation, to oblige the ACCC to have regard to certain considerations including, for example, whether the matters imposed by the orders are the least cost solution. Telstra has responded to this concern by removing these provisions from the SSU.

9.7 Monitoring of compliance during the interim period

9.7.1 Statutory framework for compliance monitoring

Section 577A(5) of the Telco Act states that the ACCC must not accept an SSU unless the ACCC is satisfied that it:

- provides for the ACCC to monitor Telstra's compliance with the SSU;

²⁰⁹ Schedule 11, para 3.4(a)(i).

²¹⁰ Schedule 11, para 2.2(b).

²¹¹ Schedule 11, para 5(a).

²¹² Schedule 11, para 2.2(e).

²¹³ Schedule 11, para 3.2(g).

- provides for Telstra to have systems, procedures and processes that promote and facilitate the ACCC's monitoring of Telstra's compliance with the SSU; and
- does so in an appropriate and effective manner.

Telstra must provide commitments to ensure ACCC oversight of Telstra's compliance both during the interim period and after the designated day.²¹⁴ Telstra's commitments must also be assessed against subparagraph 4(f) of the Ministerial Criteria Instrument which requires Telstra to implement an internal governance framework that:

- ensures appropriate oversight by Telstra of its compliance with the SSU;²¹⁵
- requires regular reporting by Telstra to the ACCC;²¹⁶
- provides that the ACCC may consult stakeholders on Telstra's compliance, and disclose information obtained through reports for such purpose;²¹⁷ and
- provides assurance to wholesale customers that Telstra is meeting its obligations under the SSU.²¹⁸

The following section details ACCC assessment of whether Telstra's compliance monitoring commitments for the interim period meet the legislative requirements. Section 10 details ACCC assessment of Telstra's commitments to provide for compliance monitoring after the designated day.

9.7.2 Overview of the interim compliance monitoring commitments

Telstra's compliance and reporting commitments are contained in Part E of the SSU. Clause 23 of the SSU provides commitments relating to Telstra's internal governance. These include commitments to:

- appoint a Director of Equivalence to monitor and promote Telstra's compliance with its interim obligations;²¹⁹
- publish an Equivalence Compliance Statement;²²⁰
- implement yearly compliance training for relevant Telstra staff, including in relation to Telstra's organisational commitments;²²¹ and
- develop an Equivalence Compliance Program.²²²

²¹⁴ Explanatory Memorandum, CACS Bill, p 91.

²¹⁵ Ministerial Criteria Instrument, subpara 4(f)(i).

²¹⁶ Ministerial Criteria Instrument, subpara 4(f)(ii).

²¹⁷ Ministerial Criteria Instrument, subparas 4(f)(iii) and (iv)

²¹⁸ Ministerial Criteria Instrument, subpara 4(f)(v).

²¹⁹ SSU, clause 23.1.

²²⁰ SSU, clause 23.2.

²²¹ SSU, clause 23.4 and clause 8.7.

²²² SSU, clause 23.5.

Telstra has also committed to provide the ACCC with a number of reports on its compliance. For example, Telstra will provide the ACCC with monthly compliance reports detailing any equivalence issues that have arisen during that month and Telstra's assessment of whether a breach of equivalence has occurred in each instance.²²³ Where Telstra has concluded that no breach has occurred, it must provide reasons as to why and the details of any action that may otherwise be necessary to respond to the issue.²²⁴ Telstra will also provide an Annual Compliance Report summarising its compliance with the SSU during the Financial Year²²⁵ as well as a quarterly TEM report and an Operational Equivalence Report.²²⁶

9.7.3 Submissions

No submission to either of the ACCC's discussion papers specifically commented on the adequacy of Telstra's interim compliance reporting measures. However, Herbert Geer and VHA queried whether the ACCC's enforcement powers under the SSU were sufficient to seek redress in the event that reporting demonstrated Telstra's non-compliance.²²⁷ The CCC suggested that the ITA be provided with a more active role in monitoring Telstra's compliance, including possibly empowering the ITA to conduct its own investigations or compel Telstra to provide evidence.²²⁸

9.7.4 Assessment against statutory framework

Ministerial Criteria Instrument considerations

The ACCC considers that Telstra's internal governance framework in the SSU satisfies the requirements of the Ministerial Criteria Instrument set out in subparagraph 4(f). Specifically:

- the appointment of a Director of Equivalence should ensure appropriate oversight of Telstra's compliance with the undertaking;
- Telstra has committed to provide the ACCC with numerous compliance reports on a monthly, quarterly and yearly basis;
- provision is made for the ACCC to consult on Telstra's compliance and disclose non-confidential elements of compliance reports for this purpose;²²⁹ and
- in light of the above measures, the governance framework is likely to provide assurance to wholesale customers that Telstra is complying with its SSU obligations.

²²³ SSU, clause 23.3.

²²⁴ SSU, clause 23.3(a)(iii).

²²⁵ SSU, clause 24.2.

²²⁶ SSU, clause 24.1(c) and (a) respectively.

²²⁷ Herbert Geer submission, September 2011, p 22 and VHA submission, September 2011, p 9.

²²⁸ CCC submission, September 2011, p 17.

²²⁹ SSU, clause 24.3.

Given their qualitative character, a more detailed discussion of the SSU’s compliance with the measures required by subparagraph 4(f)(i) and (v) of the Ministerial Criteria Instrument is provided under the following assessment of whether the commitments are “appropriate and effective” for the purpose of the Telco Act.

Appropriate and effective

In the August discussion paper, the ACCC commented that:

An appropriate internal governance framework – additional to external checks – can assist in promoting compliance by establishing systems, procedures, and processes to promote compliance. This is because Telstra is best placed to seek out and remedy any instances of non-compliance.²³⁰

The ACCC considers that the commitments in the SSU providing for ACCC oversight of Telstra’s compliance with its interim obligations meet the requirements of section 577A(5) of the Telco Act. There are a number of SSU commitments relevant to this conclusion. Firstly, the fact that the Director of Equivalence is required to report on Telstra’s compliance to the Audit Committee and the CEO is likely to help facilitate accurate reporting and promote broader awareness of emerging compliance issues at senior levels.

Secondly, Telstra’s commitments to institute compliance training as part of the induction process for new Telstra directors and employees working in areas relevant to equivalence compliance should help promote a culture of compliance in relevant areas of Telstra.²³¹ This is supported by Telstra’s public commitment, by way of its Equivalence Compliance Statement, to take action against staff knowingly or recklessly concerned in a contravention.²³² In this context, the ACCC notes that Telstra’s Equivalence Compliance Program commitments are broadly consistent with the approach to compliance programs in other trade practices contexts.²³³ Further assurance as to the likely effectiveness of this program is provided by the requirement that Telstra consult the ACCC on any recommendation it may have in this regard.²³⁴

Telstra has responded to ACCC concerns relating to Telstra’s reporting commitments under the July SSU by requiring the provision of greater detail on equivalence issues in the Annual Compliance Report and more frequent reporting.²³⁵ Furthermore, Telstra has clarified that the ACCC information request power under the SSU extends to any information that it reasonably requires for the purpose of monitoring compliance or for performing any other function or power under the SSU.²³⁶ The ACCC considers that these measures provide an appropriate and effective mechanism for the ACCC to monitor Telstra’s compliance with the SSU.²³⁷

²³⁰ August discussion paper, p 123.

²³¹ SSU, clause 23.4.

²³² SSU, clause 23.2(v).

²³³ August discussion paper, p 123.

²³⁴ SSU, clause 23.5(c).

²³⁵ SSU, clause 24.2.

²³⁶ SSU, clause 24.4.

²³⁷ December discussion paper, p 21.

The ACCC considers that for the reasons outlined above, the commitments Telstra has made under Part E of the SSU should provide assurance to wholesale customers that Telstra is meeting its interim equivalence and transparency obligations.

In regards to stakeholder concerns over the ACCC's enforcement powers, the ACCC considers that the SSU provides for the ACCC to intervene where necessary to ensure that Telstra is complying with its interim equivalence and transparency commitments. In this regard, the ACCC notes that nothing in the SSU constrains the ACCC in dealing with an equivalence-related issue from exercising its powers and functions under the CCA to any greater extent than expressly provided in the CCA (see the ACCC's Statement of Enforcement regarding the SSU at Attachment A7).

10 Monitoring of compliance with the obligation to structurally separate

10.1 Overview

- The August discussion paper noted that the lack of a provision for ACCC oversight over Telstra’s primary commitment to be structurally separated militated against the ACCC’s acceptance of the July SSU.
- In light of Telstra’s amendments to Part E, the ACCC is satisfied that the SSU now provides for compliance monitoring commitments that meet the requirements of the Telco Act.

10.2 Introduction

The ACCC must not accept an SSU unless it is satisfied that the undertaking provides for the ACCC to monitor Telstra’s compliance with the undertaking (and Telstra to have systems, procedures and process in place to facilitate such monitoring) in an appropriate and effective manner.²³⁸ Telstra must provide for compliance monitoring measures to apply “both in the lead-up to, and after, the designated day.”²³⁹ Therefore, Telstra must provide for ACCC oversight of Telstra’s primary commitment to be structurally separated from the designated day pursuant to Part C of the SSU.

Clause 22 of the SSU provides that compliance and reporting measures under Part E apply “before and after the Designated Day”.²⁴⁰ Where appropriate, provision is made for the internal governance framework commitments to apply to the monitoring of Telstra’s Part C obligations as well.²⁴¹ Telstra has also committed to provide the ACCC with a Separation Compliance Program no later than 6 months prior to the designated day, detailing how Telstra will give effect to its Part C obligation.²⁴²

10.3 Submissions received

Herbert Geer supported the ACCC’s conclusion that the lack of compliance monitoring commitments to facilitate monitoring of Telstra’s Part C obligations meant that the ACCC could not accept the July SSU.²⁴³

²³⁸ Telco Act, s 577A(5).

²³⁹ Explanatory Memorandum to the CACS Bill, p 91.

²⁴⁰ SSU, clause 22.

²⁴¹ For example, clause 23.1(d)(vi) of the SSU.

²⁴² SSU, clause 23.8.

²⁴³ Herbert Geer submission, September 2011, p 4.

10.4 Assessment against the statutory framework

10.4.1 Ministerial Criteria Instrument considerations

For the same reasons outlined under section 9.7.4, the ACCC is satisfied that Telstra's compliance monitoring commitments for its Part C obligations meet the requirements of the Ministerial Criteria Instrument.

While there are some qualifications to the application of Telstra's internal governance commitments to Part C,²⁴⁴ the ACCC is satisfied that these arrangements will ensure appropriate Telstra oversight of its compliance with these commitments. For example, Telstra's commitment to provide an Annual Compliance Report will continue after the designated day, and will include details on any non-compliance with Part C.²⁴⁵ Further, clause 24.3 of the SSU allows the ACCC to consult on Telstra's compliance with Part C. The ACCC considers that these measures should provide assurance to wholesale customers that Telstra is complying with its Part C obligations.

10.4.2 Appropriate and effective

The August discussion paper noted that the lack of a provision for ACCC oversight over Telstra's primary commitment to be structurally separated militated against acceptance of the July SSU.²⁴⁶ However, in light of Telstra's amendments to Part E, the ACCC considers that the SSU now provides for compliance monitoring commitments that meet the requirements of section 577A(5) of the Telco Act.

In the ACCC's view, given the length of time to pass before the designated day, it is appropriate that Telstra not be overly prescriptive about the detail of the Separation Compliance Program at this stage. Both the ACCC and Telstra will be better placed to determine this detail closer to the designated day.

The ACCC considers that Telstra's reporting commitments will facilitate the ACCC's monitoring of Telstra's compliance with its structural separation commitments in an appropriate and effective manner.

²⁴⁴ SSU, clause 23.

²⁴⁵ SSU, clause 24.2(b)(iii)(A) and (B).

²⁴⁶ August discussion paper, p 126.

PART B: MIGRATION PLAN

11 Overview

The structure of this part is as follows:

- **Section 12 Background** – This section provides some additional background information that is specific to the migration plan including an overview of the legislative framework and the ACCC’s role.
- **Section 13 ACCC decision** – This section sets out a summary of the ACCC’s decision.
- **Section 14 Assessment** – The ACCC’s assessment of the draft Plan against the relevant criteria is discussed in more detail in this section.

12 Background

12.1 Migration to the NBN

Telstra has elected to structurally separate, and will give effect to this decision by migrating its fixed-line customers from its copper and HFC networks to the national broadband network NBN. The migration will occur progressively as the NBN is deployed, and will involve two distinct but inter-related processes—the progressive disconnection of services from Telstra’s networks, and the connection of services to the NBN Co fibre network.

The migration of Telstra’s fixed-line customer base to the NBN is unprecedented in terms of scale and impact. For this reason, the regulatory reforms introduced to facilitate structural separation include provision for Telstra to submit a migration plan for approval by the ACCC. The migration plan is intended to:

[D]eal with matters concerning processes involved in the migration of Telstra’s customers from its own fixed-line network to the national broadband network. It will also deal with the timing of those processes, by either setting out a timetable for action or setting out a method for determining such a timetable.²⁴⁷

12.2 Legislative framework

Under section 577BC(2) of the Telco Act, a migration plan is required to specify the action that Telstra will take to:

- cease to supply fixed-line carriage services to customers using a telecommunications network over which Telstra is in a position to exercise control; and
- commence to supply fixed-line carriage services to customers using the national broadband network.

The Telco Act also requires that the migration plan comply with any migration plan principles issued by the Minister for Broadband, Communications and the Digital Economy pursuant to a Determination under section 577BB. The Minister made the *Telecommunications (Migration Plan Principles) Determination 2011* (the Determination) and the accompanying *Telecommunications (Migration Plan – Specified Matters) Instrument 2011* (the Specified Matters Instrument) on 23 June 2011.

The Determination sets out all the migration plan principles with which the migration plan must comply while the Specified Matters Instrument sets out the matters that the migration plan “may” or “must not” contain. Copies of the Determination and the

²⁴⁷ Explanatory Memorandum, CACS Bill, p 105.

Specified Matters Instrument are available on the Department of Broadband, Communications and the Digital Economy's website.²⁴⁸

The provisions of a final migration plan will have effect as if they were provisions of the structural separation undertaking that is in force due to the operation of section 577BE(5) of the Telco Act. This means that a breach of the final migration plan becomes enforceable as a breach of the SSU.

12.3 ACCC's role

The ACCC's mandate in assessing the draft Plan is to:

- approve the draft Plan, if it complies with the principles; or
- if it does not comply with the principles, request that Telstra provide a replacement plan which does comply.

The ACCC does not have discretion to seek changes to the draft Plan merely based on a preference for a particular approach. The ACCC must approve the draft Plan if it concludes that the draft Plan complies with the principles.

12.4 The migration plan principles

Chapters 12 to 14 of the August discussion paper provide useful context for the ACCC's assessment of the draft Plan. The Determination is set out in four Parts. Parts 3 and 4 contain the migration plan principles against which Telstra's draft Plan must be assessed. There are three types of migration plan principles; namely:

- general principles, which describe the overarching principles that must be met by the migration plan;
- specific principles, which provide further specificity regarding how some of the general principles are given effect in the migration plan; and
- procedural principles, which set out the procedural provisions that must be included in the migration plan.

Section 6 of the Determination establishes that, as a matter of interpretation;

- the specific principles do not limit or otherwise affect the generality of the general principles; and
- the fact that a provision of the Determination refers to a general principle, specific principle or procedural principle does not limit or otherwise affect the application and interaction of the other principles to or with that provision.

²⁴⁸ Available at DBCDE's website:
http://www.dbcde.gov.au/broadband/national_broadband_network/telecommunications_regulatory_reform_separation_framework.

Section 7 of the Determination requires the ACCC to assess the migration plan against all the principles. Further, subsections 7(2) and (3) set out the manner in which principles that refer to the ITA are to be interpreted.

13 ACCC decision

13.1 Overview

In the August discussion paper, the ACCC stated its preliminary view that, subject to submissions from interested parties, Telstra's draft Plan was likely to comply with the Determination and the Specified Matters Instrument.²⁴⁹

Having considered the submissions made during the consultation process conducted pursuant to section 577BDA(5) of the Telco Act and clarifications provided by Telstra, the ACCC has now concluded that the draft Plan complies with all of the requirements under the Telco Act, including the migration plan principles. The ACCC has therefore decided to approve Telstra's draft Plan (as submitted on 24 August 2011) pursuant to section 577BDA(2) of the Telco Act.

13.2 Compliance with the principles

The table at **Attachment B1** maps the provisions of Telstra's draft Plan against the principles in the Determination. The table indicates that Telstra's draft Plan addresses all of the migration plan principles.

The August discussion paper invited interested parties to comment on specific issues of compliance. A number of submissions were made in relation to these issues as well as some other issues not specifically raised in the August discussion paper. These include:

- whether copper disconnection processes are set out in sufficient detail;
- whether the migration plan provides for interim solutions that enable disconnection to occur in a way that minimises disruption to end-user services;
- the adequacy of disconnection arrangements for special services;
- the scope of the marketing prohibition;
- the adequacy of the arrangements for the development of "Required Measures", in particular, those relating to information security;
- whether the capacity for Telstra to impose disconnection charges for undeclared services raises equivalence concerns; and
- the adequacy of the dispute resolution arrangements, including consideration of the proposal for an ITA.

²⁴⁹ August discussion paper, p 152.

14 Assessment of draft Plan

14.1 Whether copper disconnection processes are set out in sufficient detail

14.1.1 Relevant requirements

Section 9(2) of the Determination requires that the migration plan set out the processes that Telstra will use to disconnect copper based services in “sufficient detail to enable the ACCC to be satisfied that the processes are in accordance with the general principles at sections 8 and 21”.²⁵⁰

Section 24(1) of the Determination requires that the migration plan “set out the processes that will be required for a wholesale customer to lodge, and for Telstra to accept, process and execute, an order from that wholesale customer for disconnection”.²⁵¹

As noted in the August discussion paper,²⁵² the Explanatory Statement to the Determination summarises section 8 of the Determination as requiring the migration plan to provide for the disconnection of fixed-line carriage services in a fibre rollout region to occur in a way that:

- ensures the efficient and timely disconnection of Telstra’s wholesale and retail services;
- minimises disruption to end-user services;
- gives wholesale customers autonomy in relation to the timing of disconnection of end-users; and
- provides for disconnection in an equivalent manner between Telstra and its wholesale customers.²⁵³

Section 21 of the Determination provides that “the migration plan must provide for the equivalent treatment of wholesale customers and retail business units in the implementation of processes for disconnecting carriage services from a separating network at premises in each fibre rollout region”.²⁵⁴

14.1.2 Relevant clauses of the draft Plan

Schedule 1 of the draft Plan sets out the disconnection processes that Telstra will use for both its retail and wholesale customers in the following scenarios:

²⁵⁰ The Determination, s 9(2).

²⁵¹ “from a separating network of wholesale carriage services supplied to that wholesale customer at premises in a fibre rollout region” as per s 24(1) of the Determination.

²⁵² August discussion paper, p 134.

²⁵³ Explanatory Statement to the Determination, p 4.

²⁵⁴ The Determination, s 21.

- disconnection of voice services where the number is not being ported;
- disconnection of broadband services (retail copper broadband or Wholesale ADSL Layer 2) or LSS due to the disconnection of voice services using the same copper path, where the number is not being ported;
- disconnection of a voice service and/or a broadband service (retail copper broadband, Wholesale ADSL Layer 2 or LSS) where the number is being ported;
- disconnection of broadband services (retail copper broadband, Wholesale ADSL Layer 2 where the voice service on the same copper line is not disconnected;
- disconnection of a wholesale ULL; and
- disconnection of a wholesale LSS.

The disconnection processes described under each scenario are divided into three categories; “order capture” (including records check, order validation and order modification), “order fulfilment” and “cessation of charging and final billing”.²⁵⁵ To facilitate ACCC assessment of whether this level of detail is sufficient to satisfy the requirements of the Determination, the August discussion paper invited interested parties to comment on the following questions:

- Does the level of detail in Schedule 1 (of the draft Plan) give industry certainty that disconnection processes will ensure efficient and timely disconnections and promote equivalence, service continuity, and the autonomy of wholesale customers?
- If not, what further detail needs to be provided?

14.1.3 Submissions received

AAPT, ACCAN and Optus submit that Schedule 1 of the draft Plan does not meet the requirements of section 9(2).²⁵⁶

In this regard, AAPT expressed the view that further operational processes would be required in addition to those that are described if the draft Plan was to meet the relevant objectives, including that Telstra should provide access seekers with the option of cancelling multiple ULLS simultaneously or allow for “bulk” or “managed cancellations”.²⁵⁷ Similarly, Optus submits that “many of the existing inter-operability arrangements will not be fit for purpose” for the mass migration of customers.²⁵⁸

²⁵⁵ The draft Plan, Schedule 1.

²⁵⁶ AAPT submission, September 2011, p 10; ACCAN submission, September 2011, p 8; Optus submission, September 2011, para 8.4.

²⁵⁷ AAPT submission, September 2011, p 10.

²⁵⁸ Optus submission, September 2011, p 52.

To address this, Optus suggests that access seekers should play a central role in helping to develop the detail of decommissioning and migration processes.²⁵⁹ Further, Optus stated that the complexities warrant “a trial of the migration plan arrangements in at least one fibre roll-out region.”²⁶⁰

ACCAN expresses concern over whether the procedures are sufficiently detailed to provide confidence that consumer welfare objectives, such as service continuity, will be protected.²⁶¹

14.1.4 ACCC views

The August discussion paper noted that the “draft Plan sets out the various stages of processing disconnection orders in a simplified and high level manner rather than, for example, referring to the technical specifications of the Telstra systems and processes used for every stage of disconnection, as might be included in an operations manual.”²⁶²

Each of the disconnection scenarios in Schedule 1 of the draft Plan sets out how wholesale customers can lodge, and how Telstra will accept, process and execute disconnection orders.²⁶³ As a result, the ACCC considers that Schedule 1 satisfies the requirements of section 24(1) of the Determination.

Compliance with section 9(2) of the Determination

The ACCC considers that each disconnection process is adequately described in the draft Plan. Further, the draft Plan establishes a mechanism by which deficiencies in the existing operational processes can be addressed, either by varying those processes or establishing new processes. Consequently, the draft Plan does provide assurance that—if bulk processes become necessary, e.g., to provide for equivalence in disconnection processes or to provide for efficient disconnection of copper services—these will be developed and implemented. At this time, however, it is not clear that bulk disconnection processes will be necessary.

The draft Plan also establishes mechanisms by which the ACCC can monitor the efficacy of Telstra’s disconnection processes and obtain information from Telstra in respect of them. Industry or end-user groups will be able to raise their concerns with the ACCC should discussions with Telstra not be able to resolve those concerns. Hence, the ACCC does not consider it necessary for the draft Plan to establish a formal review mechanism at a nominated time. That said, the ACCC agrees that Telstra and industry should work cooperatively over the course of the migration period to safeguard against problems arising as far as possible.

In considering the adequacy of Telstra’s commitments under the draft Plan, it is important to remember that migration from Telstra’s copper and HFC networks to

²⁵⁹ Optus submission, September 2011, p 52.

²⁶⁰ Optus submission, September 2011, p 52, paras 8.2-8.5.

²⁶¹ ACCAN submission, September 2011, p 8.

²⁶² August discussion paper, p 155.

²⁶³ “from a separating network of wholesale carriage services supplied to that wholesale customer at premises in a fibre rollout region” as per section 24(1) of the Determination.

NBN Co's fibre network will be an end-to-end process which will involve multiple parties working together—wholesale customers, end-users and NBN Co, as well as Telstra. Accordingly, while it is clearly Telstra's responsibility to ensure its disconnection and associated processes facilitate service continuity, some of the steps that could be required to ensure service continuity will fall to others.

NBN Co's information guide, *Migrating to the National Broadband Network*, (the NBN Co Migration Guide) was prepared by NBN Co "in order to provide Access Seekers and other interested parties with a high level overview of the end-to-end processes and framework for migrating end-users to the NBN".²⁶⁴ Part 4.2 of the NBN Co Migration Guide breaks down the migration process into six distinct steps, of which "disconnection" is the final step.²⁶⁵ The NBN Co Migration Guide highlights the responsibilities of NBN Co and access seekers in migration and helps contextualise Telstra's disconnection obligations under the draft Plan.

For instance, if a line is used as a Pull Through Cable and NBN Co cannot successfully complete or test the reconnection of the line, then it is NBN Co's responsibility to install a temporary line, and then return later to reconnect.²⁶⁶ Similarly, it is the responsibility of access seekers to include in the NBN orders any special requirements of the end-user to be accommodated during the service cutover to the NBN, and to correctly submit the various orders that will be required.

The processes are sufficiently detailed to enable the ACCC to be satisfied that the processes are in accordance with the general principles at sections 8 and 21.

In assessing whether Schedule 1 of the draft Plan complies with section 9(2) of the Determination, the ACCC considered whether the disconnection steps and processes provided under Schedule 1 met the requirements of the general principles at sections 8 and 21 of the Determination in the following way.

a) Efficient and timely disconnection:

The ACCC considers that in order to achieve efficient and timely disconnection, it will be necessary for Telstra to implement disconnection processes that are well-established by industry. The ACCC considers that the use of existing "business as usual" disconnection processes where possible will facilitate efficient disconnection by allowing for a smoother NBN migration for both Telstra and industry. This is because well established disconnection processes are less likely to require wholesale customers to learn or adopt new operational support systems or business support systems to interact or make use of these processes. This should reduce costs for the industry and facilitate a smoother and faster migration of premises to NBN fibre.

In its supporting submission, Telstra stated that:

Telstra is committing to use its Business as Usual disconnection processes for disconnection during the Migration Window. These processes, which are already well-

²⁶⁴ NBN Co Migration Guide, p 5.

²⁶⁵ Ibid, p 21.

²⁶⁶ Note that there are certain limited circumstances where this does not apply. See NBN Co Migration Guide, p 26.

established within the industry, and work well, allow the customer to nominate the disconnection date that best suits them.²⁶⁷

Section 23 of the Determination places a positive obligation on Telstra to use existing processes for implementing and managing disconnection of services to the extent that those existing processes are adequate to facilitate migration in a manner consistent with sections 8 and 21.²⁶⁸

In response to Optus' submission, where an existing process is found to be inadequate to meet the objectives of sections 8 and 21, clause 28 of the draft Plan provides the ACCC with the power to issue a direction and/or determination instructing Telstra to amend disconnection processes, systems and interfaces.²⁶⁹ This mechanism will ensure that any problems with disconnection which emerge during the migration period can be addressed relatively quickly.

The ACCC also considers that Telstra's commitment to provide a rebate for costs incurred as a result of any failure to meet the Telstra Committed Date (TCD) will act as an incentive for timely disconnection.²⁷⁰ Telstra's commitment applies to all disconnection scenarios provided under Schedule 1.

Clause 25 of the draft Plan establishes a reporting framework under which Telstra is obliged to prepare and submit to the ACCC a quarterly Migration Plan Compliance Report relating to specific performance metrics. These metrics include, among other matters, the total number of wholesale customer disconnection orders processed by the TCD during the quarter.²⁷¹

b) Minimises disruption to the supply of fixed-line carriage services:

The ACCC considers that the requirement of minimising disruption to supply of fixed-line carriage services during migration will be met through a demonstrated commitment to deliver service continuity to end-users, and the timely provision of information to, and co-ordination with, wholesale customers concerning disconnection timetabling.

The ACCC considers that the disconnection processes in the draft Plan promote service continuity to the degree to which it is in Telstra's control to do so. For example, the capacity for a customer, either retail or wholesale, to lodge and then modify the date upon which disconnection is to take place (the Customer Requested Date or CRD) prior to order fulfilment meets this standard.

Clause 10.3 of the draft Plan also makes provision for interim call diversion services to the end-users of WLR services, and clause 10.4 provides assurance that temporary disconnections or outages arising from Pull Through Activities will not affect call diversion services. Telstra's commitment to provide interim carriage services and call diversion meets the standard required by section 8(1)(b) of the Determination.

²⁶⁷ Telstra's supporting submission, July 2011, p 33.

²⁶⁸ See discussion of section 23 of the Determination at p 146 of the August discussion paper.

²⁶⁹ draft Plan, cl 28.1.

²⁷⁰ Telstra's supporting submission, July 2011, p 33.

²⁷¹ Clause 25.1(a)(i) of the draft Plan.

The special services arrangements under clause 21 allow for Telstra and wholesale customers to continue to provide special services beyond the fibre rollout region disconnection date, thereby ensuring continuity of service for end-users of those special services.

The ACCC also considers that clause 8 of the draft Plan demonstrates Telstra's commitment to communicate in a timely and effective manner with its wholesale customers regarding the disconnection schedule

c) Gives wholesale customers autonomy over the timing of disconnection

The ACCC considers that the requirement of providing wholesale customers with autonomy concerning timing of disconnection decisions would be met through timely provision of information concerning disconnection schedules and allowing wholesale customers to control the manner and timing of disconnection arrangements.

The scope of wholesale customer control will be limited by the fact that there will be operational and business support systems to facilitate disconnection, which only Telstra will be in a position to control.²⁷² However, in the interest of limiting any competitive advantage that may accrue to Telstra as a result of this unique position, the migration plan must, to the greatest extent practicable, give wholesale customers autonomy over decisions about the "timing of disconnection...and sequencing of that disconnection with connection".²⁷³

Most wholesale customers will be familiar with the wholesale ordering systems of LOLO and LOLIG for a variety of carriage services, including wholesale ADSL. The administration of the wholesale ordering systems by Telstra prevents wholesale customers from being given complete control of these systems. However, Telstra has enabled wholesale customers to control the disconnection dates through these systems. The ACCC considers that Telstra has complied with its obligations to provide wholesale customers with autonomy over the timing of disconnection to the greatest extent practicable. Telstra's commitment to provide information about disconnection and disconnection dates under clause 8 of the draft Plan should facilitate a smooth migration process.

Pursuant to the Determination, Telstra is required to detail those circumstances in which RSPs will not have any control over the timing and manner in which disconnection will be conducted. One example is in relation to premises for which Telstra has not received a disconnection order by the disconnection date. Telstra has undertaken to disconnect these premises pursuant to clause 14 of the draft Plan, which requires Telstra to develop the disconnection processes for these premises as a Required Measure. Section 36 of the Determination requires that the migration plan outline a "Required Measures" process for any disconnection processes that Telstra may not yet have an existing process for.²⁷⁴ Telstra must notify wholesale customers

²⁷² August discussion paper, p 136.

²⁷³ The Determination, section 8(1)(c).

²⁷⁴ Certain disconnection processes that need to be developed in accordance with the "Required Measures" process are (a) managed disconnection for copper and HFC and (b) the building of copper paths for supply of special services.

prior to disconnecting these premises.²⁷⁵ Clause 12.2 also requires Telstra to notify wholesale customers when wholesale services are automatically disconnected.

The ACCC considers that these notifications arrangements are consistent with the requirements of the Determination.

d) Provides for disconnection in an equivalent manner

In order to provide for disconnection in an equivalent manner, the ACCC considers that wholesale customers must be able to control the timing of their disconnection order. Wholesale customers must not be disadvantaged if service disconnection by Telstra occurs after TCD.

Telstra permits wholesale customers to nominate and modify the date and time of disconnection, or the CRD, in a manner equivalent to or better than the manner in which Telstra will manage disconnection of its retail customers. Telstra has also provided a commitment to rebate costs incurred as a result of any failure to meet the TCD, as outlined above. Accordingly, the ACCC believes that the Schedule 1 processes satisfy this criterion of equivalence in disconnection processes.

e) Reasonable policies and business practices

The ACCC considers that the requirement of reasonable policies and business practices would be met through efficient processes that facilitate timely disconnection of services by Telstra which are well-established and accepted within industry.

The Schedule 1 processes do not contain requirements that are inconsistent with industry arrangements for local number portability (LNP), as required by section 9(3) of the Determination. Clause 6.3(b) of the draft Plan commits Telstra to using standard industry processes relating to LNP. Further, there is a responsibility upon access seekers and industry to ensure that appropriate LNP arrangements are brought into effect, and where there are deficiencies in existing industry arrangements, then access seekers are responsible for developing strategies to deal with those situations.²⁷⁶

It is considered that the Schedule 1 processes would facilitate timely disconnection of services by Telstra. As outlined previously, the policies and business practices outlined in Schedule 1 seek to minimise the period of any service outage, and the time taken to complete LNP and any ancillary procedures. Accordingly, the ACCC considers that the policies and business practices outlined are compliant with the requirements of the Determination.

f) Section 21 equivalence requirements

The Schedule 1 processes must provide for the equivalent treatment of wholesale customers and retail business units in implementing processes for disconnection of carriage services. The Explanatory Statement states that section 21 is “intended to

²⁷⁵ draft Plan, clause 14.1.

²⁷⁶ NBN Co Migration Guide, p 31.

prevent Telstra from using its role in disconnecting services to gain an unfair commercial advantage as fixed-line carriage services transition to the NBN Co fibre network”.²⁷⁷

The ACCC is satisfied that Telstra’s commitments under Schedule 1 and in the rest of the draft Plan comply with this standard. The ACCC considers that the disconnection arrangements and Telstra’s commitments to provide notification and information on disconnection should provide wholesale customers with an equivalent opportunity for a smooth migration to the NBN fibre network.

14.2 Whether the migration plan provides for interim solutions that enable disconnection to occur in a way that minimises disruption to end-user services

Section 8(1)(b) of the Determination requires that, to the extent that it is in Telstra’s control, the migration plan provide for disconnection to occur in a way that minimises disruption to the supply of end-user services. Specific clauses in the draft Plan designed to facilitate this include:

- clause 20, which requires Telstra (as far as practicable) to continue to provide soft dial tone to a premises that has not yet been connected to the NBN at the disconnection date;²⁷⁸
- clause 15, which provides that in specified circumstances, Telstra will continue to provide services to “in-train order premises” after the disconnection date for that rollout region.²⁷⁹

There may be certain circumstances in the migration process in which end-users will be temporarily disconnected or without connectivity, such as in the “pull through” connection process.²⁸⁰ As a result, clause 10.3 of the draft Plan provides that interim call diversion services will be available for end-users of WLR services in rollout regions where NBN Co proposes to use pull through. Further, clause 10.4 of the draft Plan provides that Telstra will ensure that any temporary disconnection resulting from pull through will not affect the operation of any interim call diversion services that have been activated on the relevant copper line. In its supporting submission, Telstra stated that:

End users can use call forwarding on their Telstra services (retail or wholesale standard telephone services) to redirect calls to mobiles or other lines during the period of the service interruption caused by pull through. The draft Migration Plan commits Telstra to make that facility

²⁷⁷ Explanatory Statement to the Determination, p 10.

²⁷⁸ This is in accordance with section 14 of the Determination “maintaining a soft dial tone”.

²⁷⁹ This is in accordance with section 9 of the Determination “disconnection of carriage services using copper networks”.

²⁸⁰ “pull through” is a connection process that may be used by NBN Co, whereby the existing copper line is used to “pull” the NBN fibre through the lead-in conduit; NBN Co Migration Guide, p 22.

available to wholesale customers of the voice wholesale line rental service.²⁸¹

Clause 6.4 of the draft Plan provides that Telstra will not supply any interim carriage services other than call diversion “except at its discretion and where it occurs on commercially agreed terms”.²⁸² “Interim carriage service” has been defined in the draft Plan as

...any carriage service, including any feature or functionality associated with a carriage service, which is supplied or used to manage or mitigate a service disruption associated with Migration. Examples of Interim Carriage Services include an interim wireless service, installation of temporary Copper Paths, call forwarding and call diversion.

Telstra has asserted that the effect of clause 6.4 would be that “the ACCC would not in fact be able to declare an ‘interim service’”.²⁸³ To assist the ACCC with consideration of the compliance of the draft Plan with section 8(1)(b), the August discussion paper invited interested parties to comment on the following questions:

- Does the draft Plan provide for interim solutions that would enable disconnection to occur in a way that minimises disruption to end-user services?
- What significant issues, if any, are likely to arise from the operation of clause 6.4 of the draft Plan?²⁸⁴

14.2.1 Submissions received

ACCAN expresses concern over whether the draft Plan is sufficiently detailed to provide confidence that consumer welfare objectives, such as service continuity, will be protected.²⁸⁵ ACCAN recommends (and Optus also submits) that the ACCC approach the ACMA about developing an industry code for migration to the NBN.²⁸⁶ ACCAN also raises concerns about the circumstances in which copper/HFC lines could be reconnected once the NBN fibre network had been deployed.²⁸⁷

AAPT submits that clause 6.4 should be amended or removed to avoid any possible exclusion of standard access obligations for declared services.²⁸⁸

²⁸¹ Telstra’s supporting submission, July 2011, p 34.

²⁸² draft Plan, clause 6.4.

²⁸³ August discussion paper, p 160.

²⁸⁴ Clause 6.4 of the draft Plan is titled “Telstra not responsible for coordination or management of the connection process”.

²⁸⁵ ACCAN submission, September 2011, p 8.

²⁸⁶ ACCAN submission, September 2011, p 8; Optus submission, September 2011, p 59 suggested the insertion of specific requirement for Telstra to consider the development of an industry code for migration.

²⁸⁷ ACCAN submission, September 2011, p 9.

²⁸⁸ AAPT submission, September 2011, p 13.

14.2.2 ACCC views

The ACCC is satisfied that the provisions of the draft Plan that deal with interim carriage services strike an appropriate balance between ensuring end-user service continuity and not imposing unreasonable obligations on Telstra.

Pull through is the scenario most likely to raise significant service continuity issues. Specific provision is made for interim call diversion services to be made available in the case of pull-through.

At this time it is not clear that Telstra would have to provide other interim carriage arrangements in order to facilitate service continuity. It is worth noting here Telstra's commitments in relation to the provision of interim carriage services to address service outages resulting from the migration of services from Telstra's copper network to fibre in the South Brisbane exchange area. Although not directly analogous, this does involve a migration from copper to fibre services.

In Telstra's Guide to the South Brisbane Migration, Telstra has stated that it will provide interim services for customers experiencing service outages on the day of the migration.²⁸⁹ In this regard, Telstra has committed to provide call diversion services for residential customer for up to 1 hour and business customers for up to 4 hours of outage time. The Guide to the South Brisbane Migration also identifies in parallel copper services to be used at the time of the appointment to minimise the impact of service outages.

Telstra is implementing call diversion arrangements in the draft Plan at clause 10.3, for end users affected by pull through. Telstra has also undertaken, at its discretion as a measure of last resort, to reconnect copper paths or HFC lines in order to provide copper services or HFC services, in the event of Material NBN Unavailability at clause 18.1(b) of the draft Plan.

In relation to pull through situations, NBN Co is proposing to use existing copper or HFC line in a lead-in conduit to 'pull through' the new NBN fibre cable. Once the new fibre cable is in place, the existing copper or HFC line used to pull through may be reconnected if it is still required.²⁹⁰

The ACCC considers that the interim carriage arrangements being offered by Telstra will appropriately address any service continuity issues. Further, the ACCC does not consider it necessary to approach the ACMA about the development of an industry code at this point in time.

With respect to the scope of clause 6.4 of the migration plan, the ACCC is satisfied that the definition of "interim carriage service" is sufficiently narrow to ensure that it does not inappropriately limit the ACCC's regulatory powers under Part XIC of the CCA. In particular, Telstra only gains protection from Part XIC regulation for services it chooses to supply "to manage or mitigate a service disruption associated with Migration".

²⁸⁹ Telstra, Guide to the South Brisbane Migration, p 12.

²⁹⁰ NBN Co Migration Guide, p 22.

In relation to ACCAN's concerns, it is important to note that the restrictions on Telstra reconnecting or reactivating premises after the disconnection date are, with limited exceptions, contingent on the relevant premises being serviceable by the NBN.²⁹¹ Thus, the restriction only applies *because* the premises is able to acquire services over the NBN (by way of fixed fibre, wireless or satellite services). In this way, continuity of service for end-users is the overriding objective.

Clause 18 of the draft Plan reflects the fact that Telstra will be allowed to reconnect in certain limited circumstances relating to the unavailability of NBN service.²⁹² Given that the decision to "shut down" the NBN in any rollout region would involve considerations beyond the scope of the migration plan, the ACCC considers that Telstra's reconnection commitments are adequate for the purposes of ensuring continuity of service for end-users.

14.3 The appropriateness of arrangements for special services

"Special services" are carriage services provided over the copper network that may not yet have fibre based products that RSPs can use to provide comparable services over the NBN. Section 13 of the Determination provides that the migration plan must set out when and how Telstra will disconnect special services. Special services are defined as the fixed line carriage services described in the Schedule to the Determination.

As noted in the August discussion paper, the steps and timing for disconnection of special services under the migration plan will largely reflect Telstra's obligations to disconnect special services under the Definitive Agreements.²⁹³ The Definitive Agreements separate special services into the following two groups:

- Temporary special services: this category is comprised of "direct special services" (which are those special services provided by Telstra listed in tables 1 and 2 of Schedule 4 of the migration plan) and special service inputs (SSIs) which are special services provided by wholesale customers over ULLS or LSS that are certified to be "service equivalent" to direct special services; and
- Contracted special services: this category, referred to under item 2 of Schedule 4 of the migration plan, consists of a group of existing retail contracts entered into before 23 June 2011 for which Telstra states that it could "face significant liability for disconnection."²⁹⁴ Telstra has stated that this group is comprised of

²⁹¹ A premises is "serviceable by the NBN Co fibre network" if it "is in the fibre footprint and is shown in the NBN Co service qualification system as serviceable"; NBN Co Migration Guide, p 19. See also discussion on pp 135-136 of the August discussion paper. This restriction reflects the commercial arrangements for disconnection agreed by Telstra and NBN Co in the Disconnection Protocols and is designed to facilitate migration to the NBN.

²⁹² "Reconnection for Material Unavailability of the NBN" under clause 18.1 and "Reconnection in the event of a Permanent Cessation of Operations" under clause 18.2 of the draft Plan.

²⁹³ August discussion paper, p 141.

²⁹⁴ Telstra supporting submission, July 2011, p 37.

not more than 100,000 SIOs.²⁹⁵ This allowance does not extend to the retail contracts of wholesale customers.

14.3.1 Submissions received

While the August discussion paper did not highlight any specific issues with the compliance of the migration plan with the special services requirements, Optus raised a number of concerns in its submission.

Optus raises concerns about the degree to which the special service arrangements delivered equivalent treatment.²⁹⁶ For example, Optus suggests that tying the disconnection of wholesale customer special services to Telstra product exits is discriminatory on the basis that it cannot be assumed that “access seekers services will be comparable in all respect to Telstra’s services.”²⁹⁷ A similar criticism is made of the processes for certifying SSIs as equivalent to Telstra services listed under Schedule 4 of the draft Plan.²⁹⁸

Optus also suggests that the “White Paper” process for the development of fibre based services comparable to copper based special services is “Telstra centric” and that the allowances made to Telstra for the provision of contracted special services and doubled ended services are inequitable.²⁹⁹

14.3.2 ACCC views

The ACCC considers that Optus’ concerns about the White Paper process are not directly relevant to consideration of the migration plan, which is not required to deal with the availability of fibre-based replacements for existing services. Concerns around the specific services available on the NBN are best addressed through wholesale customers engaging in NBN Co’s product development processes. In the NBN Co Migration Guide, NBN Co has stated that:

NBN Co may (but is not bound to) choose to develop functionality to enable Access Seekers to migrate some or all of the Temporary Special Services to the NBN. Any such development work would be carried out by NBN Co after consultation with the industry to ensure that the new fibre products meet the requirements of Access Seekers and end-users.³⁰⁰

In addition, the ACCC notes that section 152AXD of the CCA prohibits an NBN corporation (including NBN Co) from discriminating between access seekers in the carrying on of a range of activities, including the development of new carriage services. This non-discrimination obligation will ensure that NBN Co provides all access seekers with appropriate opportunity to engage in product development processes.

The ACCC considers that clause 21.1(b)(i) of the draft Plan, which allows Telstra to undertake “business as usual” product exits for special services, is in compliance with

²⁹⁵ Telstra supporting submission, p 37.

²⁹⁶ Optus submission, p 52 and 53; paras 8.7 to 8.14.

²⁹⁷ Optus submission, p 52; para 8.9.

²⁹⁸ Optus submission, p 53; para 8.11(a).

²⁹⁹ Optus submission, pp 52-53; paras 8.10 and 8.12.

³⁰⁰ NBN Co Migration Guide, p 28.

the requirements of section 13(1) of the Determination. The Determination requires that the arrangements for the timing of the disconnection of special services must provide for wholesale customer control and equivalence to the “greatest extent practicable”.³⁰¹ The ACCC considers that the 18 month notification requirement under clause 21.3 is sufficient to mitigate any harm occasioned by allowing Telstra to exit a special services product.

With regards to Optus’ remaining concerns, the ACCC considers that the following warrants more detailed consideration:

- the scope of the “special service” classes;
- the equity of the certification process for assessing SSIs; and
- contracted special services and double ended services.

14.3.3 The scope of special service classes

Optus is concerned that there may be carriage services or products delivered by wholesale customers over ULLS or LSS that do not fit into an existing “class” of special services.

This potentially raises uncertainty as to whether a service will be subject to the standard disconnection processes under Schedule 1 of the draft Plan or to the special services disconnection arrangements to be developed as “Required Measures” pursuant to clause 5 of the draft Plan. To address this, Optus suggests that “access seeker special services supplied over ULLS and LSS should be defined separately” to the special services listed in Schedule 4 of the draft Plan.

ACCC views

In assessing the draft Plan on this issue, it is necessary to compare the definitions that apply to “special services” in the Determination with those that are included in the draft Plan.

The Schedule to the Determination lists the “relevant special services” that Telstra will be able to continue to provide over the copper network.³⁰² These are categorised by reference to specific access services that Telstra provides to retail and wholesale customers. The scope of a “relevant special service” is broadened by the inclusion of any “products or product bundles” provided by means of those access services either now or in the future.

Section 13(2) of the Determination defines “special service inputs” as wholesale carriage services used by wholesale customers to supply services that are “substantially similar” to those special services listed in the Schedule.³⁰³ Therefore, a wholesale customer service that is “substantially similar” to any relevant special

³⁰¹ As required under section 8(1)(c) and 8(1)(d) respectively.

³⁰² The Determination, section 13(5).

³⁰³ The Determination, section 13(2).

service listed in the Schedule will effectively be a relevant special service for the purposes of disconnection.

The terms in the draft Plan that correspond to the above definitions are “Special Service Input” and “Service Equivalent”. The former is defined as:

ULLS or LSS certified by a Wholesale Customer as being used to provide carriage services which are Service Equivalent to Direct Special Services;³⁰⁴

Further “Service Equivalent” is defined as:

in relation to two carriage services, means that those carriage services are substantially similar in terms of bandwidth, availability, service level agreements, UNI characteristics and features an encapsulation protocol

These two definitions effectively create the same scope for wholesale customer ULLS and LSS carriage services that will be classified as SSIs as required by the Determination. In this respect, Telstra has complied with the Determination. However, some uncertainty does flow from the definitions of “SS Class” and “SS Equivalent Service” provided in the migration plan. This is because these terms do not have corresponding definitions in the Determination. “SS Class” is defined under the migration plan as:

Each type of Direct Special Service identified in the “Access Service” column of Table 2 in Schedule 4 and each such SS Class will include each Special Service Input that is certified by a Wholesale Customer to be Service Equivalent to that type of Direct Special Service³⁰⁵

“SS Equivalent Services” is defined under the migration plan to mean:

in relation to an SS Class, products and services that are the same or better than the products and services that Telstra supplies to its customers by means of that SS Class at the same or better pricing as at the Plan Commencement Date;³⁰⁶

The definitions limit an SS Class to those access services used to provide special services to wholesale customers (i.e. those carriage services under Table 2) and those products and services that wholesale customers deliver over those access service inputs. Therefore, an SS Class would not appear to be constituted by a carriage service that Telstra provides solely to retail customers (those specific carriage services listed **only** under Table 1), nor any of the product bundles provided by way of those specific access services.

However, any wholesale customer services that are service equivalent to such retail services should be captured under the certification process as “substantially similar” to those Direct Special Services (and therefore SSIs), thereby ameliorating any equivalence concerns.

³⁰⁴ Definition of “Special Service Input”; p 111 of the draft Plan.

³⁰⁵ Definition of “SS Class”; p 111 of the draft Plan.

³⁰⁶ Definition of “SS Equivalent Services”; p 111 of the draft Plan.

At any rate, the ACCC notes that the Determination itself defines the scope of relevant special services which are to receive “special treatment” in the migration plan compared with standard carriage services. Given this, the ACCC does not consider that Telstra can be required to cater for any additional services in its migration plan.

A related issue arises because wholesale customers will only gain the benefits of the special services arrangements where their services are certified as special service inputs. The equity of the proposed certification process is discussed below.

14.3.4 The equity of the certification process for special service inputs

Optus asserts that the certification process for SSIs gives Telstra too much control over determining the number of wholesale customer SIOs that are SSIs. Optus suggests that the process would be improved if administered by an independent expert.³⁰⁷ While this concern is related in part to the above discussion, the focus here is on the actual procedure of certification as opposed to the substantive decision on what constitutes an SSI.

ACCC views

Telstra’s supporting submission provides some useful background to the rationale behind the need for a certification process for SSIs:

Telstra will not usually know what services are being supplied to premises by a wholesale customer using LSS or ULLS. As such, the draft Migration Plan provides that three months prior to the Disconnection Date in a Rollout Region and then at a time closer to the Disconnection Date for the region, Telstra will require each wholesale customer in the Rollout Region to provide it with a certified list of the premises within the fibre footprint in that Rollout Region where the wholesale customer is using ULLS or LSS services to provide a Special Service and what category the Special Service falls into.³⁰⁸

Section 13(3) of the Determination requires that the migration plan set out a process to allow wholesale customers to nominate SSIs. The migration plan must provide for equivalent treatment of wholesale customers and retail business units in the implementation of the certification process, in accordance with section 21 of the Determination. Clause 21.6(a) of the draft Plan provides that Telstra will use the processes in Schedule 4 of the draft Plan to confirm with each wholesale customer (i) the SSIs they use; and (ii) that the carriage services provided over those SSIs are service equivalent to a special service class. By way of summary, Schedule 4 establishes that:

- Telstra can (and will) make an initial estimate as to the number of ULLS-based SIOs that are service equivalent to direct special services.³⁰⁹

³⁰⁷ Optus submission, September 2011, p 53.

³⁰⁸ Telstra’s supporting submission, July 2011, p 25.

³⁰⁹ This is undertaken by way of reference to (a) the category-D port initiated services, less Full National Number (FNN) handback and (b) less those ULLS services with deployment class 6a (typically voice) or 6h (typically ADSL 2 and 2+).

- Telstra then requests wholesale customers that use ULLS or LSS in a rollout region, to certify the number of SIOs that are used for the provision of special services (i.e. that are SSIs).
- If certification exceeds 10 per cent of Telstra’s initial estimate then Telstra will require the wholesale customer to recertify.

The draft Plan does not provide Telstra with a unilateral right to reject a wholesale customer’s certification of SSI numbers. On this basis, certification is essentially in the hands of the wholesale customer. The ACCC is satisfied that this arrangement complies with the principles.

14.3.5 Contracted special services and double ended services

Optus claims that the arrangements for the disconnection of “Contracted Special Services” provided for Telstra under clause 21.12 of the migration plan should also apply to access seeker services supplied under existing contracts.

Optus has made a similar claim in relation to the disconnection of “double-ended service addresses” under clause 21.11 of migration plan.

ACCC views

Neither the Determination nor the Specified Matters Instrument includes any explicit requirements concerning contracted special services. The only reference is in clause 2 of the Schedule to the Determination which defines contracted services as:

Those fixed line carriage services Telstra is required to provide over a separating network, until not later than 8 April 2017, under a limited number of Telstra retail contracts entered into before the date of this Determination and which contracts are identified in accordance with an agreement between Telstra and NBN Co given to the ACCC to which subsection 577BA(3) of the Act applies, are special services

The arrangements for contracted special services are therefore governed by the requirements of the Definitive Agreements. With this in mind, Telstra has stated that:

Telstra has no capacity to expand the class of Contracted Special Services. Telstra is also not able to extend the period of its contractual obligations without the consent of NBN Co, which ensures that Telstra as an retail service provider will not have any advantage as a result of these Contracted Special Services. Given the contract term of Telstra’s current wholesale contracts and the timing of disconnection for Special Services, access seekers should not face similar issues with their downstream retail contracts.³¹⁰

The ACCC considers that the definition of ‘contracted services’ provided in the Schedule to the Determination is clearly Telstra specific. Given Telstra’s clarification on the limits to extending such contracts, the ACCC considers that the arrangements for contracted special services in the draft Plan are compliant with the Determination.

The ACCC understands that the arrangements for the disconnection of “double-ended service addresses” that are special services will be governed by the disconnection obligations applying to direct special services. In practice, this means that wholesale

³¹⁰ Telstra’s supporting submission, July 2011, p 37.

customer and Telstra “double-ended service addresses” will be treated in the same way.

14.4 The scope of the marketing prohibition in clause 11 of the draft Plan

Section 22 of the Determination requires that the migration plan prohibit Telstra from undertaking marketing activity in specified circumstances. Clause 11 of the draft Plan prohibits Telstra staff and contractors that attend on site to disconnect a premises from undertaking marketing at that premises. However, the prohibition does not apply when staff or contractors attend to disconnect the services of a Telstra retail customer.

Optus and Herbert Geer both express concerns over this limitation.³¹¹ Optus notes the difficulty faced in enforcing the prohibition, particularly where a Telstra retail customer also receives services from a Telstra wholesale customer.

In its supporting submission, Telstra states that “Telstra is not restricted by the migration plan principles from marketing to its retail customers during the course of Telstra-related work, however Telstra is restricted if that customer is also the customer of another service provider”.³¹² The ACCC agrees with this characterisation and considers that clause 11 is consistent with the requirements of section 22 of the Determination.

14.5 Information security arrangements

As noted in the August discussion paper, Telstra’s role in migration will result in it being provided with information by NBN Co or by wholesale customers that is of potential commercial value.³¹³ Section 29 of the Determination requires the migration plan to set out effective measures that Telstra will take to ensure that this information is not used by Telstra’s retail business units to obtain an unfair commercial advantage over wholesale customers. The migration plan must also provide for the protection of confidential information disclosed to Telstra in the course of its migration activities.

Clause 24 of the draft Plan divides Telstra’s information security responsibilities between “NBN Co Migration Information” and wholesale customer confidential information. Clause 24.6 establishes that information security arrangements for wholesale customer confidential information obtained by Telstra in the course of the fulfilment of functions under the migration plan will be the subject of the information security arrangements under Part D and Schedule 2 of the SSU. This has therefore been considered in the ACCC’s assessment of the SSU.

Clause 24.3 stipulates that Telstra’s information security arrangements for NBN Co Migration Information are the subject of a required measures process in accordance with clause 5 of the draft Plan. The principles governing the development of Telstra’s information security arrangements are outlined in Schedule 6 of the draft Plan. Clause 24.4 also provides for the operation of a notification regime prior to the development

³¹¹ Optus submission, September 2011, p 54, paras 8.21-8.23.

³¹² Telstra’s supporting submission, July 2011, p 27.

³¹³ August discussion paper, p 150.

of the NBN Co Migration Information Security Plan. The August discussion paper invited interested parties to comment on the following:

- Do parties consider that an information security plan that was consistent with Schedule 6 of the draft Plan would be consistent with section 29 of the Determination?
- Should the plan provide assurance that any other features or attributes will be included in the information security plan?

14.5.1 Submissions received

AAPT states that it does not consider that the information security plan set out in Schedule 6 currently satisfies section 29 of the Determination.³¹⁴ AAPT suggests that the following amendments be made:

- The process for personnel who “need to know” NBN Co Migration Information must be subject to the ring-fencing arrangements in the SSU.
- Greater detail is needed on the security measures and controls for the handling of both electronic and hard copies of NBN Co Migration Information.
- A “rectification process” for unauthorised disclosure should be included. As an example, AAPT suggested that Telstra might be required to seek a personal undertaking from any Telstra employee to which the information was disclosed to not use that information to gain an unfair commercial advantage over Telstra’s wholesale customers.
- “Appropriate consequences” for unauthorised disclosure should be included.³¹⁵

Optus is particularly concerned about the lack of “surety” provided to wholesale customers by the required measures process for information security.³¹⁶ Optus states that “the migration plan should not be approved until Telstra has provided a set of confidentiality/information ring fencing procedures that are acceptable to the ACCC.”³¹⁷ Further, Optus raises a concern with the “carve out” from information security arrangements provided under clause 24.1(e) for “any info made available under a non-DA agreement”.

Optus suggests that the “[information security] procedures should cover information gained under the terms of any agreement between Telstra and NBN Co.”³¹⁸ Optus also comments on the information security arrangements pertaining to wholesale customer confidential information provided under the SSU.³¹⁹ These concerns have been considered in the ACCC’s decision on the SSU.

³¹⁴ AAPT submission, September 2011, p 11.

³¹⁵ AAPT submission, September 2011, p 12.

³¹⁶ Optus submission, September 2011, p 54.

³¹⁷ Optus submission, September 2011, p 54.

³¹⁸ Optus submission, September 2011, p 54.

³¹⁹ Optus submission, September 2011, p 36.

14.5.2 ACCC Views

In its supporting submission, Telstra states that:

In practice, Telstra expects most of the information which it receives from NBN Co under the Definitive Agreements will be the same information which NBN Co makes available to all service providers. This should operate to substantially reduce the risks associated with information provided to Telstra by NBN Co.

Nonetheless, the draft Migration Plan requires Telstra to develop detailed confidentiality/information ring fencing procedures to be approved by the ACCC within 6 months of the Migration Plan being approved. Telstra is already working on these arrangements and expects to be in a position to submit them to the ACCC for approval shortly after acceptance of the Migration Plan (if not before).

The Determination permits Telstra to defer development of its information security measures and processes as required measures under section 36. Telstra has chosen this option, and as such the draft Plan is not required to fully specify how Telstra will meet its obligations under section 29. Telstra will be required to submit the relevant measures to the ACCC within 6 months after the migration plan comes into force.

The ACCC can undertake public consultation on any draft required measure prepared by Telstra in accordance with clause 5.4 of the draft Plan. Given the sensitivity surrounding information handling, the ACCC expects that Telstra will engage with industry groups and wholesale customers in developing its information security plan. The ACCC appreciates wholesale customer concerns relating to Schedule 6 and will take these concerns into account in the context of the relevant “required measures” process.

14.6 Equivalence in imposing disconnection charges for undeclared services

Section 5(d) of the Specified Matters Instrument states that the migration plan “must not deal with ... the imposition of charges, either in the form of one-off or ongoing charges, with respect to the provision of access to a declared service supplied by Telstra”. While the August discussion paper did not specifically invite any feedback in relation to this matter, Herbert Geer (on behalf of iiNet, Internode and Adam Internet) raised a concern in its submission.

14.6.1 Submissions received

Herbert Geer expresses concern that

...migration to the NBN may involve Telstra charging for disconnection of services from its network in circumstances where Telstra Retail does not incur a similar charge³²⁰

Herbert Geer notes while the Specified Matters Instrument may prevent the draft Plan from dealing with disconnection charges for declared services, the same prohibition

³²⁰ Herbert Geer submission, September 2011, p 22.

does not apply in relation to undeclared services. Herbert Geer submits that if disconnection charges were imposed on wholesale customers during migration of an undeclared service, this may contravene section 8(1)(d) of the Determination, unless an equivalent charge was imposed on Telstra retail customers.

To prevent this eventuality, Herbert Geer suggests the insertion of a clear prohibition on the imposition of any one-off or ongoing charges for disconnection of undeclared services.

14.6.2 ACCC views

The ACCC considers that the regulatory framework for the migration plan does not allow for this matter to be dealt with in the manner suggested by Herbert Geer. Neither the Determination nor the Specified Matters Instrument seeks to prevent Telstra from charging fees for disconnection. The requirement is only that the migration plan not deal with the imposition of charges for declared services.

At any rate, the ACCC notes that Herbert Geer's concern is most likely to eventuate in respect of the wholesale ADSL service. While undeclared at the time of Herbert Geer's submission, the ACCC declared the wholesale ADSL service on 14 February 2012.³²¹ Declaration enables the ACCC to make an access determination dealing with the terms and conditions of access to the relevant service, including any disconnection charges and the circumstances in which they would or would not apply.

14.7 The adequacy of the dispute resolution arrangements

Section 33(1) of the Determination requires that the migration plan must provide for "an adequate dispute resolution process". Further section 33(2) requires that the migration plan must provide for the ITA to oversee a process to apply where a dispute arises between Telstra and a wholesale customer under a provision of the migration plan.

Under section 7(2) of the Determination, any role an ITA may have as a dispute resolution body in relation to the migration plan is dependent on the establishment of the ITA under Telstra's SSU. In the event that the ITA is not established, the migration plan will need to provide for adequate dispute resolution by another means.

The ITA will be established under Schedule 5 of the SSU. Clause 31 of the draft Plan provides that:

- (a) A Wholesale Customer may refer any complaint or dispute under this Plan to the Adjudicator for resolution under and in accordance with the ITA Process set out in Schedule 5 to the Undertaking.
- (b) For clarity, any dispute under this Plan be referred directly to the Adjudicator and is not required to be first referred to or dealt with by Telstra under the Accelerated Investigation Process.

³²¹ See <http://www.accc.gov.au/content/index.phtml?itemId=1022756>.

The August discussion paper invited comment from interested parties on the following questions:

- Would the ITA scheme as outlined in the draft plan in practice be an adequate dispute resolution process? Are the timeframes set out for the ITA Process appropriate for dealing with disputes that arise under the plan? Is the ITA provided sufficient authority to resolve disputes effectively?
- What are the key elements that will need to be included in an alternate dispute resolution process, if the ITA is not established under the SSU?

14.7.1 Submissions received

A number of submissions raised concerns in relation to the ITA dispute resolution scheme under Schedule 5 of the SSU. A number of stakeholders, including Herbert Geer, Macquarie and Optus, raised concerns in relation to perceived limitations on the decision-making power and jurisdiction of the ITA. AAPT submitted that the effect of proposed monetary caps would be that “the bigger the failure identified in a single year, the less likely it is that Telstra will have to implement a remedy”³²² Optus criticised the constraint on the ITA from making a ruling that prescribes or proscribes a specific system or process, design or technology.³²³

The relevance of these concerns for the draft Plan is that stakeholders considered that the dispute resolution process provided under clause 31 was not “adequate” as required by section 33(1) of the Determination. To remedy this, many submissions suggested a preference for the ACCC as the relevant decision-maker for relevant disputes, including for migration plan disputes.³²⁴ AAPT and Optus also proposed a number of specific amendments to the scheme that they considered necessary to ensure it would meet their expectations.³²⁵

In light of this feedback Telstra proposed a number of revisions to the ITA scheme, including the option for wholesale customers to submit disputes to the ACCC as an alternative to the ITA. Telstra has implemented these revisions in the SSU.

14.7.2 ACCC views

As a result of the amendments made to the ITA Scheme under Schedule 5 of the SSU, the ACCC considers that the draft Plan satisfies the requirements of section 33 of the Determination. That is, the draft Plan provides for adequate dispute resolution by offering wholesale customers the option of bringing their disputes to the ACCC rather than the ITA.

The ACCC does not consider that the monetary caps will preclude the ITA (or the ACCC, if nominated by an access seeker) from directing Telstra to implement appropriate systems and processes to facilitate disconnection.

³²² AAPT submission, September 2011, p 14.

³²³ Optus submission, September 2011, p 38.

³²⁴ Herbert Geer submission, September 2011, p 11.

³²⁵ AAPT submission, September 2011, p.57; Optus submission, September 2011, pp 39-40.

LIST OF ATTACHMENTS

Part A: SSU	
A1	List of submissions received
A2	Relevant telecommunications markets
A3	Key features of the NBN
A4	Definitive Agreements
A5	Matters to which the ACCC is to have regard
A6	Equivalence and Transparency Measures
A7	Statement of enforcement
Part B: Migration Plan	
B1	Mapping of Telstra's draft Plan against the Migration Plan Principles

ATTACHMENT A1 – LIST OF SUBMISSIONS RECEIVED

PART A: SUBMISSIONS RECEIVED AS PART OF FIRST CONSULTATION PROCESS	REFERENCE IN THIS PAPER
<i>AAPT, Submission by AAPT Limited in response to ACCC’s discussion paper: Assessment of Telstra’s Structural Separation Undertaking and draft Migration Plan, 27 September 2011.</i>	AAPT submission, September 2011
<i>Australian Communications Consumer Action Network, Telstra Structural Separation Undertaking and Migration Plan – Submission to the Australian Competition and Consumer Competition, 27 September 2011.</i>	ACCAN submission, September 2011
<i>Communications Law Centre – UTS, Submission to the Assessment of Telstra’s Structural Separation Undertaking and draft Migration Plan, 27 September 2011.</i>	CLC submission, September 2011
<i>Competitive Carrier’s Coalition, Submission in Relation to the Removal of Broadband Traffic from Telstra HFC Network, 25 August 2011.</i>	CCC submission, 25 August 2011
<i>Competitive Carrier’s Coalition, Submission on initial concerns with Telstra Structural Separation Undertaking, 31 August 2011.</i>	CCC submission, 31 August 2011
<i>Competitive Carrier’s Coalition, Response –Assessment of Telstra’s Structural Separation Undertaking – Discussion Paper, 27 September 2011.</i>	CCC submission, 27 September 2011
<i>Competitive Carrier’s Coalition, Supplementary submission – Service Level rebates, October 2011.</i>	CCC submission, October 2011
<i>Geraldine Carter, Private Submission from Geraldine Carter, 29 September 2011.</i>	Geraldine Carter submission, September 2011
<i>Ken Curry, Submission to the ACCC, NBN Monopoly, Telstra and Optus, 8 November 2011.</i>	Ken Curry submission, November 2011
<i>DigEcon Research, Submission to the ACCC on “Telstra’s Structural Separation Undertaking”, 5 October 2011.</i>	DigEcon Research submission, October 2011
<i>Joshua Gans and Jerry Hausman, Submission to the ACCC on “Telstra – Structural Separation Undertaking and draft</i>	Joshua Gans and Jerry Hausman submission,

<i>Migration Plan</i> ", 14 September 2011.	September 2011
Herbert Geer Lawyers (on behalf of Adam Internet Pty Ltd, iiNet Limited, and Internode Pty Ltd), <i>Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan</i> , 27 September 2011.	Herbert Geer submission, September 2011
Macquarie Telecom, <i>Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan</i> , 27 September 2011.	Macquarie Telecom submission, September 2011
Optus, <i>Optus Submission – Telstra's Structural Separation Undertaking and Draft Migration Plan</i> , 27 September 2011.	Optus submission, September 2011
Setanta Sports, <i>Telstra Structural Separation Undertaking Discussion Paper</i> , 27 September 2011.	Setanta Sports submission, September 2011
Vocus Communications Ltd, <i>Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan</i> , 27 September 2011.	Vocus submission, September 2011
Vodafone Hutchinson Australia, <i>Telstra's Structural Separation Undertaking and draft Migration Plan – submission to the Australian Competition and Consumer Commission</i> , 27 September 2011.	VHA submission, September 2011
Peter Ward, <i>Submission – the split up of Telstra</i> , 1 September 2011.	Peter Ward submission, September 2011
PART B: SUBMISSIONS RECEIVED AS PART OF SECOND CONSULTATION PROCESS	
AAPT, <i>Submission by AAPT Limited to ACCC Discussion Paper "Telstra's Structural Separation Undertaking"</i> , dated 16 December 2011, 13 January 2012.	AAPT submission, January 2012
Competitive Carrier's Coalition, <i>ACCC Action To Resolve Wholesale Price Issues Should Clear Decks: CCC</i> , 9 December 2011.	CCC submission, 9 December 2011
Competitive Carrier's Coalition, <i>Submission on Revised SSU</i> , 22 December 2011.	CCC submission, 22 December 2011
Ken Curry, <i>Submission to the ACCC, Re: NBN/Optus agreement and NBN/Telstra Agreement</i> , 21 February 2012.	Ken Curry submission, February 2012
Herbert Geer Lawyers (on behalf of iiNet, Internode, Adam	Herbert Geer

Internet, and TransACT), <i>Submission in response to the ACCC discussion paper of December 2011 relating to Telstra's structural separation undertaking</i> , 13 January 2012.	submission, January 2012
Frank Larmour, <i>Private Submission from Frank Larmour</i> , 12 January 2012.	Frank Larmour submission, January 2012
Macquarie Telecom, <i>Submission – Telstra's Structural Separation Undertaking (Further Draft)</i> , 13 January 2012.	Macquarie Telecom submission, January 2012
Optus, <i>Submission Telstra's Structural Separation Undertaking</i> , 13 January 2012.	Optus submission, January 2012
TPG, <i>TPG Submission on Telstra's Structural Separation Undertaking</i> , 22 January 2012.	TPG submission, January 2012
PART C: TELSTRA'S SUPPORTING SUBMISSIONS	
Telstra, <i>Telstra's Structural Separation Undertaking and Migration Plan</i> , issue date 31 July 2011.	Telstra supporting submission, July 2011
Telstra, <i>Letter to ACCC re Organisational arrangements and staff incentives under the draft Structural Separation Undertaking</i> , 25 August 2011.	Telstra supplementary submission, August 2011
Telstra, <i>Submission in support of the revised Structural Separation Undertaking given by Telstra Corporation Limited to the ACCC under section 577A of the Telecommunications Act 1997</i> , 9 December 2011.	Telstra supporting submission, December 2011
Telstra, <i>Telstra Implementation timeframe for the Structural Separation Undertaking</i> , 25 January 2012	Telstra supplementary submission, January 2012
PART D: RELATED MATERIALS	
NBN Co, <i>Submission to the ACCC in relation to section 577BA of the Telecommunications Act 1997</i> , 22 August 2011.	NBN Co section 577BA submission
NBN Co, <i>Confidential submission to the ACCC in relation to section 577BA of the Telecommunications Act 1997</i> , 22 August 2011.	NBN Co Confidential section 577BA submission
Telstra and NBN Co, <i>response to ACCC letter of 22 July 2011</i> ,	Telstra and NBN

<i>Attachment B – questions regarding DAs, public version, 16 August 2011.</i>	Co's responses to questions regarding Definitive Agreements
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ATTACHMENT A2 – RELEVANT TELECOMMUNICATIONS MARKETS

The ACCC has assessed the likely impact of this structural reform upon a number of telecommunications markets. These markets, and the current state of competition in these markets, are described below.

Fixed-line access networks

There are currently three major fixed-line access networks that service premises in Australia—Telstra’s copper and HFC networks and Optus’ HFC network. Telstra also has some fibre access networks. TransACT is the next most significant owner of access networks, with a presence in the ACT and regional Victoria, supplying services over a mix of networks including fibre-to-the-premises, HFC and copper. Telstra’s copper network is the only one of these networks over which wholesale services are currently provided.³²⁶

There is significant overlap between the footprints of the Optus and Telstra networks in Melbourne, Sydney and Brisbane, with approximately 2.2 million premises being passed by both HFC networks.³²⁷ Combined, the two HFC networks pass approximately 2.9 million premises in total, with Telstra’s HFC network passing 2.7 million premises (with approximately 400,000 subscribers) and Optus’ HFC network passing 2.4 million premises (with approximately 500,000 subscribers).³²⁸ As Optus does not serve multi dwelling units and some hard to reach single dwelling units, the number of premises serviceable by the Optus HFC network is approximately 1.4 million.³²⁹

Retail fixed voice and broadband markets

The ACCC’s *telecommunications competitive safeguards for 2009-10* report notes the levels of concentration in retail fixed voice and broadband services, which the report states raise preliminary concerns of lack of competition.³³⁰ The report also notes that Telstra continues to dominate these markets.³³¹

The ACCC notes that in both fixed voice and broadband, Telstra’s market share is high, and that there is a wide gap between it and its nearest rivals. Telstra has been able to sustain its dominance in the face of open competition, although the fixed broadband market has seen some competitive progress in terms of market concentration and number of participants in recent years.

³²⁶ NBN Co Corporate Plan, p 34.

³²⁷ NBN Co Corporate Plan, p 42.

³²⁸ NBN Co Corporate Plan, p 42.

³²⁹ NBN Co Corporate Plan, p 42.

³³⁰ *ACCC telecommunications reports 2009-10*, p 81. The Herfindahl-Hirschman Index was noted in that report at 5287 and 2554 for fixed voice and fixed broadband services respectively (pp 10-11).

³³¹ *ACCC telecommunications reports 2009-10*, pp 10-11.

This improvement in competition in the supply of fixed broadband services has primarily come from the entry of competitors in the supply of DSL services over Telstra's copper network, through DSLAM investment in local exchanges in recent years.³³² DSLAM rollout has predominantly occurred in metropolitan areas and the ACCC has previously noted that access seekers are generally focused on increasing capacity at exchanges where they already have a presence, rather than expanding into new areas.³³³

Lower levels of investment in more remote areas reflects some of the difficulties in providing telecommunications services in these areas, including difficulties where infrastructure is not readily available and access seekers are unable to capture the benefits of economies of scale.

Telstra and Optus also currently supply fixed broadband services over their respective HFC networks.

The ability of a telecommunications service provider to provide audiovisual content services may affect its ability to compete in retail voice and broadband markets.

The provision of subscription TV services is dominated by FOXTEL, which is Australia's largest subscription TV provider with over 1.63 million metropolitan subscribers.³³⁴ Austar is the second largest pay TV operator with over 760,000 subscribers in regional and rural Australia.³³⁵ FOXTEL and Austar retail their services in geographically separate areas apart from the Gold Coast, where they both operate. The ACCC notes that on 26 May 2011, a proposed acquisition of Austar by FOXTEL was announced. The ACCC is currently conducting an informal review of the proposed acquisition.³³⁶

Market inquiries in the context of the proposed FOXTEL-Austar transaction have highlighted the increasing importance in the future of telecommunications and broadband competitors being able to provide a 'triple-play' or 'quad-play' bundle of three or four services to consumers. Such a bundle includes fixed voice, broadband internet, television and in some cases, mobile services.

The ACCC notes that the NBN may provide content owners and content service providers, such as pay TV providers and channel aggregators, with an enhanced ability to either provide telecommunications services or partner with telecommunications providers to provide bundles of communications services.

Telstra currently owns a 50 per cent interest in FOXTEL. It is likely that Telstra's ownership of FOXTEL will act as a disincentive for Telstra to actively compete with FOXTEL in the provision of content services. However, other suppliers of content services are emerging, such as the wholesale IPTV provider Fetch TV. IPTV-

³³² ACCC telecommunications reports 2009-10, pp 10-11.

³³³ ACCC telecommunications reports 2008-09, p 14.

³³⁴ FOXTEL-Austar Statement of Issues, p 2.

³³⁵ FOXTEL-Austar Statement of Issues, p 3.

³³⁶ See: FOXTEL-Austar Statement of Issues.

delivered services currently offer a more limited range of content than a full pay TV service.³³⁷

The ACCC recently noted that emerging content delivery mechanisms, including IPTV, have “the potential to become increasingly important in the future”³³⁸ in competing with traditional subscription television platforms such as FOXTEL. However, the ACCC noted that the ability of these platforms to compete effectively is dependent on a number of factors including, but not limited to, the ability to source suitable content.

Content acquisition was identified as an emerging issue for the Government’s Convergence Review,³³⁹ for which a final report is expected in March 2012.³⁴⁰

Wireless voice and broadband markets

Wireless broadband is offered over fixed and mobile networks. For the purpose of this paper, the ACCC is considering the broad scope of wireless services to include mobile voice, fixed wireless broadband³⁴¹ and mobile wireless broadband.³⁴²

The provision of wireless voice and broadband services is fairly concentrated across three main providers—Telstra, Optus and Vodafone Hutchison Australia (VHA)—all of which own their own mobile networks. The ACCC’s *telecommunications competitive safeguards for 2009-10* report shows that while Telstra maintained the largest share of mobile customers in the reporting period, there appears to be a greater balance across the three major providers and that Telstra is not as dominant as in other markets.³⁴³ A small share of the retail market is served by resellers which purchase wholesale services from the three network operators.

Wholesale markets

Wholesale telecommunications markets facilitate the provision of downstream services as non-network owners may either acquire:

- wholesale service inputs, such as ULLS, which a retail service provider would combine with other self-supplied components of the end-to-end retail service; or

³³⁷ For example, FetchTV, via various ISPs, currently offers a basic subscription television package which includes around 24 channels and access to a variety of on-demand services.

³³⁸ FOXTEL-Austar Statement of Issues, pp 8-9.

³³⁹ Convergence review emerging issues paper, pp 30-31.

³⁴⁰ Convergence review emerging issues paper, p 41.

³⁴¹ Fixed wireless has evolved out of extensions of fixed services (such as internet). The access network is provided by means of a radio channel (air interface) using point-to-point or point-to-multipoint technology. This technology usually requires a fixed antenna at the receiving point. (ACCC *telecommunications report 2008-09*, p 31).

³⁴² Mobile wireless has evolved from mobile phone technology. The access network is provided by means of a radio channel (air interface) using cellular topology which offers roaming from interconnected regions of service. Users can access this network either via a 3G voice handset or via non-voice service equipment such as a universal serial bus (USB) modem or datacard (ACCC *telecommunications report 2008-09*, p 32).

³⁴³ ACCC *telecommunications reports 2009-10*, p 11.

- managed wholesale services, such as wholesale DSL, where the retail service provider does not need to acquire or supply any other infrastructure services in order to deliver an end-to-end service.

Currently the market for the provision of wholesale fixed-line telecommunications services is dominated by Telstra, which supplies both wholesale service inputs and managed wholesale services over its copper network. These services are utilised by other service providers to provide retail voice and broadband services.

Some other service providers are able to participate in wholesale markets to a limited extent, by acquiring certain wholesale service inputs from Telstra and using their own infrastructure to sell managed wholesale services, or reselling Telstra's managed wholesale services.

Transmission capacity market

Transmission capacity broadly refers to links (or 'backhaul') which are used to connect service providers' core networks with points of service delivery (such as exchanges). Transmission capacity is an important input into the ability of service providers to provide downstream retail and wholesale services.

The DTCS is a type of transmission capacity and a declared service. Where there is evidence of competition on transmission routes such that the routes are sufficiently competitive for the removal of regulation, the ACCC has exempted those routes from the DTCS declaration.

The transmission capacity market is characterised by a dominant incumbent (Telstra) with two second tier transmission capability providers (Optus and Nextgen). Telstra's transmission network is the only ubiquitous carrier grade network and has the most extensive geographic coverage. There are a number of smaller providers of transmission capacity and competition has emerged in CBD and some metropolitan areas, as well as on inter-capital and some capital-regional routes. However, there are still many areas which are characterised by ineffective competition.

The ACCC considered the state of competition in transmission markets in detail in its 2010 advice to the Government on the number and location of the initial POIs for the NBN.³⁴⁴

³⁴⁴ ACCC, *Advice to Government: National Broadband Network Points of Interconnect*, Public version, November 2010, pp 21-34.

ATTACHMENT A3 – KEY FEATURES OF THE NBN

Background

On 7 April 2009, the Government announced that it intended to establish a company, NBN Co, to build and operate a wholesale-only, open access NBN.³⁴⁵

The Government commissioned an independent study, the NBN Implementation Study, by McKinsey and Company and KPMG, which was released in May 2010 and which made a number of recommendations to the Government relating to the technology, financing, ownership, policy framework and market structure of the NBN project. This report informed a number of the decisions made by the Government in relation to the NBN.

In December 2010, the Government released its SOE, which outlined the Government's expectations in relation to a number of matters relating to the NBN including the coverage of the NBN, the location of points of interconnect, uniform national pricing, NBN Co's compliance with the proposed regulatory framework as well as service offerings, pricing, funding and privatisation.

At that time, NBN Co released its Corporate Plan, which provided information in relation to products and pricing, network rollout and connections, financial forecasts and funding arrangements and key assumptions relating to issues such as its contractual agreements with Telstra and legislative arrangements.

In March 2011, Parliament passed the NBN Companies Act and the NBN Access Act. The NBN Companies Act provides a regulatory framework for the operation of the NBN including the wholesale-only structure of NBN corporations. The NBN Access Act amended the CCA and the Telco Act to introduce new access, transparency and non-discrimination obligations relating to the supply of wholesale services by an NBN corporation.

The Government will retain full ownership of NBN Co until all of the following have occurred:

- the Minister declares that the NBN is fully built and operational (this must be declared by 31 December 2020);
- a Productivity Commission report on the NBN has been tabled in Parliament,³⁴⁶ and

³⁴⁵ Prime Minister, Treasurer, Minister for Finance, Minister for Broadband, 'New National Broadband Network,' joint media release, 7 April 2009.

³⁴⁶ The Productivity Commission Inquiry must consider a wide range of issues, including the regulatory framework for NBN Co, the impact on future Commonwealth budgets of the sale of NBN Co, the impact of the sale on the equitable supply of broadband services and the impact on competition in telecommunications markets.

- the Finance Minister has declared conditions suitable to carry out the sale of NBN Co.

Once privatised, to prevent retail service providers from investing in NBN Co and gaining control over it, the Governor General can make regulations in relation to unacceptable private ownership/control situations.³⁴⁷ The Communications and Finance Ministers can require an NBN corporation to functionally separate (for example, its Layer 1 and Layer 2 businesses) in line with specified principles.³⁴⁸

Government policy and objectives

The Government has stated that its objective is for NBN Co to build a fibre-to-the-premises access network that connects at least 93 per cent of Australian premises, with a minimum fibre coverage obligation of 90 per cent of premises, delivering speeds of up to 100Mbps. The remainder of premises will be served via NBN Co's fixed wireless and satellite services, delivering speeds of at least 12Mbps, as well as by Telstra's existing copper network.³⁴⁹

Relevantly, the SOE states the following:

The Government notes and agrees with the assumption inherent in the business plan that NBN is to be planned as a monopoly national fixed-line network (with the exception of existing fixed-line infrastructure) as far as practical from the points of interconnect to premises.³⁵⁰

The Government's broad NBN policy objectives are summarised in the Revised Explanatory Memorandum to the NBN Companies Bill and NBN Access Bill as follows:³⁵¹

In broad terms these policy objectives can be summarised as ensuring:

- consumers have access to high-quality superfast broadband services, preferably delivered by fibre-to-the-premises (FTTP) (the 'speed and quality objective');
- superfast broadband services are available nationally (the 'coverage objective');
- there is national uniform wholesale pricing for such services (the 'pricing objective'); and
- there is efficient and effective competition in the provision of superfast broadband infrastructure and services, that supports, by open and equivalent access to wholesale services on that infrastructure, a vibrant and competitive retail market (the 'competition objective').

By ensuring these four objectives are delivered nationally, the Government is also aiming to provide, as far as possible, equitable access to superfast broadband services to all Australians, whether in metropolitan, regional, rural or remote Australia (the 'equity' objective').

³⁴⁷ NBN Companies Act, s 69.

³⁴⁸ NBN Companies Act, ss 24-30. Principles include but are not limited to maintaining two or more specified business units, arms length functional separation between the business units, systems, procedures and practices that relate to compliance monitoring. Separation arrangements could include full functional separation of all business units, or more light touch separation. The ACCC has 44 days to provide advice on the functional separation undertaking and proposed variations to the final undertaking.

³⁴⁹ SOE, pp 3-4.

³⁵⁰ SOE, p 4.

³⁵¹ Explanatory Memorandum, NBN Companies Bill and NBN Access Bill, p 48.

As the key vehicle for delivering these objectives is NBN Co, the Commonwealth also has an objective of ensuring that NBN Co can operate on a commercially sustainable basis (the ‘sustainability’ objective).

...

Clearly, these objectives are inter-related. For example, if the pricing objective is to be delivered through NBN Co being required to implement an internal cross-subsidy, other fibre providers could select to roll-out fibre in low-cost, high-revenue markets and offer potentially cheaper wholesale prices – effectively cherry-picking NBN Co’s revenue streams. While such an outcome would be consistent with the Government’s competition objective, it would impact on NBN Co’s ability to deliver the coverage, equity and sustainability objectives.

(footnotes removed)

The Government has prescribed that NBN Co should offer uniform national wholesale pricing over the network from a point of interconnect to a premises. The NBN Access Act introduced amendments to the CCA which supports this objective.³⁵² NBN Co has confirmed that it will offer a uniform product construct across fibre, wireless and satellite at 12 Mbps downstream and a 1 Mbps upstream entry-level offer across all three access technologies for the same price.³⁵³

The Government has stated that it expects NBN Co’s approach to pricing will recognise the importance of maintaining affordability to drive take up rates.³⁵⁴

NBN Co’s network

The Government has stated that its intention is that NBN Co will be planned as a monopoly national fixed-line network as far as practical from the points of interconnect to premises.³⁵⁵

NBN Co must not refuse to allow interconnection to its network at the locations identified in a list developed by the ACCC in consultation with NBN Co.³⁵⁶ The locations on that list reflect the Government’s direction to NBN Co that its network should extend to meet with but not overbuild competitive backhaul routes.³⁵⁷

On the assumption that the Definitive Agreements proceed, NBN Co has estimated that the construction of the NBN will take approximately 9.5 years and will be completed in 2021.³⁵⁸

Regulation of NBN based services

NBN Co is not able to supply an eligible service unless the service is declared. This is both a condition of NBN Co’s carrier licence and a service provider rule.³⁵⁹

Declaration of NBN services only occurs if either (i) NBN Co publishes a Standard

³⁵² CCA, s 151DA.

³⁵³ NBN Corporate Plan, p 91.

³⁵⁴ SOE, p 10.

³⁵⁵ SOE, p 4.

³⁵⁶ CCA, ss 152AXB (4 and (4A), 151DB.

³⁵⁷ SOE, p 7.

³⁵⁸ NBN Co Corporate Plan, Exhibit 6.4, p 79.

³⁵⁹ CCA, s 152 CJA(1), 152CJC, 152 CJD.

Form Access Agreement on its website; (ii) an SAU has been accepted by the ACCC for the service; or (iii) the service has been declared by the ACCC.³⁶⁰

NBN Co is subject to open access, wholesale-only, transparency and non-discrimination obligations relating to the supply of its services. The same obligations have also been extended to owners of new (as of January 2011) ‘superfast’ fixed-line networks (outlined in more detail below).

Other relevant features of the regulatory regime specific to NBN Co include:

- An NBN corporation must not supply an eligible service to another person unless that person is a carrier or service provider (that is, it is “wholesale-only”).³⁶¹ Exemptions to this rule are made for certain services.³⁶²
- The Minister may impose conditions on NBN Co’s carrier licence that have the effect of prohibiting it from supplying a specified service (prohibited service) or requiring it to supply a specified service (mandatory service).³⁶³ This mechanism is aimed at enabling the Minister to provide certainty as to the level of services that NBN Co will and will not provide. NBN Co is also prohibited from supplying a non-communications service or supplying goods not in connection with the supply of an eligible service. An NBN Corporation must not supply a content service.³⁶⁴
- The Government has stated that its expectation is that NBN Co will offer open and equivalent access to wholesale services at the lowest levels in the network stack necessary to promote efficient and effective retail level competition via Layer 2 bitstream services in the fibre footprint.³⁶⁵
- The Government expects that NBN Co will upgrade services over time and demonstrate that the functionality and performance of its services is meeting demand and supporting innovation across all technology platforms. The government expects NBN Co to regularly advise it of its upgrade plans.³⁶⁶

“Level playing field” provisions

The NBN Access Act introduced amendments to the Telco Act and CCA³⁶⁷ which introduce special requirements for operators of fixed-line ‘superfast networks’, referred to by the Government as the level regulatory playing field arrangements.³⁶⁸

³⁶⁰ CCA, s 152AL (8A), (8D) and (8E).

³⁶¹ NBN Companies Act, s 9.

³⁶² The exemptions provide for NBN Co to supply network management services to a number of utilities which would otherwise not be able to receive a service from NBN Co. Exemptions relate to Air Services Australia or State public transport authorities, electricity supply bodies, the managing/charging of natural gas transmission or distribution, the managing/charging of water distribution, sewerage or storm water, and used by State or Territory road authorities for the managing or control of road traffic. There is a requirement that these exemptions will only apply if these bodies do not on-supply the service.

³⁶³ NBN Companies Act, s 41. Before giving NBN Co a notice in relation to such a condition, the Communications Minister must consult the ACCC.

³⁶⁴ NBN Companies Act, ss 17-19.

³⁶⁵ SOE, p 2.

³⁶⁶ SOE, p 4.

³⁶⁷ These amendments are to commence on 12 April 2012 unless proclaimed earlier.

These amendments mean that supplying services over new and upgraded superfast fixed-line networks will be prohibited unless a Layer 2 bitstream service is also offered. This service can only be supplied to carriers or service providers (that is, on a wholesale-only basis). This applies to superfast networks built or upgraded after 1 January 2011.

The ACCC is required to declare access to the Layer 2 bitstream services supplied over these networks. Once the ACCC has made that declaration, the SAOs will apply. In supplying the service, providers will be subject to similar non-discrimination obligations and transparency reporting arrangements as those applying to NBN Co.

NBN Services

In December 2010, NBN Co released details of its initial product and price offering. NBN Co's initial offering consists of four product components which can be used over fibre, wireless and satellite technologies.³⁶⁹ The four components are the User Network Interface (UNI), Access Virtual Circuit (AVC), Connectivity Virtual Circuit (CVC), and the Network-Network Interface (NNI), summarised in the table below. All four components are required to deliver NBN services to end-users.

Table 1 Summary of the key NBN Co Fibre Access product components

Component	Applies To	Notes
1. UNI	End-user	The UNI provides physical handoff off AVCs at and end-user premises. One or more UNIs can be ordered by an Access Seeker. An Access Seeker can map one or more AVCs to one UNI but a UNI interface cannot be shared by multiple Access Seekers.
2. AVC	End-user	Each end-user will be served by a single or multiple AVC. Each AVC will be delivered to one UNI, although multiple AVCs can be delivered to the same UNI of an Access Seekers.
3. CVC	Fibre Connectivity Serving Area	A CVC aggregates multiple AVCs back to the Point of Interconnect. The CVC is shared among nominated AVCs and allows the Access Seeker to manage network contention. The CVC connects to one Connectivity Service Area.
4. NNI	Point of Interconnect	The NNI provides physical aggregation of several CVCs. It forms the physical handoff point to the Access Seeker at a Point of Interconnect and may be configured with interface protection options.

³⁶⁸ A superfast carriage service is defined a carriage service supplied to an end-user using a fixed-line, where the download speed is normally more than 25 Mbps.

³⁶⁹ NBN Co, *NBN Co Wholesale Access Service – Product and Pricing Overview for Access Seekers*, December 2010.

The four components work together to deliver an Ethernet bitstream service from the NBN Co point of interconnect to the end-user premises.

NBN Co provides two options for interconnection at each point of interconnect:³⁷¹

1. *Passive Interconnection* – requires optical patching between the NNI and a backhaul service provided by a third party; or
2. *Active Interconnection* – requires a physical presence in the point of interconnect for the purpose of housing transmission and aggregation equipment related to the provision of backhaul.³⁷²

Access seekers to the NBN will be able to construct their wholesale or retail products using these inputs from NBN Co.

Competition over the NBN

Service providers will be able to provide retail services based upon the NBN fibre network in two separate ways:

1. Directly acquiring a Layer 2 bitstream service from NBN Co and self-supplying other components required to provide an end-to-end retail service (including by acquiring either access or use rights to third party infrastructure or services). The service provider is ‘directly connected’ to the NBN.
2. Acquiring a wholesale service from a service provider which is directly connected to the NBN. There is a broad range of potential wholesale services, including access to the NBN, that may be provided by wholesale service providers, including:
 - Wholesale service inputs, such as aggregation or routing services bundled with NBN Co’s Layer 2 bitstream service. In addition to the wholesale service input, the retail service provider would also need to self-supply key components of the end-to-end retail service.
 - Managed wholesale services that would facilitate a ‘pure reseller’ model. That is, the retail service provider would not need to acquire or supply any other infrastructure services in order to deliver an end-to-end service.

The ACCC expects that retail and wholesale service providers will be able to differentiate their services and innovate in a number of ways using the NBN. This could include:

- Differentiation in relation to how each service provider dimensions its networks. This would include decisions regarding the combination of services

³⁷⁰ NBN Co, *NBN Co Wholesale Access Service – Product and Pricing Overview for Access Seekers*, December 2010, p 14.

³⁷¹ NBN Co, *NBN Co Wholesale Access Service – Product and Pricing Overview for Access Seekers*, December 2010, p 23.

³⁷² NBN Co, *NBN Co Wholesale Access Service – Product and Pricing Overview for Access Seekers*, December 2011, p 128.

it will acquire from NBN Co, including capacity and quality of service, and decisions relating to the capacity and quality of service for the relevant domestic and international transmission. Service providers, especially those who are directly connected to the NBN, will also be able to differentiate the quality of their retail product through the design of and investment in their core network capability.³⁷³

- Differentiation in relation to the available bundled services that the service provider is able to offer in conjunction with the NBN-based telephony service. This would include the ability of the service provider to provide ‘triple play’ (voice, broadband and TV) or even ‘quadruple play’ (voice, broadband, TV and mobile) service offerings.
- Differentiation through the level of customer service and support provided to customers.
- Differentiation on price, based upon the cost of other inputs that are required in order to provide an end-to-end service (as the NBN Co access price comprises only a part of service providers’ costs of providing a retail or wholesale service).

Network layers and the NBN

Telecommunications networks are constructed as a number of independent ‘layers’ of communication. Services are provided at a particular layer. Figure 1 below is a common example of the structure of a layered model of communication.

Figure 1 Layered model structure

Layers		
5	Application	The application the end user is using
4	Transport	Ensure the data is not lost and is in order
3	Network	Get the data across a network of links
2	Data Link	Ensuring that the data gets from point to point
1	Physical	The electronics that puts the signals on the medium
0	Medium	The copper wire, optical fibre or radio channel

Each layer provides a defined and well-specified ‘service’ to the layer above and expects a defined and well-specified service to be provided by the layer below. The layer at each end of a link communicates with the matching layer at the other end of

³⁷³ The scope for innovation and differentiation in relation to how each service provider dimensions its network may be further increased if service providers become able to acquire a Layer 1 service from NBN Co in the future.

the link using a 'protocol stack' (software in each layer that communicates with the other layer). Services are provided between layers, not within a layer.

In the NBN Co Corporate Plan, NBN Co states that it has proceeded with its network and system design on the basis that it would provide a Layer 2 bitstream service only, using predominantly a GPON architecture.³⁷⁴ Development of applications and Layer 3 services are beyond NBN Co's remit.³⁷⁵ Therefore, this is the layer at which retail service providers will be able to differentiate their service in order to compete.

The operation of network layers and the NBN is further described in Attachment A2 to the August discussion paper.

The NBN Co Corporate Plan notes that NBN Co is not preparing for the provision of Layer 1 services, Layer 1 unbundling, functional or structural separation.³⁷⁶ However, the prospect of future Layer 1 unbundling was also envisaged by amendments to the CCA and the Telco Act by the NBN Access Act, and the NBN Companies Act. Together, this legislation established a legislative framework by which NBN Co could at a future date be required by the Government to supply an unbundled Layer 1 service. This possibility is discussed further in Attachment A2 to the August discussion paper.

³⁷⁴ NBN Co Corporate Plan, p 14.

³⁷⁵ NBN Co Corporate Plan p 129.

³⁷⁶ NBN Co Corporate Plan, p 14.

ATTACHMENT A4 – DEFINITIVE AGREEMENTS

PART A: LIST OF AGREEMENTS PROVIDED TO THE ACCC PURSUANT TO SECTION 577BA(3) OF THE TELCO ACT

- Subscriber Agreement between NBN Co and Telstra dated 23 June 2011
- Infrastructure Services Agreement between NBN Co and Telstra dated 23 June 2011
- Access Deed between NBN Co and Telstra dated 23 June 2011
- Letter dated 23 June 2011, sent to John Stanhope and entitled ‘Condition Precedent – Optus’
- Deed of Amendment to Implementation and Interpretation Deed and Subscriber Agreement dated 24 February 2012

The ACCC also received copies of other agreements that form a part of the Definitive Agreements, including the Implementation and Interpretation Deed dated 23 June 2011. These agreements have not been listed were not provided pursuant to section 577BA(3) of the Telco Act.

PART B: SUMMARY OF RELEVANT PROVISIONS IN DEFINITIVE AGREEMENTS

Subscriber Agreement

The Subscriber Agreement contains a number of restrictions on Telstra's ability to compete with the NBN in the NBN Fibre Footprint.³⁷⁷ These restrictions only apply within the NBN Fibre Footprint.

There is also scope for the future commercial activities of NBN Co to be restrained by the provisions in the Subscriber Agreement.

Disconnection of premises from Telstra's copper and HFC networks

On or before the Disconnection Date for a particular region,³⁷⁸ Telstra must permanently disconnect premises in the NBN Fibre Footprint from the Telstra copper network and HFC network, subject to limited exceptions. These exceptions include the continued provision of specified 'Special Services'³⁷⁹ over the copper network and services for delivering certain pay TV services over the HFC network.

After disconnecting premises within the NBN Fibre Footprint from Telstra's copper network and HFC network and deactivating its HFC network within the NBN Fibre Footprint, Telstra will not reconnect premises to the copper network or HFC network or reactivate the HFC network within the Fibre Footprint except in limited circumstances including where the NBN is materially unavailable.³⁸⁰

Telstra will receive a payment from NBN Co for each active premises that it disconnects from its copper and HFC networks (irrespective of whether Telstra provides a wholesale or retail service to that premises, provided that it must have been

³⁷⁷ Broadly, the NBN Fibre Footprint is defined as: (a) the geographic areas in which NBN Co intends to rollout its fibre network, excluding the parts of those geographic areas that are in Rollout Regions in respect of which the Disconnection Commencement Date or Region Ready for Service date has occurred; and (b) for each Rollout Region in respect of which the Disconnection Commencement Date or Region Ready for Service Date has occurred, the set of premises notified from time to time by NBN Co to Telstra under the Subscriber Agreement as the premises in that Rollout Region which are "passed" by the NBN Co fibre network and which NBN Co intends will be "passed" in that Rollout Region.

³⁷⁸ Broadly, the Disconnection Date for a Rollout Region is the date which is 18 months after the Ready For Service Date for that Rollout Region, or such later date as determined under the Disconnection Protocols.

³⁷⁹ There are two categories of special services: "Temporary Special Services" and "Contracted Special Services". "Temporary Special Services" are certain services identified in the Definitive Agreements which are unable to be provided over the NBN for technical or operational reasons and includes both retail and wholesale special services offered by Telstra and also ULLS and LSS used by access seekers to offer special services of their own which are equivalent. "Contracted Special Services" are services which Telstra is contractually required to provide using the Copper Network pursuant to a limited number of retail contracts that were entered into by Telstra before 23 June 2011.

³⁸⁰ Material unavailability of the NBN is defined in the Definitive Agreements as occurring where, in respect of a Rollout Region, the NBN Co Fibre Network is unable to be used to provide any NBN based services in the entirety of that Rollout Region for at least five consecutive days.

providing a “commercial service” of some kind). Telstra is not entitled to this payment for a disconnected premises where that premises does not connect to the NBN by a specified date and a relevant person at that premises is in receipt of a Telstra wireless service at that date, however Telstra will become entitled to the payment for that premises if it subsequently connects to the NBN within three years of disconnection.

Network Preference

For a period of 20 years from the Commencement Date,³⁸¹ Telstra has committed to exclusively use the NBN Co fibre network as the fixed-line connection to premises, within the NBN Fibre Footprint, to provide fixed-line carriage services to those premises.

This is subject to several limited exceptions, as set out below. In general terms, it also does not prevent Telstra from providing fixed-line carriage services to those premises using its copper and HFC networks prior to the Disconnection Date for the Rollout Region in which the premises are located (or after that date in the case of Special Services provided over the copper network).

Pay TV services over the HFC

After the Disconnection Date in a Rollout Region, Telstra is able to continue to supply that Rollout Region:

- FOXTEL television services;³⁸² and
- services that Telstra is obliged to provide to enable the provision of certain other pay TV services under specified contracts that were in existence as at 20 June 2010³⁸³ Setanta is the only firm which falls within this exemption.

For the purposes of this paper, the above are referred to as the HFC Television Services.

This means that Telstra is not able to provide any services over the HFC network to premises in the NBN Fibre Footprint in a Rollout Region after the Disconnection Date for the Rollout Region other than HFC Television Services to FOXTEL and Setanta..

Although Telstra is only permitted to supply services that it is obliged to provide under a specified contract, the Subscriber Agreement provides that these contracts may be renewed or extended with NBN Co’s consent (which may be withheld at NBN Co’s discretion). NBN Co provided its consent that Telstra may continue to supply the relevant HFC carriage services to Setanta. That consent covers the period within

³⁸¹ The Definitive Agreements define Commencement Date as the date that all of the Conditions Precedent to the Definitive Agreements are either waived or satisfied.

³⁸² These are the carriage services which are required and are used only to enable the broadcast by FOXTEL, using the HFC network, of any or all of subscription television or audio broadcasting services or on-demand analogue or digital cable television or audio services, but which must not include internet protocol based services

³⁸³ Excludes services that enable the provision of internet protocol based services, voice services, broadband services or services requiring a return path transmission over the HFC network from the end user.

which FOXTEL must use Telstra's HFC network for carriage of its subscriptions television services. Further, if Telstra and Setanta would like to extend their arrangements beyond this period, NBN Co must not unreasonably withhold its additional consent to such an extension.

Telstra is prohibited under the Subscriber Agreement from providing any HFC services that enable the provision of internet protocol based services, voice services, broadband services or services requiring a return path transmission over the HFC network to premises in a Rollout Region after the Disconnection Date for that Rollout Region.

In respect of carriage services required by current and potential future access seekers to FOXTEL's set top box under the FOXTEL SAU, Telstra is able to provide those services to a premises in a Rollout Region using the HFC network prior to the Disconnection Date for that region. After the Disconnection Date, any potential future access seekers who seek access to the FOXTEL digital set-top unit would only be able to obtain access to that set-top unit other than by use of the HFC network, to the extent that this is technically or practically feasible.

Point-to-point (P2P) Services

Telstra may provide P2P Services over Telstra P2P fibre which is in operation or installed as at the Commencement Date.

Telstra may install new P2P fibre where:

- the P2P fibre is installed to provide P2P Services in response to a bona fide customer request received by Telstra on or before the Commencement Date; or
- the P2P fibre is installed to provide P2P services to premises that, as at the Commencement Date, Telstra is required to provide to those premises under an existing contract with a Telstra customer; or
- it is otherwise permitted to do so, having complied with the requirements in the Subscriber Agreement giving NBN Co a right of first refusal to install such new P2P fibre.

Where Telstra installs new P2P fibre, it may only do so:

- if, at the time the P2P fibre is installed there is not sufficient existing unused Telstra P2P fibre available to fulfil the relevant customer requirements; and
- if the new P2P fibre meets specific capacity limits in the Subscriber Agreement or NBN Co is satisfied as to the capacity requirements of the new fibre.

After the Commencement Date, Telstra is generally not permitted to supply P2P services to 'demand aggregators' without NBN Co's consent.³⁸⁴ The parties have

³⁸⁴ "Demand Aggregator" is defined in the Definitive Agreements as "an entity that acquires or intends to acquire P2P Services from Telstra ... for use in conjunction with other equipment, for

advised that the intention of this provision is to ensure that Telstra won't be able to supply P2P services to a person who acquires those services for the purposes of aggregating demand from multiple sub-addresses at a single location which is residential in nature (such as apartment blocks), which would circumvent the intention of the network preference provision.

Passive Optical Network (PON) Fibre

For 20 years from the Commencement Date, Telstra must not own, operate or use PON infrastructure (other than the NBN) or install PON infrastructure for operation or use by Telstra as the fixed line connection to premises in the NBN Fibre Footprint for the provision of fixed line services other than:

- as required for Telstra's existing PON projects that are specifically listed in the Definitive Agreements;³⁸⁵
- as required for an optical fibre interim network to meet Telstra's USO obligations and its obligations under the Commonwealth's greenfields policy; or
- pursuant to a written contract between Telstra and NBN Co for the ownership, operation, use or installation by Telstra of fibre network components.

Telstra is also permitted to install new PON fibre networks in limited circumstances in the interim period before NBN Co has rolled out to an area to provide services within a business or government MDU or business park in that area, provided Telstra does so in accordance with the requirements of the Subscriber Agreement including giving NBN Co a right of first refusal to install the new PON fibre. Ownership of these PON fibre networks will be transferred to NBN Co once NBN Co has rolled out to the relevant region.

Telstra is restricted from disposing of its PON networks or granting a third party a right to operate its PON networks, or any part thereof, without NBN Co's prior written consent, subject to some limited exceptions. From the date which is 20 years after the Commencement Date, Telstra can dispose of PON networks that are outside of the set of premises that are passed by NBN Fibre as at the date which is 20 years after the Commencement Date, without requiring NBN Co's consent.

Generally, where, pursuant to these exceptions, Telstra is permitted to install, own, operate and/or use PON infrastructure (other than the NBN) as the fixed-line connection to premises in the NBN Fibre Footprint for the provision of fixed-line services, it is subject to the same disconnection obligations as apply to Telstra's copper and HFC networks.

the purposes of aggregating demand from multiple subaddresses at a single location which is predominantly residential in nature.”

³⁸⁵ This encompasses Telstra's Fibre-to-the-premises Velocity network which Telstra has established as the customer access network in a number of new housing estates around Australia. In its 2009 Submission to the DBCDE's Consultation paper: *National Broadband Network: Fibre-to-the-premises in Greenfield estates*, Telstra estimated that there are approximately 170,000 currently contracted for FTTP deployment and approximately 2,800 active services.

The PON restrictions do not apply to the PON network Telstra is building in the South Brisbane Exchange Area.

Acquisitions by Telstra

If Telstra acquires control over an entity that operates a fibre network and provides fixed-line carriage services over that network to premises within the NBN Fibre Footprint, Telstra must ensure that the entity ceases to provide those services within 12 months. Similar provisions apply in relation to any acquisition by Telstra of a reseller of non-NBN fixed-line services to premises within the NBN Fibre Footprint.

Restrictions on sale of copper and HFC networks

Telstra is restricted from selling its copper and HFC networks to third parties (other than for scrap or for use overseas if the acquirer is prohibited from using the networks for the provision of services in Australia) unless NBN Co agrees to the sale. Telstra is also restricted from granting rights to third parties to use the copper and HFC networks.

From the date which is 20 years after the Commencement Date, Telstra will be able to sell the parts of the copper and HFC networks that are located outside the set of premises that are passed by NBN Fibre Footprint as at the date which is 20 years after the Commencement Date without NBN Co's consent.

Telstra wireless services

Restrictions on marketing wireless services

The parties have agreed to amend the wireless promotion restriction so that it replicates the prohibitions on misleading and deceptive marketing practices in the Australian Consumer Law.

Other wireless provisions

Telstra is not entitled to any fee for disconnecting a premises if the following wireless substitution occurs:

- that premises has not connected to the NBN at any time up until the date which is six months after the Disconnection Date (defined above) for that Rollout Region; and
- as at the date which is six months after the Disconnection Date the Relevant Account Holder (i.e. the subscriber to the Telstra copper or HFC service at that premises) for that premises is party to an agreement, arrangement or understanding with Telstra or a Telstra reseller for the acquisition of a Telstra wireless service (which could be a voice only service and not a wireless data service).

Telstra can earn back the fee if the premises connects to the NBN on or before the date which is 3 years after the Disconnection Date for the applicable Rollout Region.

There are also anti-avoidance provisions which could extend the application of wireless substitution to other members of the Relevant Account Holder's household in certain circumstances.

Restrictions regarding Optus' HFC network

In reaching their agreement Telstra and NBN Co agreed that the Definitive Agreements would be conditional upon NBN Co entering into an agreement with Optus which provided for Optus' HFC network to be removed or rendered permanently inoperable progressively as the NBN is rolled out. That Optus Agreement has been entered into and the condition has therefore been satisfied.

There are also provisions within the Definitive Agreements that prohibit NBN Co from incorporating Optus' HFC network into the NBN.

Substantial Adverse Events

The Subscriber Agreement provides for a mechanism for variation of the Subscriber Agreement if a "substantial adverse event" (SAE) occurs in relation to either NBN Co or Telstra within 20 years from the Commencement Date. The party who is affected by the SAE may initiate the variation procedure. The variation procedure now also includes review by the ACCC pursuant to the related s 87B undertaking (see section 8.3 for further details).

Where an SAE will occur in relation to NBN Co

An SAE will occur in relation to NBN Co where Telstra engages in competition with NBN Co in the market for the provision of carriage services to premises which has the effect, or would be highly likely to have the effect, of substantially adversely affecting the business of NBN Co in operating its fibre network.

An SAE will not occur to the extent that the conduct engaged in by Telstra is a bona fide proportionate competitive activity in mobile markets—either to meet the competition in that market or to maintain proportionate competitive advantage.

Specific examples of an SAE in relation to NBN Co would include (but is not limited to):

- Telstra establishing a mobile network with picocell density that would supply services that are substitutable for comparable NBN services (other than for use in public places with high demand); or
- Telstra systematically using its rights under the Definitive Agreements to materially increase the quantity and extent of P2P fibre in rollout regions in advance of the NBN Rollout over and above the quantity and extent of P2P fibre that would be implemented by Telstra based on market trends and bona fide demand at the time.

Where an SAE will occur in relation to Telstra

An SAE will occur in relation to Telstra where NBN Co engages in competition with Telstra in:

- the market for the supply of retail carriage services to consumer, business or government in Australia; and
- the market for the supply of mobile carriage services,

with the effect, or which would be highly likely to have the effect, of substantially adversely affecting the business of Telstra in those markets.

An SAE will not occur in relation to Telstra to the extent that the conduct engaged in by NBN Co is the provision of:

- services that facilitate the supply of carriage services by NBN Co (other than prohibited routing or switching services) to persons whom NBN Co is permitted to supply under the NBN Companies Act (as at 23 June 2011);
- satellite or fixed wireless services to premises that are not in the NBN Fibre Footprint or which are in the Fibre Footprint but are not serviceable by the NBN Co Fibre network;
- facilities access to non-Telstra mobile base stations and facilities access to Telstra mobile base station where Telstra has consented to the provision of that facilities access;
- backhaul to mobile base stations or wireless base station devices; or
- the supply of permitted services (such as services between a location that is NBN connected and a point of interconnect).

Specific examples of an SAE in relation to Telstra will include (but is not limited to):

- NBN Co providing services on a non-wholesale basis by directly providing services to parties who are not persons to whom NBN Co is permitted to supply under the NBN Companies Act (as at 23 June 2011);
- NBN Co supplying a routing or switching service between two locations which are NBN connected (or one location and a public network such as the internet) (excluding certain permitted services such as routing or switching between a premises and a Point of Interconnect); or
- NBN Co supplying mobile services.

Consequences of an SAE

If an SAE has occurred and the affected party has initiated the relevant procedure, the parties are required to negotiate a variation to the Subscriber Agreement. Such variation could:

- modify or delete specified clauses of the Subscriber Agreement to an extent which is proportionate to the competitive activities that gave rise to the SAE;
- modify or delete any other provisions of the Subscriber Agreement in a way which puts the affected party in a position to more effectively compete with the other party, to an extent which is proportionate to the competitive activities that gave rise to the SAE; and/or
- impose restrictions on the party engaging in conduct in competition with the affected party to an extent which is proportionate to the competitive activities

that gave rise to the SAE and which, to the extent practicable, have the effect of putting each party in the same position in which it would have been had that SAE not occurred.

For example, if NBN Co decided to provide mobile services and that had or was likely to have a substantial adverse effect on Telstra in the agreed markets, then two possible outcomes could be that NBN Co could be restrained from providing those services, or that Telstra's restrictions on promoting wireless as a substitute for fibre could be relaxed to enable Telstra to more efficiently compete with NBN Co.

Infrastructure Services Agreement

The Infrastructure Services Agreement contains the terms on which Telstra will provide long term key access infrastructure and services required by NBN Co.

NBN Co acquisition of infrastructure/licences to use infrastructure

NBN Co will incrementally acquire ownership of Telstra's lead in conduits when NBN Co installs fibre into the lead in conduit to connect a premises to the NBN fibre network. Under this agreement, NBN Co will also acquire long term rights to access and use Telstra's infrastructure including ducts, rack spaces in Telstra's exchanges and dark fibre links.

Restrictions on NBN Co's ability to resupply Telstra's dark fibre

Telstra agrees to supply its dark fibre to NBN Co on the condition that NBN Co will not permit third party use without Telstra's consent, other than by way of carriage service supplied over the NBN.

Access Deed

The Access Deed documents the high-level commitments made by NBN Co to Telstra in respect of the proposed supply of NBN Co's BSO³⁸⁶ and the charging for certain wholesale supply services.

There is a restraint in relation to NBN Co's submissions to the ACCC regarding the price of its BSO (BSO Restraint). It provides that NBN Co must not make any submissions to the ACCC seeking a price for the supply of the BSO that is more than the BSO price (being \$24 per service, per month) for the period from 5 years from the Commencement Date.

³⁸⁶ NBN Co's Basic Service Offering essentially comprises an entry level broadband service (12 Mbps download/1 Mbps uplink) and a voice telephony service.

ATTACHMENT A5 – MATTERS TO WHICH THE ACCC IS TO HAVE REGARD

Introduction

In deciding whether to accept the SSU, the ACCC must have regard to a number of considerations which are set out at section 577A(6) of the Telco Act. In having regard to these matters, the ACCC must give weight and genuine consideration to each of them.

Section 577A(6) provides as follows:

In deciding whether to accept an undertaking under this section, the ACCC must have regard to:

- (a) the matters set out in an instrument in force under subsection (7); and
- (aa) the national interest in structural reform of the telecommunications industry; and
- (ab) the impact of that structural reform on:
 - (i) consumers; and
 - (ii) competition in telecommunications markets; and
- (b) such other matters (if any) as the ACCC considers relevant.

Section 577A(7) refers to the Ministerial Criteria Instrument, which sets out a number of additional matters to which the ACCC is to have regard.

The matters to which the ACCC “must have regard” can be broadly divided into the following categories:

- Substantive criteria, which the ACCC is required to analyse and consider in some depth. For example, the impact of the structural reform on consumers and competition in telecommunications markets.
- Specific criteria, where the ACCC is required to form a view as to whether the SSU has satisfied that matter. For example, many of the factors set out in the Ministerial Criteria Instrument relating to interim equivalence and transparency will either be satisfied by the measures in the SSU or not.
- Additional matters that form part of the contextual background within which the ACCC has made its decision. For instance, some of the matters relating to the NBN as set out in the Ministerial Criteria Instrument would fall into this category.

As a part of its assessment of the SSU, in respect of some particular criteria the ACCC has applied a ‘future with and without’ analysis. However, the ACCC’s decision on whether to accept the SSU is based upon an overall assessment, having regard to all of the specified mandatory statutory considerations.

1. The national interest in structural reform of the telecommunications industry

Section 577A(6)(aa) requires that the ACCC have regard to “the national interest in structural reform of the telecommunications industry”.

The term ‘national interest’ is generally understood to refer to a worthwhile objective as viewed from a nation’s perspective. Such objectives could fall within a broad spectrum. For instance, they could involve matters of national defence, economic prosperity or social cohesion.

In the context of structural reform of the telecommunications industry, the ACCC’s view is that the most appropriate interpretation of this term appears to be the achievement of economic objectives. This is because structural reform is concerned with enhancing the way economic activity can be better arranged—for example, what should be produced, how resources should be organised, the way income and wealth should be distributed—to maximise the economic welfare of the country.

Examples of economic objectives could be to improve economic efficiency and output, and increase national wealth.

The potential for structural reform to promote economic efficiency, and therefore the overall welfare of a nation, is well established. This was recognised in the Hilmer Report and subsequently by the then Industry Commission, which estimated the growth and revenue implications from that report and related structural reforms.³⁸⁷

In particular, the Hilmer Report noted that structural reforms may be the appropriate response to vertical integration in order to promote effective competition:

The introduction of effective competition into markets traditionally supplied by public monopolies will often require more than the removal of regulatory restrictions on competition. Where the incumbent firm has developed into an integrated monopoly during its period of protection from competition, structural reforms may be required to dismantle excessive market power and increase the contestability of the market.³⁸⁸

The concept of ‘sabotage’, as referred to in economic literature, occurs when an incumbent network-based provider uses its control over network facilities to engage in non-price discrimination to reduce the ability of new entrants to compete. Telstra’s undertaking provides principally for separating control of particular networks from its supply of downstream services and, until such time as that separation can be effected, provides certain safeguards against misuse of its ongoing market power arising from its control over those networks.

This is consistent with the Hilmer Report, which noted that there are alternatives for addressing concerns arising from vertical integration of natural monopoly elements and potentially competitive services. Broadly speaking, either the natural monopoly element should be separated from the potentially competitive elements, or regulatory

³⁸⁷ Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms: a Report by the Industry Commission to the Council of Australian Governments*, 1995.

³⁸⁸ Hilmer Report, p 215.

controls should be established to guard against misuse of control over access to the natural monopoly element by the integrated operator.³⁸⁹

2. The impact of structural reform on competition

Section 577A(6)(ab)(ii) provides that the ACCC is to have regard to “the impact of that structural reform on competition in telecommunications markets”.

For the purposes of its assessment, the ACCC is not required to precisely define the relevant telecommunications markets that may be affected by the structural reform to be implemented by the SSU. The ACCC has considered the affected markets in a broad sense, assessing any benefits or detriments that would arise in those markets from the impact of the structural reform proposed. Part of the ACCC’s analysis involves an assessment of the likely magnitude of those benefits and detriments by reference to the state of those markets ‘with and without’ the SSU.

The assessment of the relevant markets, and the potential impact that the SSU may have upon those markets is, by its very nature, open to contention. The ACCC has therefore based its consideration of the relevant markets on its current understanding of how these market structures are likely to evolve into the future.

The ACCC has undertaken a long term forward-looking assessment of the likely impact of structural reform upon these markets. In order to make this assessment, the ACCC has considered the likely impact that the SSU coming into force would have upon these markets.

Consideration of the impact upon competition includes having regard to the expected levels of both price and non-price competition. An important consideration to this assessment is whether or not the likely structure of the relevant market will give rise to one or more participants having the ability to exercise market power.

3. The impact of structural reform on consumers

Section 577A(6)(ab)(i) provides that the ACCC is to have regard to “the impact of that structural reform on consumers”.

The impact of this structural reform upon consumers is closely related to the likely impact on competition and efficiency in telecommunications markets.

The Hilmer Report recognised the direct link that effective competition and the resulting efficiency has on welfare, and its translated impact on consumers and society:

Economic efficiency plays a vital role in enhancing community welfare because it increases the productive base of the economy, providing higher returns to producers in aggregate, and higher real wages. Economic efficiency also helps ensure that consumers are offered, over time, new and better products and existing products at lower cost. Because it spurs innovation and invention, competition helps create new jobs and new industries...³⁹⁰

³⁸⁹ Hilmer Report, p 219.

³⁹⁰ Hilmer Report, p 4.

Increased economic efficiency also means that firms are better able to adjust to changes, including unforeseen changes. This makes the economy more resilient and robust, and better able to adjust to changes in global economic conditions.

The Government has stated that a key objective of its structural reform is “to promote an open, competitive telecommunications market to provide Australian consumers with access to innovative and affordable services”.³⁹¹

The ACCC may also have regard to other matters relating to the likely impact of the proposed structural reform upon consumers, such as broader social benefits or detriments arising from the SSU coming into force.

4. Matters set out in the Ministerial Criteria Instrument

Section 577A(6)(a) of the Telco Act provides that the ACCC is to have regard to matters set out in an instrument in force under section 577A(7) (the Ministerial Criteria Instrument).

In the following outline of these matters the ACCC has grouped together some items included in the Ministerial Criteria Instrument for ease of reference only.

(a) Government policy objective

The Minister has specified that the ACCC must have regard to:

[T]he Government’s policy objective of improving the accessibility and quality of broadband services for consumers in Australia, including those in regional, rural and remote areas.³⁹²

The Explanatory Statement to the Ministerial Criteria Instrument notes that the intent of the Government’s telecommunications policies is to “dramatically improve the availability of broadband across Australia by creating a national network that is not controlled by a retail company or companies.”³⁹³

(b) The Government’s support for a migration form of separation

The Minister has specified that the ACCC must have regard to:

[T]he Government’s support for a form of structural separation whereby Telstra will progressively migrate fixed-line carriage services that it supplies to retail customers to the national broadband network as that network is rolled out.³⁹⁴

The Explanatory Statement to the Ministerial Criteria Instrument also notes that the proposed method of structural separation (that is, migration of customers to the NBN in accordance with the Definitive Agreements) is supported by the Government as it delivers the Government’s structural reform objectives.³⁹⁵

³⁹¹ Explanatory Memorandum, CACS Bill, p 3.

³⁹² Ministerial Criteria Instrument, para 4(a).

³⁹³ Ministerial Criteria Instrument, Explanatory Statement, p 3.

³⁹⁴ Ministerial Criteria Instrument, para 4(b).

³⁹⁵ Ministerial Criteria Instrument, Explanatory Statement, p 4.

The ACCC considers that this criterion also requires consideration of the practical support that the Government is providing in order to give assurance that the migration will proceed.

(c) Expected distribution of the long-term economic benefits to consumers

The Minister has specified that the ACCC must have regard to:

[The] expected distribution of the long-term economic benefits for different types of consumers in different geographic areas that would occur as a result of the [SSU] coming into force.³⁹⁶

A key focus of this analysis is the likely effect of the SSU coming into operation on the range of competing product offerings likely to be available in particular market segments and the efficiency benefits that may be derived as a result.

(d) Conduct authorised under section 577BA

The Minister has specified that the ACCC must have regard to:

[T]he conduct that would be authorised under section 577BA of the Act as a consequence of the ACCC's acceptance of the undertaking or the undertaking coming into force.³⁹⁷

The Explanatory Memorandum to the CACS Bill states that the requirement that the parties provide the Definitive Agreements to the ACCC is intended to “allow the ACCC to scrutinise the agreements between Telstra and NBN Co before the ACCC decides whether to accept the undertaking.”³⁹⁸

The ACCC considers that the Ministerial Criteria Instrument makes it clear that the ACCC must have regard to the conduct that will receive the benefit of the legislative authorisation under section 577BA as a result of the decision to accept the SSU or the SSU coming into force, as outlined at section 4.4 of this paper.

Telstra and NBN Co have provided the ACCC with a copy of various agreements between NBN Co and Telstra. The operative provisions some of these agreements are subject to a condition precedent, namely, the coming into force of an undertaking under section 577A and copies of these agreements were provided to the ACCC in accordance with section 577BA(3). These are listed in Attachment A4

It is important to note that the ACCC will have no mechanism for reviewing or monitoring how the parties give effect to the Definitive Agreements. Furthermore, given the complexity of the Definitive Agreements, it is difficult for the ACCC to have a high degree of certainty regarding how particular provisions in the Definitive Agreements will be implemented by the parties over the term of the arrangements.

The ACCC has considered the impact of the Definitive Agreements as a whole, however, in some instances the ACCC has had regard to individual elements of the

³⁹⁶ Ministerial Criteria Instrument, para 4(c).

³⁹⁷ Ministerial Criteria Instrument, para 4(d).

³⁹⁸ Explanatory Memorandum, CACS Bill, p 100.

Definitive Agreements, where those elements are not directly relevant to the achievement of network consolidation. These individual elements have been discussed in section 8 of this paper.

The key types of conduct that the ACCC considers will be likely to receive the benefit of authorisation under section 577BA(3) of the Telco Act are set out in section 7, section 8 and Attachment A4.

(e) ACCC to be provided with all contracts, arrangements or understandings entered into by Telstra in order to comply with the SSU

The Ministerial Criteria Instrument requires the ACCC to have regard to whether the SSU provides for Telstra to give the ACCC “written copies of all contracts, arrangements or understandings entered into by Telstra in order for it to comply with the undertaking.”³⁹⁹ Telstra has met this requirement under clause 23.9 of SSU.

(f) Telstra’s governance framework

The Ministerial Criteria Instrument states that the ACCC is to have regard to whether the SSU requires Telstra to implement a governance framework that provides for certain measures, namely:

- appropriate oversight by Telstra of its compliance with the SSU;
- regular reporting by Telstra to the ACCC on Telstra’s compliance with the SSU;
- ACCC consultation with stakeholders about Telstra’s compliance with the SSU;
- ACCC disclosure of non-confidential information provided in Telstra’s compliance reports for the purpose of ACCC consultation; and
- measures that provide assurance to wholesale customers that Telstra is meeting its obligations under the SSU.⁴⁰⁰

The Explanatory Statement notes that some of these matters respond to concerns raised in the consultation process by industry. The ACCC’s consideration of the governance framework criteria as they relate to the interim equivalence and transparency measures (Part D of the SSU), and the primary commitment by Telstra to structurally separate, is set out in sections 9 and section 10 of the decision paper, respectively.

(g) Specific factors relating to transparency and equivalence

The Ministerial Criteria Instrument states that the ACCC is to have regard to a number of specific factors relating to interim transparency and equivalence.⁴⁰¹ The

³⁹⁹ Ministerial Criteria Instrument, para 4(e).

⁴⁰⁰ Ministerial Criteria Instrument, para 4(f).

⁴⁰¹ Ministerial Criteria Instrument, subparas 4(g)(i) to (vii), and para 4(h).

ACCC is required to have regard to whether the SSU meets these requirements. These specific factors would also inform an assessment of whether the SSU provides for transparency and equivalence in relation to Telstra's supply of regulated services in an appropriate and effective manner, as required by subsection 577A(3).

The interim transparency and equivalence measures form a discrete part of the ACCC's consideration of the SSU and the application of these criteria is further considered in section 9 and Attachment A6 of this decision paper.

(h) Matters relating to NBN

The Ministerial Criteria Instrument⁴⁰² states that the ACCC is to have regard to a number of matters relating to NBN. These include:

- the Government's SOE;
- NBN Co's Corporate Plan; and
- the governance and operating framework of NBN Co established by the NBN Companies Act and the NBN Access Act.

Combined, these documents provide the framework for how NBN Co will likely operate and have informed the ACCC's considerations regarding the likely structure of telecommunications markets following the rollout of the NBN. The key features of the regulatory framework that arises from these documents are set out in Attachment A3.

The ACCC has also had regard to the fact that both the Government and NBN Co have indicated that they will act in a manner which is consistent with these documents.

5. Other matters the ACCC considers relevant

Section 577A(6)(b) provides the ACCC discretion to have regard to "such other matters (if any) as the ACCC considers relevant". The ACCC's view is that the full suite of matters set out in subsection 577A(6) have been sufficient for the ACCC to consider whether or not to accept the SSU and to reach a final view.

⁴⁰² Ministerial Criteria Instrument, paras 4 (i)-(k).

ATTACHMENT A6 – EQUIVALENCE AND TRANSPARENCY MEASURES

Price Equivalence and Transparency Measures

1. Overview

Telstra's SSU contains essentially two commitments that are intended to provide equivalence and transparency over the price of Regulated Services.

The first commitment is that Telstra will publish a rate card with reference prices for the regulated services. Unless Telstra and a wholesale customer expressly agree another price, Telstra will supply the regulated service at the reference price.

For declared services, the reference prices on the rate card will be as per an access determination made by the ACCC under Part XIC of the CCA. Where new services are declared and an access determination made, or additional prices addressed in an access determination for an existing declared service, these will be 'pulled through' to the rate card.

Different rules apply for determining the prices to be specified on the rate card for the TEBA service, which is not the subject of an access determination.

A wholesale customer will be able to access the reference prices from the SSU commencement date for wholesale ADSL services, as well as for other Regulated Services unless the wholesale customer has agreed pricing under a current contract for that service. For any such services where there is agreed pricing, the wholesale customer will be able to access the reference prices upon terminating the relevant service schedule or access agreement.

The second commitment is that Telstra will develop a public reporting framework to report unit costs, prices and Telstra's financial performance on a segmented basis (Telstra's TEM Report). Telstra will include in its public report the external wholesale prices for relevant services, and the internal unit costs it faced in the relevant period for those services.

Telstra has publicly provided templates that it intends to use as the basis for its public TEM reporting and will update the TEM report should the ACCC declare a new service or specify new price terms for an existing declared service in an access determination.⁴⁰³

These reports will be drawn from the Telstra Economic Model, which is the main financial reporting and management tool that Telstra uses in managing its day to day

⁴⁰³ TEM public reporting templates, available at: <http://www.accc.gov.au/content/item.phtml?itemId=1022782&nodeId=9308e39d2c6b74bf168a84bf8b5d80a0&fn=Telstra's%20public%20reporting%20TEMplates.pdf>

business.⁴⁰⁴ Telstra will prepare and maintain a set of TEM Guidelines that records matters such as the cost allocation methodology employed.⁴⁰⁵

If there is a variation greater than 5 per cent between the reported internal and external wholesale prices for any bundle of wholesale services, then Telstra will provide a substantiation report to the ACCC explaining the variation.⁴⁰⁶

2. Submissions

Submissions in response to the August discussion paper expressed a number of concerns around the then proposed price equivalence measures. These concerns centred upon the manner in which the Reference prices were to be calculated in the absence of an applicable access determination.

These concerns related principally to wholesale ADSL services (which was not declared) and for WLR services (where the access determination was limited to specified geographic areas), although concerns were also expressed that all material charges might not be included in access determinations that addressed other Regulated Services.

A number of submissions to the August discussion paper sought greater clarity over the information to be included in the TEM reports, and criticised the absence of clear consequences for a divergence between internal units costs and external wholesale charges that these reports might disclose.

Submissions in response to the December discussion paper indicated that declaration of the wholesale ADSL service and making an access determination for that service, as well as making an access determination for the WLR service that covered metropolitan areas, would ameliorate the primary concerns that had been expressed around price equivalence for those services.⁴⁰⁷

However, a number of further concerns were expressed in those submissions, including:

- potential delays to a wholesale customer obtaining the Reference prices where it was 'on contract' for the Regulated Service
- potential for future determinations made by the ACCC in arbitrating current Part XIC access disputes to be nullified
- an absence of price equivalence measures for services that the Minister might in future determine should become Regulated Services.⁴⁰⁸

3. Assessment against statutory framework

⁴⁰⁴ SSU, clause 18.4(c).

⁴⁰⁵ SSU, Schedule 9, paras 5.1 and 5.2.

⁴⁰⁶ SSU, Schedule 9, para 4.4.

⁴⁰⁷ AAPT submission, January 2012, p 3; Herbert Geer submission, January 2012, p 3; Optus Submission, January 2012, p 7.

⁴⁰⁸ Herbert Geer submission, January 2012, p 3.

The ACCC considers that the price equivalence and transparency measures are appropriate and effective, and that these measures will provide sufficient transparency to enable the ACCC to provide assurance to stakeholders that the undertaking provides for equivalence in price terms and conditions,⁴⁰⁹ which is a matter to be considered under the Ministerial Criteria instrument.

Hence, the ACCC considers the inclusion of these measures supports the view that the SSU provides for equivalence and transparency in an appropriate and effective manner.

It is important to note that the price equivalence and transparency measures have been modified in light of the submissions made in response to the August and December 2011 discussion papers.

For instance, the scope of the Rate Card mechanism has been expanded, and it has been made clear that it will complement and not supersede ACCC access determinations. It has also been clarified that accepting the SSU will not nullify subsequent arbitral determinations that the ACCC makes in respect of TEBA.

Similarly, reporting templates that provide further details around the transparency measures to be implemented pursuant to the SSU have been published following concerns being raised regarding a lack of detail around them. These templates on their face appear suitable, and were not the subject of critical comment in the submissions in response to the December discussion paper.

Further, and importantly, the ACCC has since made access determinations for the wholesale ADSL service and the WLR service that covers metropolitan areas. These, combined with the 'pull through' mechanism for future access determinations, provide assurance that price equivalence is likely to be achieved over time.⁴¹⁰

The ACCC considers that the 'pull-through' mechanism also resolves the concern that was expressed around the lack of clear consequences for a material divergence that Telstra reports in external wholesale prices and internal unit costs. This is because the ACCC will be able to recalibrate external wholesale prices should this be appropriate by varying an access determination.

The ACCC notes that, notwithstanding some positive changes that Telstra has made, there could still be potential for some wholesale customers to be delayed in accessing all the Rate Card prices for Regulated Services (other than for the wholesale ADSL service). This would be the case for a wholesale customer that has current commercial pricing for the service, and will continue until that pricing expires.

That said, Telstra has advised that wholesale customers will be able to access the rate card prices in respect of around 85 per cent of Regulated Services (by revenue) from

⁴⁰⁹ Ministerial Criteria Instrument, subpara 4(g)(i).

⁴¹⁰ A FAD that specified WLR pricing for metropolitan areas was made in December 2011. The declaration of the wholesale ADSL service and an interim access determination for that service was made on 14 February 2012 following a public inquiry. The reasons for making those decisions are provided in the ACCC's reports which are available at www.accc.gov.au.

the date that the first rate card is published, with this proportion increasing as further wholesale customer service schedules expire and wholesale customers move to terminate their agreements.

Further, it is not clear that, should there be an uneven commencement of the Rate Card mechanism for particular wholesale customers and particular services, this would necessarily raise strong equivalence concerns.

This is because, for those Regulated Services that were the subject of ACCC pricing determination at the time the current service schedule was negotiated, it is likely that wholesale customers gained at least some commercial advantage when agreeing to that pricing, as would be consistent with the broader policy position that government has taken that commercial agreements can take precedence over regulated rates.

For wholesale ADSL services, for which there would not have been an access determination at the time of any existing commercial agreements being struck, the SSU will provide for wholesale customers to access the rate card prices prior to the expiry of their contracts. A wholesale customer will be able to make such an election within three months of the first Rate Card being published.

It is important to note that making such an election, a wholesale customer will be choosing between the net prices payable under the existing contract and the rates published on the Rate Card. Similarly, a wholesale customer that elects to access the Rate Card prices will be required to do so for all its wholesale ADSL services.

That is, Telstra has not undertaken to apply existing bespoke discount arrangements or specials that might exist under a contract to the Rate Card prices, or continue to supply any (more basic) ADSL services at below the Rate Card prices should this election be made. This limitation is appropriate, as otherwise the achievement of price equivalence would be delayed until such time as those special arrangements (which vary between wholesale customers) were unwound contractually.

The ACCC notes the concern around coverage of services that subsequently become Regulated without being declared, however considers that this is unlikely to eventuate.

Non-price equivalence and transparency measures

1. Overview

The SSU contains a range of specific non-price equivalence and transparency measures, including commitments in respect of operational quality, technical quality, systems support and information in relation to Regulated Services. These commitments are supported by Telstra's overarching equivalence commitment.

Operational quality

Operational quality refers to the time taken to activate/provision or rectify a fault for a Regulated Service. The SSU includes a number of specific commitments in this regard, including:

- system and process commitments;⁴¹¹
- equivalence and transparency metrics which establish service levels against which Telstra's performance is to be measured;⁴¹² and
- reporting commitments.⁴¹³

Telstra undertakes to establish order management systems and other systems/processes relating to the activation/provision of orders and fault rectification for Regulated Services. These will be equivalent for tickets of work, basic telephone services (BTS) and Wholesale ADSL.⁴¹⁴ For the Line Sharing Service (LSS), Unconditioned Local Loop Service (ULLS) and DTCS, the systems/processes will be built to meet the equivalence and transparency metrics for the relevant service levels required under Schedule 3.⁴¹⁵

The metrics establish service levels (i.e. minimum timeframes) for the activation/provision and fault detection/handling/rectification of Regulated Services as well as the availability of wholesale customer interfaces including LinxOnline Ordering web services (LOLO). The metrics also form the basis for:

- any investigation by Telstra of non-compliant results and proposed steps to rectify the non-compliance ('fixes'); and
- the provision of rebates (together, the 'fix and pay mechanisms').

The fix and pay mechanisms apply when Telstra's metric reporting demonstrates a Reporting Variance which is defined as either:

- a variance of negative 2 per cent or more between performance provided to wholesale customers and Telstra's retail business units in respect of BTS, wholesale ADSL metrics and DTCS; or,
- a variance of negative 2 per cent or more from the minimum percentage performance threshold in respect of LSS, ULLS, TEBA, and LOLO availability.⁴¹⁶

Telstra's metric reporting and, consequently, the fix and pay mechanisms, are subject to certain exclusions.⁴¹⁷ Where an exclusion applies to a ticket of work, that ticket of work will not be counted for the purpose of metric reporting and rebates will not be payable.⁴¹⁸

⁴¹¹ SSU, clause 11 and clause 13.

⁴¹² SSU, Schedule 3 and clause 16.

⁴¹³ SSU, clause 16.

⁴¹⁴ SSU, clauses 11.1, 11.2 and 11.3 respectively.

⁴¹⁵ SSU, clauses 11.4 and 11.5.

⁴¹⁶ SSU, Schedule 1, Definition of Reporting Variance.

⁴¹⁷ SSU, Schedule 3, para 10.

⁴¹⁸ SSU, Schedule 3, para 10 and SSU, Schedule 7, para 4.

Telstra also commits to provide quarterly operational equivalence reports to the ACCC and ITA which will include average performance results for relevant metrics.⁴¹⁹ Further Telstra commits to measure and compare its retail and wholesale performance and report to the ACCC on Common Retail/Wholesale Job Tasks within 6 months from Commencement.⁴²⁰

Equivalence in quality of systems support

Quality of systems support refers to the support provided to an access seeker to interact with the access provider's operational support systems – for example, to place customer orders or diagnose faults.

Telstra commits to ensuring that LOLO and a business to business interface (Wholesale B2B interface) will be fit for the purpose of performing a specified set of functions.⁴²¹ These systems are to have a high degree of reliability and Telstra has provided a LOLO-specific metric which measures the system's availability against the specified service level (at least 98 per cent uptime).⁴²²

Telstra also undertakes that the standard of reliability and response accuracy for service qualification systems for Copper Services provided to wholesale customers (except ULLS) will be equivalent to those provided to Telstra retail business units.⁴²³

Technical quality

Technical quality refers to the functionality of Regulated Services.

The specific commitments in the SSU relating to technical quality in the provision of wholesale ADSL have been superseded by the ACCC's declaration of wholesale ADSL and will therefore not take effect.⁴²⁴

Pursuant to the overarching equivalence commitment, Telstra undertakes that the supply of Regulated Services to wholesale customers will be equivalent in respect of technical quality.⁴²⁵

Information equivalence

Information equivalence is intended to ameliorate any unfair advantage that Telstra Retail may gain as a result of its access to information about Telstra's network or operations that may not otherwise be available to wholesale customers.

To this end, Telstra commits to establishing and maintaining wholesale customer engagement arrangements. For each wholesale customer, Telstra will appoint a manager or customer team that is appropriately resourced to deal with and respond in

⁴¹⁹ SSU, clause 16.2(a) – (g).

⁴²⁰ SSU, clause 16.5.

⁴²¹ SSU, clauses 13.1 and 13.2.

⁴²² SSU, Schedule 3, para 9.

⁴²³ SSU, clause 13.5.

⁴²⁴ SSU, clause 15(e).

⁴²⁵ SSU, clause 9(a)(i).

a “timely and effective” manner on matters likely to affect the delivery or operational quality of Regulated Services.⁴²⁶ Telstra commits to use monthly customer reviews to update wholesale customers of relevant network, system, or product upgrades or developments through monthly customer reviews.⁴²⁷ In addition, Telstra undertakes to provide Copper Network Notifications and notice of major network modernisation or upgrades.⁴²⁸ This commitment includes notifications on planned events in relation to:

- planned maintenance or repair work;
- availability of ADSL capability;
- exchange service area information;
- major network incident notifications;
- other general service or provisioning matters impacting operational support systems (OSS announcements);
- disaster recovery plan (DISPLAN) information; and
- major network modernisation and upgrades (at least 30 weeks notice).

2. Submissions

Operational quality

Optus notes that Telstra’s system/process commitments do not require that Telstra change its current systems which Optus submits do not provide for EOO.⁴²⁹ Optus states that an independent audit is required to ascertain the ‘gap’ in delivering equivalent outcomes arising from Telstra’s systems, as well as a commitment from Telstra to close the gap.⁴³⁰

Optus and Herbert Geer submit that the metrics do not demonstrate equivalence.⁴³¹ Optus suggests that they should facilitate an assessment of performance based on actual performance rather than whether the minimum service level has been met.⁴³² In particular, the LSS, ULLS and TEBA metrics, which are based on an absolute minimum service level rather than a comparison with performance provided to Telstra retail business units, should be comparative.⁴³³

Further, Optus raises concerns around the inadequate scope of the ULLS metrics (which do not include enhanced service assurance terms), the TEBA metrics and the wholesale system metrics and submits that certain ULLS and DTCS service levels are

⁴²⁶ SSU, clause 14.2(a).

⁴²⁷ SSU, clause 14.2(c).

⁴²⁸ SSU, Schedule 4.

⁴²⁹ Optus submission, September 2011, p 27.

⁴³⁰ Optus submission, September 2011, p 28.

⁴³¹ Optus submission, January 2012, p 8; Herbert Geer submission, January 2012, p 19.

⁴³² Optus submission, September 2011, p 28.

⁴³³ Opus submission, January 2012, p 8.

not sufficiently high.⁴³⁴ Herbert Geer consider that Telstra's commitment to identify Common Retail/Wholesale Job Tasks does not go far enough.⁴³⁵

Both the CCC and Optus submit that the exclusion of all NBN activities from the metrics is inappropriate.⁴³⁶

Herbert Geer⁴³⁷ and Macquarie Telecom⁴³⁸ submit that the ACCC should be given an express power to vary or add to the list of Comparable Retail Services and/or metrics to better reflect equivalence.

Submissions state that the rebate scheme is ineffective in countering the incentives of Telstra to engage in sabotage behaviour. In this regard, the CCC submits that the rebate scheme should compensate wholesale customers and incentivise Telstra.⁴³⁹ Optus submits that the rebate scheme fails to do so.⁴⁴⁰ Herbert Geer,⁴⁴¹ the CCC⁴⁴² and Macquarie Telecom⁴⁴³ also submit that the rebate payments are too low. The CCC contends that the rebates should scale with the severity of the breach.⁴⁴⁴

Optus⁴⁴⁵ and the CCC⁴⁴⁶ object to the rebate scheme being the sole means to incentivise Telstra to provide equivalence in operational quality and consider that there should be a focus on fixing the cause of non-equivalence. The CCC submits that the rebates should operate in addition to contractual liquidated damages.⁴⁴⁷ Optus also objects to participation via entry into an agreement.⁴⁴⁸

Technical equivalence

TPG raises concerns around the Megalink 2Mbit/s service being the Comparable Retail Service for DTCS and notes that wholesale customers would normally require DTCS with significantly greater bandwidths than 2Mbit/s and using Ethernet as the underlying technology.⁴⁴⁹

Quality of systems support

Optus submits that the metric reporting regarding wholesale systems is inadequate as Telstra only commits to reporting on the availability of LOLO and is not obliged to

⁴³⁴ Optus submission, January 2012, p 9.

⁴³⁵ Herbert Geer submission, January 2012, p 19.

⁴³⁶ CCC submission, September 2011, p 16; Optus submission, January 2012, p 8.

⁴³⁷ Herbert Geer submission, January 2012, p 20.

⁴³⁸ Macquarie Telecom submission, January 2012, p 4.

⁴³⁹ CCC supplementary submission, October 2011, p 3-4.

⁴⁴⁰ Optus submission, September 2011, p 31.

⁴⁴¹ Herbert Geer submission, September 2011, p 20.

⁴⁴² CCC submission, September, p 15; CCC supplementary submission, October 2011 p 6.

⁴⁴³ Macquarie Telecom submission, September 2011, p 4; Macquarie Telecom submission, January 2012, p 3.

⁴⁴⁴ CCC submission, September 2011, p 15; CCC supplementary submission, October 2011, p 6.

⁴⁴⁵ Optus submission, September 2011, p 32.

⁴⁴⁶ CCC submission, September 2011, p 15; CCC supplementary submission, October 2011, p 6.

⁴⁴⁷ CCC supplementary submission, October 2011, p 5.

⁴⁴⁸ Optus submission, September 2011, p 31.

⁴⁴⁹ TPG submission, January 2012, p 2.

report on the availability of other wholesale systems. Optus further submits that as the measures which relate to service qualification do not apply to ULLS, the SSU does not provide for equivalence as it relates to ULLS service qualification. Optus also submits that the metrics should apply to measure service qualification.⁴⁵⁰

Information equivalence

Optus raised concerns around the information equivalence obligations not being sufficient to ensure equivalence between Telstra's retail business units and wholesale customer.⁴⁵¹ Herbert Geer submit that the information equivalence provisions are not fit for purpose. In particular, Herbert Geer cite Telstra's failure to address previous ACCC concerns as to the potential for greater clarity as to the quality and timeliness of information provided to Telstra's retail business unit notifications as evidence of this contention.⁴⁵²

3. Assessment against statutory framework

Ministerial Criteria Instrument

The ACCC must have regard to whether the SSU provides for measures that ensure systems used for wholesale customers in relation to billing information, ordering, provisioning, and fault reporting/rectification provide equivalent outcomes and functionality to the systems used by Telstra's retail business units.⁴⁵³

The SSU contains a number of commitments relevant to this assessment, including: Telstra's overarching commitment to provide an equivalence of outcomes in relation to systems, procedures and processes used for the supply of Regulated Services;⁴⁵⁴ the specific commitments relating to systems/processes contained in clause 11 of the SSU; and the metric reporting and related fix and pay mechanisms. These measures are discussed in detail under the appropriate and effective assessment below.

The ACCC must also have regard to whether the SSU provides for measurable standards for the equivalent supply of Regulated Services and enforcement of those standards, including through service level guarantee payments.⁴⁵⁵ The ACCC considers that the SSU provides for this through the service levels prescribed in the metrics. Where a Reporting Variance is identified, Telstra must make automatic service level guarantee payments to wholesale customers pursuant to the rebate scheme.

Telstra has responded to previous ACCC concerns around limits on court enforceability of Telstra's non-price equivalence commitments. The ACCC can directly enforce Telstra's service quality and operational equivalence commitments other than where non-compliance is trivial or in response to complaints which are frivolous or vexatious. The ACCC considers that the ordinary legal meaning of the

⁴⁵⁰ Optus submission, January 2012, p 9.

⁴⁵¹ Optus submission, September 2011, p 32 to 34.

⁴⁵² Herbert Geer submission, January 2012, p 20.

⁴⁵³ Ministerial Criteria Instrument, subpara 4(g)(vii).

⁴⁵⁴ SSU, clause 9(a)(ii).

⁴⁵⁵ Ministerial Criteria Instrument, subpara 4(g)(iii).

word ‘trivial’ is well understood and that this threshold will not unduly restrict the ACCC’s ability to enforce compliance with the commitments.

In addition, Telstra has clarified that in determining whether a particular equivalence issue is trivial for the purposes of assessing non-compliance with its service quality and operation equivalence commitments, the acceptance of an equivalence complaint by the ITA and enforcement of the overarching equivalence commitment – the extent to which the matter involves or is reflected in a Reporting Variance may be taken into account, but is not determinative of whether the matter is trivial.⁴⁵⁶ The ACCC considers that this addresses Herbert Geer’s concern that the definition of trivial could undermine the enforcement and dispute resolution mechanisms in the SSU.⁴⁵⁷

The ACCC must have regard to whether the SSU provides for equivalent notification to Telstra’s wholesale customers and Telstra’s retail business units of matters relating to Telstra’s networks which affect the delivery or operational quality of Regulated Services.⁴⁵⁸ In this regard, the ACCC notes that the specific network notification periods in the SSU are generally not tied to an equivalence-based standard. However, Telstra undertakes to provide equivalent information about the technical and operational quality of relevant Regulated Services pursuant to its overarching equivalence commitment.⁴⁵⁹ On this basis, the ACCC considers that the SSU meets the Ministerial Criteria Instrument requirements.

Appropriate and effective

The ACCC has assessed the non-price equivalence and transparency measures in terms of whether they can be expected to provide equivalence of outcomes during the interim period. Based on such assessment, the ACCC considers that Telstra’s specific non price commitments, in combination with the overarching equivalence commitment and dispute resolution mechanisms, militate in favour of the view that the SSU provides for non-price equivalence and transparency in an appropriate and effective manner.

Operational quality

The ACCC considers that the commitments in the SSU relating to Telstra’s underlying systems and processes for Regulated Services are an important component in providing operational equivalence of outcomes during the interim period. For example, Telstra undertakes that wholesale ADSL service activation orders will occur in an equivalent manner regardless of whether the order is received from a wholesale customer or Telstra.⁴⁶⁰ Similar commitments apply for tickets of work and BTS activation/provision and fault rectification.⁴⁶¹ These commitments are court enforceable.

⁴⁵⁶ SSU, Schedule 3, para 1(c).

⁴⁵⁷ Herbert Geer submission, January 2012, p 25.

⁴⁵⁸ Ministerial Criteria Instrument, subpara 4(g)(v).

⁴⁵⁹ SSU, clause 9(a)(iii).

⁴⁶⁰ SSU, clause 11.3(a).

⁴⁶¹ SSU, clauses 11.1 and 11.2.

The ACCC notes that the SSU does not require Telstra to establish equivalent systems and processes for LSS, ULLS and TEBA, rather it obliges Telstra to provide order management systems and other measures that enable Telstra to meet the metrics.

The metrics for LSS, ULLS and TEBA refer to an absolute level of performance rather than comparing performance against that provided to Telstra retail business units. While Optus and Herbert Geer identified this as a concern, the ACCC considers that the relevant service levels appear to provide for an appropriately high level of performance. Further, should these service levels not reflect equivalence, any disparity is likely to become apparent through the requirement for Telstra to measure and compare its retail and wholesale performance and report to the ACCC on Common Retail/Wholesale Job Tasks.⁴⁶² Telstra can then propose changes to the existing metrics, with any variations being subject to ACCC approval.

The metrics require reporting on whether a service level has been met rather than requiring Telstra to report on the actual time taken to perform fault rectification for wholesale customers and Telstra retail business units. In this regard, Optus submits that the metrics do not measure equivalence. Optus also submits that Telstra's commitment to report the average cycle time for each Regulated Service and its Comparable Retail Service (Average Performance Result) will disguise non-equivalence due to the averaging. However, Telstra must provide the full data set used to calculate Average Performance Result, where requested by the ACCC.⁴⁶³ Should these results reveal an equivalence issue, the ACCC can investigate the conduct under the overarching equivalence commitment.

Although several respondents raised concerns around the service levels for ULLS, the ACCC considers that the service level for the ULLS metric (3 days for Bands 1 and 2 where there is an intact metallic path) is appropriate and represents a significant improvement on the timeframes specified in the ULLS Industry Code.⁴⁶⁴

Telstra has responded to submissions around the lack of an express power for the ACCC to require Telstra to revise the service levels in the metrics, by committing to vary the SSU to ensure that the metrics remain consistent with any ACMA or Ministerial change to retail Customer Service Guarantee (CSG) standards.⁴⁶⁵ Further, should it become evident that the service levels are not providing equivalence, the underlying equivalence issue can be directly addressed via the ITA scheme or under the overarching equivalence commitment.

Submissions also suggest that the effectiveness of the metrics is undermined by the broad exclusions in the SSU. The ACCC notes that most of the exclusions, such as that relating to mass outage events, are well understood from the OSP context. In relation to the NBN exclusion, the ACCC notes Telstra has restricted the effect of the exclusion through a causal link to NBN-related activities in any Rollout Region or

⁴⁶² SSU, clause 16.5.

⁴⁶³ SSU, clause 16.2(g).

⁴⁶⁴ Unconditional Local Loop Service Ordering Provisioning and Customer Transfer Code (CS69:2005).

⁴⁶⁵ SSU, clause 16.1(f).

migration of a copper line.⁴⁶⁶ The exclusion now only applies to metrics which are compared against an absolute level of performance.⁴⁶⁷

The ACCC considers that the transparency commitment in clause 16 of the SSU will enable the ACCC to identify instances where the exclusions have been misapplied or are potentially undermining the effectiveness of the metrics.

In relation to industry concern around the service level rebates, the ACCC notes that the rebate scheme is not the sole measure for enforcement of Telstra's service quality and operational equivalence commitments. As these commitments are both directly enforceable by the ACCC and supported by the overarching equivalence commitment, Telstra will be incentivised to provide equivalence given its exposure to potential court orders for compensation and, in some circumstances, pecuniary penalties for non-compliance with the SSU.

The SSU also contains a number of mechanisms to rectify operational equivalence issues. In the first instance, where the metrics reveal a Reporting Variance, if Telstra determines that there has been non-compliance, it will set out steps to further investigate and/or rectify the non-compliance.⁴⁶⁸ Wholesale customers have recourse to the ITA which can issue binding directions on Telstra to comply with its systems and process commitments, and can require Telstra to modify its systems or processes in order to resolve an equivalence issue. In addition, the SSU includes detailed rectification mechanisms in respect of possible breaches of the overarching equivalence commitment.

Technical quality

The overarching equivalence commitment obliges Telstra to provide Regulated Services of an equivalent technical quality to the relevant Equivalent Service.⁴⁶⁹ The ACCC considers that the list of Equivalent Services in Attachment B of the SSU represent an appropriate comparator for the technical functionality of essential wholesale inputs and an effective basis against which to measure Telstra's performance in delivering technical equivalence.

Quality of systems support

The quality of systems support available to wholesale customers will also be important to ensuring wholesale customers are delivered operational equivalence in the interim period. In this regard, the ACCC understands that Telstra's commitment to meet the service level of 98 per cent availability for LOLO is comparable to that provided to Telstra Retail. The ACCC considers that the metric reporting and fix and pay mechanisms will incentivise Telstra to comply with this commitment.

In relation to the concern raised by Optus regarding lack of reporting for wholesale customer facing systems other than LOLO, the ACCC notes that any non-equivalence issues that stem from those systems could be the subject of the ITA process.

⁴⁶⁶ SSU, Schedule 3, para 10(a).

⁴⁶⁷ ULLS, LSS, TEBA and LOLO availability under Schedule 3 of the SSU.

⁴⁶⁸ SSU, clause 16.3(a).

⁴⁶⁹ SSU, clause 9(a)(i).

The ACCC considers that Telstra’s commitment to provide for equivalent system reliability and response accuracy provides for an equivalence of outcomes in respect of service qualification. Further, for new service qualification systems, Telstra commits to use the same systems, which is akin to an equivalence of input standard. The exception is for ULLS for which the ACCC understands Telstra has effectively codified “current practice”⁴⁷⁰ by undertaking to permit wholesale customers to use ULLCIS and the LSS service qualification tools.⁴⁷¹ Should an equivalence issue arise in relation to ULLS service qualification functionality, this could be remedied through the ITA process.

Although the metrics do not apply to service qualification, the SSU provides for improved transparency through Telstra’s commitment to publish the processes and systems used for service qualification for each Regulated Service and its Comparable Retail Service.⁴⁷²

Information equivalence

The ACCC considers that Telstra’s commitments regarding wholesale customer engagement have the potential to increase the timeliness and quality of information available to wholesale customers.⁴⁷³

Telstra’s improvements to the notification commitments are also likely to provide greater assurance as to information equivalence.⁴⁷⁴ For example, in relation to the Major Network Incident Notifications commitment, Telstra undertakes that a suitably senior and qualified representative of the wholesale business unit will participate in any crisis management team as a means to ensure that wholesale customers will receive information in a manner consistent with Telstra retail customers.

The ACCC’s previous concern around the need to clarify how the proposed network notifications in Schedule 4 compare to the information and notice periods available to Telstra’s retail business units has been mitigated through Telstra’s inclusion of information equivalence within the scope of the overarching equivalence commitment.⁴⁷⁵

Equivalence in relation to the Telstra Exchange Building Access Service (TEBA)

1. Overview

Telstra’s ownership and control of exchange buildings and its terms and conditions of access to facilities within exchange buildings directly affects the ability of wholesale customers to compete.

⁴⁷⁰ Telstra supporting submission, December 2011, p 13.

⁴⁷¹ SSU, clause 13.5(b).

⁴⁷² SSU, clause 11.8.

⁴⁷³ August discussion paper, p 107.

⁴⁷⁴ SSU, Schedule 4, para 7.

⁴⁷⁵ SSU, clause 9(a)(iii).

Pursuant to the Regulated Services Determination, the SSU must provide appropriate and effective equivalence and transparency measures during the interim period in relation to TEBA, which is defined as the use of an exchange building to facilitate the supply of an active declared service by Telstra or for the purpose of enabling interconnection of facilities operated by access seekers to enable the supply of such a service.⁴⁷⁶

The SSU includes the following specific TEBA commitments. These are supported by Telstra’s overarching equivalence commitment.

Queue Management

Telstra undertakes to process internal and external applications for TEBA and External Interconnect Facilities in an “equivalent manner” via a single queue on a “first in, first served” basis.⁴⁷⁷

In addition, Telstra commits to detailed queue management principles to apply in circumstance where common construction works are required to make space at an exchange.⁴⁷⁸ Any application for augmentation or expansion of an exchange will be subject to sufficient work being undertaken to satisfy other queued applications that are dependent on the completion of that work.⁴⁷⁹ Once approved, later applications that are dependent on those works or are not otherwise safe to implement may be placed on hold.⁴⁸⁰ Telstra must notify any wholesale customer affected by such a decision as well as inform them of the timeframe for completion.⁴⁸¹ Telstra must also notify all wholesale customers in the queue once work is completed or where completed by a wholesale customer, after a Joint Completion Inspection has been undertaken.⁴⁸²

Reservation of capacity by wholesale customers

The SSU makes provision for wholesale customers to reserve exchange space for their future anticipated requirements for up to 36 months.⁴⁸³ This is equivalent to the length of time for Telstra exchange space reservations.⁴⁸⁴ Applications to reserve exchange space will be processed in accordance with ordinary TEBA processes, including the queue management principles.⁴⁸⁵ This will involve undertaking a Preliminary Study to determine whether sufficient floor space is available. If there is, it will be reserved accordingly, though activities such as “power or air conditioning viability audits” will not be undertaken until the space is to be used.⁴⁸⁶

⁴⁷⁶ Regulated Services Determination, subsection 5(2).

⁴⁷⁷ SSU, Schedule 13, subpara 1(b)(i).

⁴⁷⁸ SSU, Schedule 13, subpara 2(a).

⁴⁷⁹ SSU, Schedule 13, subpara 2(b), referred to as “Dependent Applications”.

⁴⁸⁰ SSU, Schedule 13, subpara 2(d).

⁴⁸¹ SSU, Schedule 13, subpara 2(f).

⁴⁸² SSU, Schedule 13, subpara 2(h).

⁴⁸³ SSU, Schedule 12, subpara (d)(iii).

⁴⁸⁴ SSU, clause 12.1.

⁴⁸⁵ SSU, Schedule 12, subpara (a).

⁴⁸⁶ SSU, Schedule 12, subpara (d).

Exchange capping

Telstra commits not to reject an application for access to an exchange building on the basis of lack of exchange capacity unless Telstra has undertaken an onsite audit of the exchange within the previous 30 days.⁴⁸⁷ Further, any decision to cap an exchange or reject an application on the basis that an exchange is capped must be approved by the TEBA Governance Committee.⁴⁸⁸

2. Submissions

Submissions in relation to the July SSU expressed concerns that only Telstra was permitted to reserve exchange capacity or access to external interconnection facilities.⁴⁸⁹ In this regard, Optus and the CCC submitted that Telstra's queue management commitments were undermined by the allowance made for Telstra to reserve capacity for 36 months.⁴⁹⁰ Macquarie Telecom stated that the arrangements allowed for Telstra to maintain privileged access to exchange capacity and interconnect facilities.⁴⁹¹

In regards to queue management, Optus stated that it was not possible to assess whether the commitments delivered equivalence as Telstra had not committed to establish a common ordering process.⁴⁹² Other submissions emphasised the need for "genuine equivalence" in order to mitigate legacy concerns over Telstra's control of exchanges.⁴⁹³ Herbert Geer pointed to Telstra's past practice, particularly in relation to exchange capping, to suggest that Telstra would continue to use its control of exchange facilities to impede competition.⁴⁹⁴ Optus suggested that the TEBA governance arrangements were ineffective and should expressly provide for independent oversight.⁴⁹⁵

In response to the December discussion paper, Herbert Geer sought clarity over whether the overarching equivalence commitment applies to TEBA.⁴⁹⁶ The CCC stated that the requirement that access seekers pay for reserved TEBA space can only be considered equivalent if the costs are based on the TEM.⁴⁹⁷ Optus submitted that the TEBA metric should be expanded to reflect steps other than the timeframes for the joint completion inspection process.⁴⁹⁸

3. Assessment against statutory framework

⁴⁸⁷ SSU, clause 12.3(a).

⁴⁸⁸ SSU, clause 12.3(b).

⁴⁸⁹ Optus submission, September 2011, p.35; CCC submission, August 2011, p 3.

⁴⁹⁰ Optus submission, September 2011, p.34; CCC submission, August 2011, p 3.

⁴⁹¹ Macquarie Telecom submission, September 2011, p 4.

⁴⁹² Optus submission, September 2011, p 35.

⁴⁹³ AAPT submission, September 2011, p 4.

⁴⁹⁴ Herbert Geer submission, September 2011, p 20.

⁴⁹⁵ Optus submission, September 2011, p 34.

⁴⁹⁶ Herbert Geer submission, January 2012, p 13.

⁴⁹⁷ CCC submission, January 2012, p 2.

⁴⁹⁸ Optus submission, January 2012, p 9.

The ACCC considers that Telstra's TEBA commitments, which are now supported by the overarching equivalence commitment, provide for equivalence and transparency in an appropriate and effective manner.

While a number of the TEBA commitments broadly reflect Telstra's existing TEBA processes and procedures, the codification of these arrangements in the SSU will ensure Telstra's compliance with the measures.

For example, Telstra's commitment to process all internal and external applications on a "first in, first served" basis via a single queue serves to establish a clear benchmark against which Telstra's delivery of TEBA can be readily measured. Further assurance is provided by way of Telstra's commitment to keep wholesale customers informed of delays occasioned by applications being placed on hold as a result of common construction works and associated extensions of time. The ACCC considers that this is likely to promote competition by allowing access seekers to plan their operations more effectively. It may also prompt access seekers to identify any causes of delay and refer the issue to Telstra, the ITA or the ACCC for resolution.

Telstra has also responded to submissions through undertaking to implement meaningful improvements to TEBA arrangements which the ACCC considers will promote equivalence of outcomes. For example, the SSU now addresses concerns around Telstra's ability to access reserved capacity on an as needs basis and bypass any queue processes where it has reserved exchange capacity through a provision for wholesale customers to reserve a TEBA allocation to meet their reasonably anticipated future requirements.⁴⁹⁹ This will promote equivalence and efficiency by enabling access seekers to undertake their own network planning. Concerns as to the potential for this mechanism to be gamed by access seekers are mitigated by the requirement that wholesale customers pay for the period of any reservation.

While the ACCC notes that Telstra has not committed to establish a common ordering process, imposing an EOI standard would necessitate the replacement by Telstra of legacy systems with a single order processing system and involve substantial cost. The ACCC considers that the specific TEBA commitments in the SSU will promote equivalence of outcomes. Further, should the arrangements not prove to be fit for purpose over time then this is something that could be the subject of an investigation by the ITA or addressed under the overarching equivalence commitment.⁵⁰⁰

Wholesale customers and the ACCC have previously had concerns over the transparency of Telstra's decision-making with respect to TEBA arrangement and, in particular, Telstra's decisions to cap exchanges. In this regard, the ACCC considers that the SSU will provide for increased transparency around TEBA arrangements.

For example, Telstra undertakes to maintain a TEBA Governance Committee which will be responsible for overseeing Telstra's compliance with Telstra's TEBA commitments, responding to information requests from the ACCC and for approving decisions to cap exchanges.⁵⁰¹ Telstra has also committed to provide the ACCC with

⁴⁹⁹ SSU, clause 12.6 and Schedule 12.

⁵⁰⁰ December discussion paper, p 19.

⁵⁰¹ SSU, clause 12.5(a), (b) and (c) respectively.

details of floor space that Telstra has reserved at capped exchanges, potentially capped exchanges and any exchange building which is an NBN POI⁵⁰² and will provide updates on reservations 10 business days after any change.⁵⁰³ The ACCC considers that these arrangements facilitate appropriate independent oversight of Telstra's compliance with its interim TEBA commitments.

Organisational measures

1. Overview

The primary objective of the organisational measures is to promote interim equivalence and transparency through addressing Telstra's ability and underlying incentives to favour its own retail business to the disadvantage of wholesale customers. Effective organisational arrangements within Telstra should better align Telstra's incentives to deliver price and non-price equivalence by ensuring that Telstra has limited incentives to discriminate in favour of its retail business.

Clause 8 of the SSU requires Telstra to maintain one or more separate wholesale, retail and network services business units and includes a number of commitments around how these separated business units deal with each other. In addition, it contains measures intended to realign Telstra employee incentives with the objectives and performance of their respective business units.

2. Submissions

A number of submissions received by the ACCC state that the SSU should provide stronger ring-fencing arrangements.

Optus submits that Telstra's wholesale business units and network services business units should operate independently and should be physically separated. Optus also submits that there should be internal contracts between the Separated business units.

The CCC submits that the network services business unit should be better separated.⁵⁰⁴ Optus submits that the network services business units should treat Telstra's wholesale business units and the retail business units equivalently.⁵⁰⁵ Herbert Geer express the view that wholesale customers should be able to deal with the network services business units directly on a fee for service basis, rather than via the wholesale business units.⁵⁰⁶

Optus and VHA submit that management decisions for the business units should be made by their respective management only. In particular, management decisions should not be made by managers which oversee different business units.⁵⁰⁷ AAPT

⁵⁰² SSU, clause 12.1(b).

⁵⁰³ SSU, clause 12.1(d).

⁵⁰⁴ CCC submission, September 2011, p 14.

⁵⁰⁵ Optus submission, September 2011, p 22.

⁵⁰⁶ Herbert Geer submission, September 2011, p 22; Herbert Geer submission, January 2012, p 23.

⁵⁰⁷ Optus submission, September 2011, p 22-23; VHA submission, September 2011, p 5.

raises concerns around marketing activities being shared across Telstra’s wholesale business units and retail business units.⁵⁰⁸

Further, Optus, the CCC, VHA and AAPT express concerns around managers who determine wholesale pricing carrying out other functions for retail business units.⁵⁰⁹ In this regard, Optus notes that the head of Telstra’s Retail Marketing also has oversight of Telstra’s wholesale pricing decisions.

Macquarie Telecom also raises concerns around the ability of staff to move permanently between the business units.⁵¹⁰

Herbert Geer, the CCC and Optus submit that the exceptions undermine the organisational measures.⁵¹¹ Herbert Geer⁵¹² and Optus⁵¹³ also express concerns around the “customer excellence” clause.

Herbert Geer submit that the threshold for enforcement—that the breach must not be ‘trivial’—is unclear and is open to substantial disputation.⁵¹⁴ Optus⁵¹⁵ and Herbert Geer⁵¹⁶ consider that *all* breaches should be enforceable by the ACCC.

3. Assessment against statutory framework

Ministerial Criteria Instrument

The Ministerial Criteria Instrument (at subparagraph 4(g)(ii)) requires the ACCC to have regard to whether the SSU provides for Telstra to maintain organisational arrangements within Telstra that promote interim transparency and equivalence, including the arrangements and measures set out in Schedule 1 to the Instrument.

The ACCC has assessed the extent to which the organisational measures are likely to promote interim transparency and equivalence as part of its consideration as to whether the organisational measures are appropriate and effective in the context of section 577(3) of the Telco Act.

The ACCC considers that the organisational arrangements and measures in the SSU are broadly consistent with those set out in Schedule 1 of the Ministerial Criteria Instrument. The ACCC therefore considers that this militates in favour of acceptance of the SSU.

Appropriate and effective

⁵⁰⁸ AAPT submission, January 2012, p 8.

⁵⁰⁹ Optus submission, September 2011, p 22-23; CCC submission, September 2011, p 10, VHA submission, September 2011, p 5; AAPT submission, September 2011, p 3; CCC submission, December 2011, p 2.

⁵¹⁰ Macquarie Telecom submission, September 2011, p 3.

⁵¹¹ Optus submission, September 2011, p 24; CCC submission, September 2011, p 15; Herbert Geer submission, September 2011, p 21.

⁵¹² Herbert Geer submission, January 2012, p 21-22.

⁵¹³ Optus submission, September 2011, p 22-23.

⁵¹⁴ Herbert Geer submission, January 2012, p 22.

⁵¹⁵ Optus submission, September 2011, p 24.

⁵¹⁶ Herbert Geer submission, January 2012, p 22.

The ACCC is of the view that the organisational arrangements will support and promote Telstra's compliance with the interim equivalence and transparency commitments. This militates in favour of the ACCC's overall view that the price and non-price equivalence and transparency measures are appropriate and effective.

In assessing the organisational measures, it is again relevant to note that the Minister has clearly stated that the requirement for interim transparency and equivalence measures is not intended to require Telstra to implement functional separation during this period.⁵¹⁷ In this context, the Explanatory Statement to the Ministerial Criteria Instrument states that functional separation would "require a much stricter form of organisational separation than is intended under the interim transparency and equivalence measures."⁵¹⁸

This guidance has informed the ACCC's views as to whether the arrangements are appropriate and effective. In this regard, the ACCC notes that a number of parties submit that the SSU should provide stricter organisational arrangements – including, for example, internal transactions between separate business units, requiring the network services business units to deal directly with wholesale customers, and decentralised management decisions. However, the ACCC considers that such arrangements may be disproportionately costly relative to any benefit of their effect in light of the interim nature of the measures.

Separation of business units and staffing

Telstra commits to maintain separate wholesale, retail and network services business units.⁵¹⁹ The main focus of the organisational arrangements is on separating retail business units from the network services and wholesale business units, and vice versa.

The ACCC considers that Telstra's commitments regarding the separation and staffing of business units is likely to promote equivalence. For example, the requirement that only wholesale business units have control over wholesale customer sales and management of service delivery will prevent another business unit with competing incentives (i.e. retail business units) from performing these functions. This measure is further supported by the prohibition on employees of wholesale business units undertaking work for retail business units, and vice versa.

In response to submissions concerning the adequacy of separation arrangements in respect of the network services business unit, Telstra has stated that the separation of the functions of the network services business unit is "primarily to ensure that staff in that business unit are not incentivised to give preference to retail customers or orders."⁵²⁰

Senior management

⁵¹⁷ The Hon Stephen Conroy, *Media Release: Structural reform of telecommunications a step closer*, 24 June 2011 (http://www.minister.dbcde.gov.au/media/media_releases/2011/206).

⁵¹⁸ Ministerial Criteria Instrument, Explanatory Statement, p 2.

⁵¹⁹ SSU, clause 8.1.

⁵²⁰ Telstra supplementary submission, August 2011, p 6.

Telstra has addressed ACCC concerns regarding the carve-out for staff with management responsibilities through the inclusion of measures that apply to employees with Line Management Responsibilities.⁵²¹ These apply for all types of Line Management Responsibilities, including those relating to marketing functions. The ACCC considers that these measures are likely to promote price and non-price equivalence, by ensuring that managers cannot have responsibilities for different Separated business units. This minimises any conflict of interest of those managers, a concern raised in submissions.

There are several limited exceptions to these measures including a carve-out for the CEO, the COO and other roles approved by the ACCC. In this regard, Telstra submits that “as Telstra is a single company, management and reporting lines must necessarily come together at a senior level in the company”.⁵²² The ACCC accepts that management decisions will be necessarily centralised at some point in Telstra’s organisational structure and that the level of responsibility that Telstra has nominated is not unreasonable.

There is a further exception in respect of employees whose functions arise solely as part of group wide responsibilities, such as Human Resources officers.⁵²³ The ACCC considers this exception to be operational and unlikely to undermine the effect of the organisational measures.

Staff with pricing responsibilities

The ACCC notes concerns raised in submissions around Telstra managers determining wholesale pricing and also having responsibilities for retail business units. In response to these concerns, Telstra undertakes that a GMD who has responsibility for company-wide pricing must not be the head of a retail business unit.⁵²⁴ The ACCC also notes that while the SSU does not preclude employees who do not work principally for a Wholesale or retail business unit from having responsibilities for company-wide pricing decisions, Telstra has clarified that its commitment not to use or disclose Protected Information to give retail business units an unfair advantage continues to apply in these circumstances.⁵²⁵

Incentive and employee benefit arrangements

Localised incentive measures are instrumental to supporting equivalence by minimising any incentive for wholesale or network services staff to favour the interests of Telstra’s retail business units. Telstra undertakes that all incentive remuneration for employees working principally for a wholesale or network services business unit will reflect solely the objectives and performance of that business unit.⁵²⁶

⁵²¹ SSU, clause 8.10.

⁵²² Telstra supporting submission, December 2011, p 6.

⁵²³ SSU, clause 8.10(c)(ii); also see Telstra’s supporting submission, December 2011 p 6.

⁵²⁴ SSU, clause 10.5(d)(i).

⁵²⁵ SSU, clause 10.5(e).

⁵²⁶ SSU, clauses 8.6(a) and (b).

The ACCC considers that Telstra’s proposed incentive and employment benefit arrangements, and supporting compliance processes, promote equivalence and transparency.

Whilst there are some exceptions to the incentive and employee benefit arrangements, the ACCC considers that these would be unlikely to undermine the effectiveness of the measures.

Customer excellence clause

Response submissions express concerns around the potential impact of the “customer excellence” provisions in the SSU which provide that employees who undertake “certain bona fide efforts to resolve a customer issue” would not breach the organisational measures in the SSU.⁵²⁷

Telstra explains that the rationale for this clause is to avoid the pitfalls that separation can have on customer service and the overall customer experience.⁵²⁸ In addition, Telstra states that “there are checks and balances to ensure that the exception cannot be used by Telstra to commit breaches of the SSU”.⁵²⁹ The ACCC notes that these include prohibitions against “win-back” or marketing activity carried out by network services business unit employees attending end-user premises.⁵³⁰ The ACCC considers that these “checks” mitigate concerns around the breadth of the exception.

Compliance and enforcement

The SSU includes commitments by Telstra to maintain systems and processes to ensure compliance with the organisational measures.⁵³¹

The organisational measures are directly enforceable by the ACCC in court save that Telstra will not be in breach where non-compliance is trivial and the ACCC cannot take any action in response to complaints which are vexatious or frivolous. The ACCC does not consider that this threshold will unduly restrict the ACCC’s ability to enforce compliance with the organisational measures.

Information security

1. Overview

The purpose of the information security measures is to ensure that Telstra does not misuse information obtained by virtue of its vertical integration to its own commercial advantage.

Telstra undertakes not to use or disclose Protected Information to give retail business units an unfair commercial advantage.⁵³² Protected Information includes confidential

⁵²⁷ SSU, clause 8.9.

⁵²⁸ Telstra supporting submission, July 2011, p 43.

⁵²⁹ Telstra supplementary submission, August 2011, p 7.

⁵³⁰ SSU, clause 8.9(c).

⁵³¹ SSU, clause 8.7.

⁵³² SSU, clause 10.3.

and commercially sensitive information obtained from a wholesale customer, and certain information derived from that information where the wholesale customer or its end user is identifiable.⁵³³

2. Submissions

Optus submits that the undertaking by Telstra to not use/disclose information in a manner which will provide an unfair commercial advantage is unclear with regard to the meaning of “unfair”,⁵³⁴ and should extend to the use of information by the *network services business unit* to provide the *retail business unit* an unfair commercial advantage.⁵³⁵

Optus also submits that the primary commitment should apply to the exceptions to organisational arrangements i.e. when the “customer excellence” clause applies and where work undertaken by one separated business unit for another business unit is permitted. Optus further submits that employees with company-wide pricing responsibilities should not be able to access or use Protected Information.⁵³⁶

The CCC submits that the information security measures generally comply with the Ministerial Criteria Instrument, but that the measures should apply to all wholesale services and not be limited to Regulated Services.⁵³⁷

3. Assessment against statutory framework

Ministerial Criteria Instrument

The Ministerial Criteria Instrument specifies that the ACCC must have regard to whether the SSU provides for effective measures to protect against unauthorised disclosure or use of confidential information and commercially sensitive information regarding wholesale customers or their end-users.⁵³⁸

The definition of Protected Information in the SSU is consistent with the Ministerial Criteria Instrument and is supported by a number of specific ring-fencing measures together with Telstra’s broad commitment not to use or disclose Protected Information to give retail business units an unfair commercial advantage.

The ACCC further considers the effectiveness of the information security measures within the context of the appropriate and effective assessment, below.

Appropriate and effective

The ACCC is of the view that the information security measures will limit any unfair informational advantage Telstra has by virtue of its position as a vertically integrated access provider, thereby encouraging competition on its merits. On this basis, the

⁵³³ SSU, clause 10.1.

⁵³⁴ Optus submission, January 2012, p 7.

⁵³⁵ Optus submission, September 2011, p 37.

⁵³⁶ Optus submission, January 2012, p 7.

⁵³⁷ CCC submission, September 2011, p 22.

⁵³⁸ Ministerial Criteria Instrument, subpara 4(g)(iv).

ACCC considers that the information security measures support the view that the SSU provides for equivalence and transparency in an appropriate and effective manner.

Telstra's primary commitment not to exploit an "unfair" commercial advantage would appear appropriate as it is consistent with the Ministerial Criteria Instrument⁵³⁹ and reflects the parallel requirement under the Migration Plan Principles.⁵⁴⁰

With regard to Optus' concern around inadequate information security measures for employees with company-wide pricing responsibilities, the ACCC notes that the obligation on Telstra not to use or disclose Protected Information to gain or exploit an unfair commercial advantage continues to apply in respect of these employees.

In response to concerns around the application of the information security to activities excluded from the organisation arrangements, Telstra has made revisions to the SSU to make it clear that the information security measures in clause 10 apply to these activities.⁵⁴¹

Telstra has also revised the drafting of clause 10.5(a) to address a concern raised by Herbert Geer in relation to the disclosure of aggregated information to Telstra Retail in circumstances other than where Telstra Retail has requested access to the information.⁵⁴²

The ACCC considers that Telstra's commitments are sufficiently broad to address Optus' concern around the network services business unit using information to provide an unfair commercial advantage to the retail business unit given the overriding obligation in clause 10.3. This obligation is supported by ring-fencing measures and the default position under Telstra's processes and systems of 'no access' for network services staff to Protected Information.

Further assurance regarding the effectiveness of the measures is provided through a commitment by Telstra to establish and maintain effective measures to monitor compliance with the information security requirements, including employee education and performance management for non-compliance.⁵⁴³

Dispute Resolution mechanisms in the SSU

1. Overview

The ACCC is required to have regard to whether the SSU provides effective mechanisms for the resolution of equivalence disputes between Telstra and its wholesale customers.⁵⁴⁴

The SSU provides a variety of dispute resolution mechanisms, including the establishment of an Accelerated Investigation Process (AIP) and an ITA. The AIP and

⁵³⁹ Ministerial Criteria Instrument, Sch 1, item 11(i).

⁵⁴⁰ Migration Plan Principles Determination, General principle 29(1) and (2).

⁵⁴¹ SSU, clause 8.4 and clause 8.9(b)(i).

⁵⁴² Herbert Geer submission, January 2012, p 23.

⁵⁴³ SSU, Schedule 2, para 4.

⁵⁴⁴ Ministerial Criteria Instrument, subpara 4(g)(vi).

the ITA constitute a two part process for the resolution of wholesale customer Equivalence Complaints, which are defined as:

- a non-price complaint or issue that relates to or is likely to have been caused by a system or process affecting Telstra’s compliance with obligations set out in Part D (of the SSU); or
- a non-price complaint in connection with a TEBA order or process.

Accelerated Investigation Process

Clause 19.1 of the SSU commits Telstra to establish the AIP as an internal process by which Telstra can “quickly and flexibly respond to, and resolve, Equivalence Complaints to the reasonable satisfaction of the wholesale customer.” The process is designed to provide Telstra with an opportunity to resolve the complaint by way of a Rectification Plan submitted to the wholesale customer for approval.⁵⁴⁵ Telstra can terminate the AIP where the complaint is the subject of a Rectification Proposal or a Rectification Direction made by the ACCC under the overarching equivalence commitment enforcement process.⁵⁴⁶

Independent Telecommunications Adjudicator

If a wholesale customer rejects a Rectification Plan proposed by Telstra under the AIP, it may refer the matter to the ITA Process.⁵⁴⁷ Telstra has committed to establish the ITA as an independent ‘fast track’⁵⁴⁸ process for the resolution of Equivalence Complaints and Migration Plan disputes.⁵⁴⁹ Before the ITA can commence operation, Telstra must develop an ITA Constitution and Charter of Independence for ACCC approval. The ACCC must also approve the appointment of the ITA Adjudicator.⁵⁵⁰ The ACCC can operate as the Adjudicator at the election of the referring party.⁵⁵¹

Price Equivalence Billing Disputes & General Price Equivalence Disputes

The SSU also provides a mechanism for the resolution of Price Equivalence Billing Disputes and other General Price Equivalence Disputes.⁵⁵² Essentially, the mechanism provides that a wholesale customer may opt into a process, detailed in Schedule 10, whereby disputes over the accuracy of a bill or the calculation of the price for the provision of a Regulated Service can be resolved without having to resort to litigation. A party’s right to litigation is preserved in both instances.⁵⁵³ The SSU also provides that disputes about Major Network Modernisations, Coordinated Capital Works

⁵⁴⁵ SSU, clause 19.3(d).

⁵⁴⁶ SSU, clause 19.4(b)(i) and (ii).

⁵⁴⁷ SSU, clause 20.2(b)(ii).

⁵⁴⁸ Telstra’s supporting submission, July 2011, p.4.

⁵⁴⁹ SSU, Schedule 5, para 7.1.

⁵⁵⁰ SSU, Schedule 5, para 5.1.

⁵⁵¹ SSU, Schedule 5, para 6.1.

⁵⁵² SSU, clause 18.7 and Schedule 10.

⁵⁵³ SSU, Schedule 10, subpara 1.5(e) and para 2.5 respectively.

Programs and any related negotiations will be resolved by way of applicable mechanisms in a final access determination made by the ACCC.⁵⁵⁴

2. Submissions

Herbert Geer, Macquarie and Optus express concerns as to the ITA's independence.⁵⁵⁵

ACCAN and the CCC consider that wholesale customers should not be bound by ITA decisions nor have to pay for use or fund the ITA.⁵⁵⁶ Macquarie Telecom opposes the need for access seekers to have an ITA agreement in place with Telstra to be heard.⁵⁵⁷

With regards to the ITA's powers, AAPT suggests that the monetary caps may limit the ITA's power to require Telstra to implement any major changes to disconnection processes.⁵⁵⁸ Herbert Geer expresses concern over the potential for delays created by requirements that a breach be "systemic" and for an access seeker to demonstrate that they have been "materially and detrimentally affected" by it in order to be heard.⁵⁵⁹ Optus criticised the constraint on the ITA from making a ruling that prescribes or proscribes a specific system or process, design or technology.⁵⁶⁰

Herbert Geer and Optus express a preference for the ACCC to act as the relevant decision-maker.⁵⁶¹ AAPT and Optus proposed a number of specific amendments, including that the ITA should operate under the jurisdiction of the ACCC with the Adjudicator appointed by the ACCC after industry consultation.⁵⁶²

In response to the December discussion paper, Optus submits that the requirement that a wholesale customer go through the AIP prior to applying to the ITA would provide Telstra with an opportunity to game the ITA process.⁵⁶³ Optus also submits that the ACCC should not be bound by the ITA process when acting in its capacity as the ITA and restates previous concerns regarding the need for wholesale customers to pay to use the ITA.⁵⁶⁴ Herbert Geer submit that there is a lack of clarity as to what effect the deemed acceptance of a rectification plan by a wholesale customer under the AIP may have on the capacity of the ACCC to pursue Schedule 11 enforcement for the same issue.⁵⁶⁵ The CCC states that the use of monetary caps is unjustified and inconsistent with the legislative requirements.

3. Assessment against statutory framework

⁵⁵⁴ SSU, Schedule 4, para 13.

⁵⁵⁵ Herbert Geer submission, September 2011, p 11; Macquarie Telecom submission, September 2011, p 3; Optus submission, September 2011 p 38.

⁵⁵⁶ ACCAN submission, September 2011, p 8; CCC submission, August 2011, p 2.

⁵⁵⁷ Macquarie Telecom submission,, September 2011, p 3.

⁵⁵⁸ AAPT submission, September 2011, p 14.

⁵⁵⁹ Herbert Geer submission, September 2011, p 11.

⁵⁶⁰ Optus submission, September 2011, p 38.

⁵⁶¹ Herbert Geer submission, September 2011, p 11; Optus submission, September 2011, p 37.

⁵⁶² AAPT submission, September 2011, p 13; Optus submission, September 2011, p 39-40.

⁵⁶³ Optus submission, January 2012, p 7.

⁵⁶⁴ Optus submission, January 2012, p 8.

⁵⁶⁵ Herbert Geer submission, January 2012, p 25.

Ministerial Criteria Instrument

The ACCC considers that the SSU provides effective mechanisms for the resolution of equivalence disputes between Telstra and its wholesale customers.

In the first instance, wholesale customers must raise equivalence complaints with Telstra pursuant to the AIP. The ACCC does not consider that this requirement will provide Telstra with an opportunity to game the ITA process, as where a wholesale customer is dissatisfied with the outcome of the AIP, it may escalate the complaint to the ITA. Nor does the ACCC consider that the deemed acceptance of a rectification plan under the AIP would preclude a wholesale customer's ability to request the ACCC to exercise its powers under the overarching equivalence commitment.

Telstra is not required to establish the ITA as part of the equivalence dispute resolution mechanisms under the SSU. However, as it has done so, the ACCC must have regard to whether the organisational and governance arrangements in respect of the ITA meet the requirements of Schedule 2 to the Ministerial Criteria Instrument.⁵⁶⁶ The ACCC is satisfied that Telstra has met each of these requirements under Schedule 5 of the SSU.

Appropriate and effective

The ACCC considers that the dispute resolution mechanisms in the SSU are appropriate and effective measures for the purposes of s.577A(3) of the Telco Act.

The fact that the organisational and governance arrangements for the ITA meet each of the requirements of Schedule 2 of the Ministerial Criteria Instrument weighs in favour of this conclusion.⁵⁶⁷

The ACCC considers that the amendments Telstra has made to ensure the ITA's independence and strengthen the effectiveness of the ITA's powers should encourage wholesale customers to participate in the dispute resolution scheme.

In the August discussion paper, the ACCC stated that "on balance, while the ITA has the potential to be an effective dispute resolution body its effectiveness is dependent on industry participation and on the ability of the ITA to actually resolve any disputes".⁵⁶⁸ In addition to consideration of submissions, ACCC assessment of the likelihood of industry participation has been guided by the following considerations:

- whether the ITA is sufficiently independent such that wholesale customers have assurance that disputes will be handled impartially;
- whether the ITA has appropriate jurisdiction and powers to ensure resolution of disputes; and
- whether the ITA process is sufficiently expeditious and affordable to attract wholesale customer participation.

⁵⁶⁶ Ministerial Criteria Instrument, subpara 4(h).

⁵⁶⁷ Ministerial Criteria Instrument, subpara 4(h).

⁵⁶⁸ August discussion paper, p 119.

Independence of the ITA

The ACCC considers that the ITA will be sufficiently independent to ensure impartial decision-making. A number of Telstra's SSU commitments are relevant in this regard. For example, Telstra has provided that before the person nominated as the ITA Adjudicator can be approved by the ACCC, wholesale customers must have the opportunity to indicate whether they consider the nominated individual to be genuinely independent of Telstra.⁵⁶⁹ The requirement that the ACCC approve the ITA Constitution and the Charter of Independence subject to public consultation also provides assurance as to its independence.⁵⁷⁰

Further, the SSU provides for wholesale customers to elect to have an ITA dispute heard by the ACCC (as the Adjudicator) which neutralises concerns around the ITA's independence. The ACCC considers that this model provides an appropriate safeguard to ensure that wholesale customers will have access to an independent adjudicator.

ITA jurisdiction and powers

Telstra has responded to wholesale customer concerns regarding the jurisdiction of the ITA by providing that a single event as well as a pattern of behaviour can now form the basis of an Equivalence Complaint.⁵⁷¹

The ACCC considers that the SSU provides the ITA with sufficient power to ensure that it can resolve equivalence disputes. For example, the ITA's power to appoint an independent engineer or auditor could be effective in relation to interrogating the accuracy of a Telstra audit of Exchange Capacity.⁵⁷²

The directions powers provided to the ITA would also appear appropriate to ensure that the ITA can resolve equivalence disputes. When making a final determination, the ITA is empowered to make any direction that the Adjudicator considers "necessary or expedient...to achieve a permanent resolution of the relevant ITA dispute."⁵⁷³

Telstra has responded to ACCC and wholesale customer concerns about the lack of a clear power for the ITA to direct Telstra to remediate relevant processes and systems that may be causing non-equivalence.⁵⁷⁴ Importantly, if the ITA is not satisfied that a party's proposal for the modification of its processes or systems will achieve the desired goal, the ITA may make a binding direction on that party prescribing the specific system or process designs or technology to be implemented.⁵⁷⁵

The ACCC considers that the limitations on the Adjudicator's powers to make directions would generally appear commensurate with its intended role as an expert

⁵⁶⁹ SSU, Schedule 5, para 5.1(d)(i).

⁵⁷⁰ SSU, Schedule 5, paras 4.1(g) and 4.2(d) respectively.

⁵⁷¹ SSU, clause 19.2(b).

⁵⁷² SSU, clause 12.3(b).

⁵⁷³ SSU, Schedule 5, para 11.1(a).

⁵⁷⁴ SSU, Schedule 5, para 11.2.

⁵⁷⁵ SSU, Schedule 5, para 11.2(d).

technical adjudicator. For example, the ITA is not able to direct Telstra to develop or supply products or services that are not Regulated Services.

While submissions raised concerns around the ITA being subject to monetary caps, the ACCC notes that the \$1 million cap is effectively a “soft cap”, and does not consider that the \$10 million annual monetary cap will unduly limit the ITA from directing Telstra to implement appropriate systems and process changes to promote equivalence.

The ACCC also notes that Telstra has clarified that the monetary caps only apply to the ACCC in its capacity as Adjudicator and not when enforcing the overarching equivalence commitment.⁵⁷⁶ If Telstra does not implement a process or system modification because to do so would exceed the monetary caps, the other party to the relevant ITA dispute, or the Adjudicator, may refer the matter to the ACCC for consideration under the overarching equivalence commitment or to be dealt with under Parts IV, XIB or XIC of the CCA or under the Telco Act.

The ITA process

The ACCC has considered the likely impact of ITA process and administrative issues, including costs and potential delays, on the willingness of wholesale customers to participate in the ITA Process.

Telstra has made a number of improvements to the SSU to address wholesale customer concerns over costs and potential delays. For example, a wholesale customer will no longer face any delays associated with having to demonstrate that it has been “materially and detrimentally affected” by an issue before it can be heard by the ITA.⁵⁷⁷ Wholesale customers may also opt out of the ITA process up to 10 business days after the ITA makes a final determination.⁵⁷⁸

The availability of the ACCC as an alternative Adjudicator ameliorates concerns over any impeding effect that procedural shortcomings may have on the ITA’s capacity to operate as an effective dispute resolution mechanism. In this regard, when operating in its capacity as Adjudicator, the ACCC is able to develop its own procedural rules for the hearing of ITA disputes.⁵⁷⁹

Price Equivalence Billing Disputes & General Price Equivalence Disputes

The price equivalence dispute resolution mechanism in the SSU will complement the ACCC’s regulation of price terms under Part XIC and may assist to reduce litigation in relation to billing and other price related matters.

Implementation

1. Overview

⁵⁷⁶ SSU, Schedule 5, para 11.5(c).

⁵⁷⁷ Paragraph 7.2(a)(ii) of Schedule 5 of the July SSU.

⁵⁷⁸ SSU, Schedule 5, para 7.3(a).

⁵⁷⁹ SSU, Schedule 5, paras 9.2(a) and (b).

Clause 7.1(a) of the SSU provides that Telstra’s interim equivalence and transparency commitments under Part D of the SSU will commence from the Commencement Date. To this end, commitments such as those relating to service quality and operational equivalence, information security, information equivalence and most elements of Telstra’s organisational ring fencing will come into force when the SSU is accepted by the ACCC and the conditions precedent have been satisfied.⁵⁸⁰

However, clause 21 of the SSU specifies periods after the Commencement Date during which Telstra will implement its other equivalence and transparency commitments. For example, the price equivalence and transparency measures, the overarching equivalence commitment, the TEBA commitments and the dispute resolution processes of the AIP and the ITA will commence 2 months after the Commencement Date. Further, the equivalence and transparency metrics and the service level rebates will commence at the start of the Quarter which commences after the Commencement Date. The effect of these arrangements is that Telstra will not be regarded as being in breach of its specific equivalence and transparency commitments or the overarching equivalence commitment in respect of the relevant commitments during the period in which they are being implemented.⁵⁸¹

2. Submissions

Herbert Geer raise concerns regarding the implementation provisions in the SSU, noting that not all the interim measures commence at the date when the SSU comes into force.⁵⁸²

Telstra has provided the ACCC with a submission (Telstra supplementary submission, January 2012) providing reasons as to why the implementation periods should apply.⁵⁸³

The submission highlights the context in which Telstra will be implementing its interim equivalence and transparency commitments noting that the regulatory requirements of the Migration Plan and commercial obligations under the Definitive Agreements present a “substantial” implementation task for Telstra.⁵⁸⁴ It also explains that those interim equivalence and transparency commitments that rely on Telstra’s use of “business as usual” processes and systems are more readily able to be implemented by the Commencement Date. Telstra states that certain commitments, such as those in relation to the availability of wholesale customer facing systems and the capacity for wholesale customers to reserve exchange space for their future anticipated requirement, rely on modifications to or the development of new systems and processes and can therefore only be implemented once Telstra has these new arrangements in place. Further, other commitments, such as the new dispute resolution process under the SSU will require the establishment of new internal governance arrangements, new appointments, such as the ITA Adjudicator and further

⁵⁸⁰ SSU, clause 2.

⁵⁸¹ SSU, clause 21.2(c).

⁵⁸² Herbert Geer submission, January 2012, p 27.

⁵⁸³ Telstra implementation timeframe for Structural Separation Undertaking, 25 January 2012.

⁵⁸⁴ Telstra implementation timeframe for Structural Separation Undertaking, 25 January 2012; p.1.

regulatory approvals from the ACCC, including in relation to the ITA Constitution and the Charter of Independence.⁵⁸⁵

3. Assessment against statutory framework

The Telco Act stipulates that the equivalence and transparency measures are to apply during the period “beginning when the undertaking comes into force; and ending at the start of the designated day”.⁵⁸⁶ The ACCC considers that this requirement must be read in conjunction with the requirement for the SSU to provide for interim equivalence and transparency in an “appropriate and effective” manner.⁵⁸⁷

The ACCC considers that the staggered commencement dates that Telstra has specified for certain of its commitments are appropriate given the need for Telstra to have in place systems that will deliver effective equivalence and transparency. This conclusion is based on the understanding that these particular commitments will require Telstra to develop new systems and processes in order to meet certain obligations. Further, commitments such as the equivalence and transparency metrics and service level rebates rely on the collection of data and reports in order to assess Telstra’s performance. This is also the case in relation to the relevance of the TEM reports to the delivery of price equivalence.

In addition, the ACCC considers that the 2 month period for the implementation of the overarching equivalence commitment is appropriate given that the delivery of overarching equivalence relies in part on the establishment of appropriate and effective systems and processes to meet the specific equivalence and transparency commitments. Of particular relevance in this regard are the operational and systems equivalence commitments. Finally, the later commencement of the dispute resolution commitments under the AIP and ITA is appropriate given the need for industry consultation on and ACCC approval of the ITA Constitution and the Charter of Independence.

The ACCC notes that the staggered commencement arrangements occur over a relatively short period of time. If Telstra fails to take the action necessary to complete implementation of the relevant measures by the end of the implementation period, it will be in breach of the SSU. Any extensions to the implementation period are subject to ACCC approval.⁵⁸⁸

⁵⁸⁵ Telstra implementation timeframe for Structural Separation Undertaking, 25 January 2012; p.2-3.

⁵⁸⁶ Telco Act, subsection 577A(3).

⁵⁸⁷ Telco Act, subsection 577A(3)(b).

⁵⁸⁸ SSU, clause 21.3.

ATTACHMENT A7 – STATEMENT OF ENFORCEMENT

Introduction

The purpose of this statement is to provide general guidance to Telstra and industry as to the approach the ACCC will take in relation to potential breaches of the SSU, and in particular to potential breaches of the interim equivalence and transparency commitments.

The SSU enforcement and compliance framework

Telstra has made a number of specific commitments in the SSU which are directly enforceable pursuant to section 577G of the Telco Act and Telstra's carrier licence conditions. If the ACCC considers that Telstra has breached the SSU, the ACCC can apply to the Federal Court for a wide range of remedies including an order directing Telstra to comply with the undertaking, pecuniary penalties and compensation for any person who has suffered loss or damage as a result of the breach.

The ACCC may bring more limited enforcement proceedings under the Telco Act in respect of a possible breach by Telstra of the overarching equivalence commitment in clause 9 of the SSU where Telstra has failed to provide a Rectification Proposal.

Whether Telstra has in fact breached a particular provision of the SSU will depend on the scope of the specific commitment and the nature of Telstra's conduct.

Court enforcement is not the only means of ensuring equivalence is delivered by the SSU. Some of Telstra's commitments require Telstra to follow a process or procedure. These processes—such as those under the ITA scheme and the rectification mechanisms relating to the overarching equivalence commitment—are directed at ensuring equivalence is maintained over time and are intended to provide an expedited means of resolving equivalence concerns without recourse to litigation.

Failure by Telstra to follow these processes is directly enforceable as a breach of the SSU – for example, Telstra must comply with final determinations of the ITA and with any Rectification Proposal accepted by the ACCC.

The broader regulatory framework

An equivalence issue may potentially fall within one or more processes in the SSU as well as being a matter which the ACCC can seek to address under Parts Ivs, XIB and XIC of the CCA).

Importantly, nothing in the SSU constrains the ACCC in dealing with an equivalence-related issue, from exercising its powers and/or performing its functions under the CCA to any greater extent than is expressly provided in the CCA, including pursuant to:

- **Part IV** which prohibits a range of specified restrictive trade practices, such as misuse of market power, which can be enforced by the ACCC.
- **Part XIB** which provides that a carrier or carriage service provider must not engage in anti-competitive conduct. The ACCC can take enforcement action in relation to contraventions of the competition rule,⁵⁸⁹ provided certain administrative processes are followed.⁵⁹⁰
- **Part XIC** which requires an access provider to supply an active declared service, upon request, to service providers in accordance with the standard access obligations set out in section 152AR. The ACCC may specify price and non-price terms and conditions of access for declared services through an access determination or binding rule of conduct.⁵⁹¹

The ACCC's approach to enforcement

The SSU provides for Telstra to implement a governance framework which the ACCC considers is likely to provide assurance to wholesale customers that Telstra is complying with the SSU. The ACCC will monitor Telstra's compliance and Telstra has committed to certain reporting obligations to facilitate this.

If Telstra contravenes the SSU, the ACCC can take enforcement action to enforce the SSU. In general, the ACCC has discretion to decide whether to take enforcement action and the nature of that action. The ACCC aims to pursue a proportionate response, taking into account the impact of the breach and the circumstances surrounding it. If a breach of the SSU is relatively minor, the matter may be addressed administratively. The ACCC will only commence court proceedings where there are reasonable grounds for starting the proceedings and where litigation is the most suitable method of dispute resolution.⁵⁹²

In some circumstances, the ACCC may consider intervention under Parts IV, XIB and/or XIC of the CCA more expedient than bringing enforcement proceedings in respect of an alleged breach of the SSU. This will depend on the nature of Telstra's conduct and a consideration of the appropriate remedy.

⁵⁸⁹ Subject to s 151CQ of the CCA.

⁵⁹⁰ Proceedings for enforcing the competition rule, other than proceedings for injunctive relief (which can be instituted at any time), cannot be instituted unless the alleged conduct is of a kind dealt with in a Part A competition notice that was in force at the time the alleged conduct occurred. The ACCC may issue a Part A competition notice stating that a specified carrier or carriage service provider has engaged, or is engaging, in a specified instance of anti-competitive conduct or in a particular kind of anticompetitive conduct.

⁵⁹¹ Subject to s 152ER of the CCA.

⁵⁹² The Legal Services Directions 2005 are binding on the ACCC. A copy of the directions are available online at: <http://www.comlaw.gov.au/Details/F2011C00098>.

ATTACHMENT B1 – MAPPING OF TELSTRA’S DRAFT PLAN AGAINST THE MIGRATION PLAN PRINCIPLES

SECTION OF DETERMINATION	PROVISION IN TELSTRA’S DRAFT PLAN
<p>Section 8</p> <p>Disconnection of carriage services</p>	<p>Clause 2 – Objective and scope of this Plan</p> <p>Clause 6– Telstra to use existing processes</p> <p>Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services during the Migration Window</p> <p>Clause 12 – Telstra activities in the lead up to the Disconnection Date for each Rollout Region</p> <p>Clause 13 – Order Stability Period prior to the Disconnection Date</p> <p>Clause 21 – Special Services</p> <p>Clause 22 – Removal of Wholesale Customer equipment from Telstra facilities</p> <p>Schedule 1 – Telstra existing standard processes for disconnection of copper services (other than special services)</p> <p>Schedule 2 – Telstra existing standard processes for disconnection of HFC services</p> <p>Schedule 4 – Special Services</p>
<p>Section 9</p> <p>Disconnection of carriage services using copper networks</p>	<p>Clause 6 – Telstra to use existing processes</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services during the Migration Window</p> <p>Clause 14 – Managed disconnection commencing at the Disconnection Date (NB – Required Measure under Schedule 7)</p> <p>Clause 15 – Types of premises and related disconnection windows (in-train orders and premises prevented by law from disconnection)</p> <p>Clause 16 – Disconnection of all Premises to be completed by the</p>

SECTION OF DETERMINATION	PROVISION IN TELSTRA'S DRAFT PLAN
	<p>Designated Day</p> <p>Clause 17 – No supply of new Copper Services and HFC services after a Premises becomes NBN Serviceable</p> <p>Schedule 1 – Telstra existing standard processes for disconnection of copper services (other than special services)</p> <p>Schedule 3 – Principles for managed Disconnection immediately following the Disconnection Date (for use in development of the relevant Required Measure)</p> <p>Schedule 5 – Technical Conditions constituting permanent disconnection</p>
<p>Section 10</p> <p>Disconnection of carriage services using HFC networks</p>	<p>As above</p> <p>Schedule 2 – Telstra existing standard processes for disconnection of HFC services</p>
<p>Section 11</p> <p>Coordination of connection and disconnection</p>	<p>Clause 6.4 – Telstra not responsible for management or coordination of the connection process</p> <p>Clause 7 – Telstra's timetable for disconnection of Premises will be determined by reference to NBN Co's Rollout schedule</p> <p>Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates</p> <p>Clause 9 – disconnection of Copper Services and HFC Services during the Migration Window</p> <p>Clause 12 – Telstra activities in the lead up to the Disconnection Date for each Rollout Region (notifications re automatic disconnection)</p> <p>Schedule 1 – Disconnection of a copper broadband service or LSS due to disconnection of a voice service using same copper path</p>
<p>Section 12</p> <p>Restrictions on the supply of carriage services prior to and after the disconnection date</p>	<p>Clause 4.3 – Telstra's existing non-Migration related activities and rights are unaffected by the Plan</p> <p>Clause 13 – Order Stability Period prior to the Disconnection Date</p> <p>Clause 17 – No supply of new Copper Services after a Premises becomes NBN Serviceable</p> <p>Clause 18 – Temporary Reconnection</p> <p>Clause 31- Dispute resolution process</p>

SECTION OF DETERMINATION	PROVISION IN TELSTRA'S DRAFT PLAN
<p>Section 13</p> <p>Special Services</p>	<p>Clause 4.3 – Telstra’s existing non-Migration related activities and rights are unaffected by the Plan</p> <p>Clause 21 – Special Services</p> <p>Schedule 4 – Special Services</p> <p>Schedule 7 – Required Measures</p>
<p>Section 14</p> <p>Maintaining a soft dial tone</p>	<p>Clause 20 – Soft Dial Tone</p>
<p>Section 15</p> <p>Reactivation of carriage services</p>	<p>Clause 17 – No supply of new Copper Services and HFC Services after a Premises becomes NBN Serviceable</p> <p>Clause 18 – Temporary Reconnection</p>
<p>Section 16</p> <p>Equipment of wholesale customers</p>	<p>Clause 22 – Removal of Wholesale Customer equipment from Telstra facilities</p>
<p>Section 17</p> <p>Timetable for disconnecting fixed-line carriage services</p>	<p>Clause 7 – Telstra’s timetable for disconnection of Premises will be determined by reference to NBN Co’s rollout schedule</p> <p>Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates</p> <p>Clause 21 – Special Services</p>
<p>Section 18</p> <p>Timing of disconnection orders</p>	<p>Clause 7 – Telstra’s timetable for disconnection of Premises will be determined by reference to NBN Co’s rollout schedule (including clause 7.4 – First and last date on which orders for disconnection can be lodged)</p> <p>Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates</p> <p>Clause 21 – Special Services</p>
<p>Section 19</p> <p>Control of disconnection timing and processes</p>	<p>Clause 6 – Telstra to use Existing Processes</p> <p>Clause 9.3 – Wholesale customers to retain autonomy over disconnection decisions, including control over the timing of disconnection</p> <p>Clause 10 – Pull Through Activities</p> <p>Clause 12 – Telstra activities in the lead up to the Disconnection Date for each Rollout Region (notification of automatic disconnections)</p> <p>Clause 21 – Special Services (including certification of Special</p>

SECTION OF DETERMINATION	PROVISION IN TELSTRA'S DRAFT PLAN
	<p>Service Inputs)</p> <p>Schedule 1 – Disconnection of a copper broadband service or LSS due to disconnection of a voice service using same copper</p>
<p>Section 20</p> <p>Provision of information regarding disconnection</p>	<p>Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates</p> <p>Clause 12 – Telstra activities in the lead up to the Disconnection Date for each Rollout region</p> <p>Clause 14.4 – Telstra to notify wholesale customers before final decision</p>
<p>Section 21</p> <p>Equivalence regarding disconnecting Telstra retail business units and wholesale customers</p>	<p>Clause 5 – Required measures</p> <p>Clause 6 – Telstra to use existing processes</p> <p>Clause 7 – Telstra's timetable for disconnection of Premises will be determined by reference to NBN Co's rollout schedule</p> <p>Clause 8 – Provision by Telstra of information about disconnection and Disconnection Dates</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services during the Migration Window</p> <p>Clause 12 – Telstra activities in the lead up to the Disconnection Date for each Rollout Regions</p> <p>Clause 13 – Order Stability Period prior to the Disconnection Date</p> <p>Clause 15 – Types of Premises and related Disconnection Windows</p> <p>Clause 21 – Special Services (notifications about product exits)</p> <p>Schedule 1 – Telstra existing standard processes for disconnection of Copper Services (other than special services)</p> <p>Schedule 3 – Principles for Managed Disconnection immediately following the Disconnection Date</p> <p>Schedule 7 – Required Measures</p>
<p>Section 22</p> <p>Prohibition of marketing activity</p>	<p>Clause 11 – Telstra staff and contractors attending on site</p>
<p>Section 23</p> <p>Use of adequate processes</p>	<p>Clause 5 – Required Measures (for disconnection processes in relation to special services and managed disconnection)</p>

SECTION OF DETERMINATION	PROVISION IN TELSTRA'S DRAFT PLAN
	<p>Clause 6 – Telstra to use Existing Processes</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services during Migration Window</p> <p>Clause 10 – Pull-Through Activities</p> <p>Clause 28 – Variation of an existing process or development of new or modified disconnection measures</p> <p>Clause 29 – Testing of new or modified Disconnection processes</p> <p>Schedule 1 – Telstra existing standard processes for disconnection of copper services (other than special services)</p> <p>Schedule 2 – Telstra existing standard processes for disconnection of HFC services</p>
<p>Section 24</p> <p>Specification of disconnection processes</p>	<p>Clause 6 – Telstra to use Existing Processes</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services during Migration Window</p> <p>Clause 10 – Pull Through Activities</p> <p>Clause 12.2 – Notification to Wholesale Customers when Wholesale Services are automatically disconnected</p> <p>Schedule 1 – Telstra existing standard processes for disconnection of copper services (other than special services)</p>
<p>Section 25</p> <p>Development of disconnection processes</p>	<p>Clause 28 – Variation of an existing process or development of new or modified disconnection measure</p>
<p>Section 26</p> <p>Modifications to existing processes and disconnection measures</p>	<p>Clause 28 – Variation of an existing process or development of new or modified disconnection measure</p> <p>Clause 31- Dispute resolution process</p>
<p>Section 27</p> <p>Using standard Telstra operating systems, interfaces and processes</p>	<p>Clause 6 – Telstra to use Existing Processes</p> <p>Clause 9 – Disconnection of Copper Services and HFC Services during the Migration Window</p> <p>Clause 28 – Variation of an existing process or development of a new or modified disconnection measure</p> <p>Schedule 1 – Telstra existing standard processes for disconnection of copper services (other than special services)</p>

SECTION OF DETERMINATION	PROVISION IN TELSTRA'S DRAFT PLAN
<p>Section 28</p> <p>Supply of information by Telstra to NBN Co</p>	<p>Clause 23 – Information supplied to NBN Co</p> <p>Clause 24.4 – notification regime prior to establishment of NBN information Security Plan</p> <p>Schedule 8 – Information to be provided by Telstra to NBN Co under the Definitive Agreements</p>
<p>Section 29</p> <p>Protection of information</p>	<p>Clause 5 – Required Measures</p> <p>Clause 24 – Information Security</p> <p>Schedule 6 – Information Security principles for the development of NBN Co Migration Information security measures</p> <p>Schedule 7 – Required Measures</p> <p>Structural Separation Undertaking – Part D and Schedule 2 (organisational structure, information security and related measures)</p>
<p>Section 30</p> <p>Commencing to supply fixed-line carriage services using the NBN</p>	<p>Clause 19 – Telstra commencing to provide services using the NBN</p>
<p>Section 31</p> <p>Reporting framework</p>	<p>Clause 25 – Reporting Framework</p> <p>Clause 27 – Compliance</p>
<p>Section 32</p> <p>Rectification</p>	<p>Clause 26 – Rectification of the Plan</p>
<p>Section 33</p> <p>Dispute Resolution</p>	<p>Clause 31 – Dispute Resolution process</p> <p>Structural Separation Undertaking – Schedule 5 (Independent Telecommunications Adjudicator)</p>
<p>Section 34</p> <p>Scope of modifications to processes</p>	<p>Clause 28 – Variation of an existing process or development of a new or modified disconnection measures</p> <p>Clause 29 – Testing of new or modified disconnection processes</p>
<p>Section 35</p> <p>Consultation with NBN Co</p>	<p>Clause 30 – Telstra will consult with NBN Co about relevant matters under this Plan</p>
<p>Section 36</p>	<p>Clause 5 – Required Measures</p>

SECTION OF DETERMINATION	PROVISION IN TELSTRA'S DRAFT PLAN
Required measure development process	<p>Schedule 3 – Principles for Managed Disconnection immediately following the Disconnection Date</p> <p>Schedule 6 – Information security principles for development of NBN Co Migration Information Security measures</p> <p>Schedule 7 – Required Measures</p>
Section 37 Test procedure processes	<p>Clause 29 – Testing of new or modified Disconnection processes</p>
Section 38 Cessation of migration plan	<p>Clause 4 – Commencement and Term</p> <p>Clause 17 – No supply of new Copper Services after a Premises becomes NBN Serviceable</p> <p>Clause 18 – Temporary reconnection</p> <p>Clause 24 – Information security</p>

List of acronyms and abbreviations

List of acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	Asymmetric digital subscriber line
AVC	Access Virtual Circuit
AIP	Accelerated Investigation Process
BSO	Basic Service Offering
BTS	basic telephone service
CAN	customer access network
CAU	contract, arrangement or understanding
CRD	Customer Requested Date
CVC	Connectivity Virtual Circuit
DSL	digital subscriber line
DSLAM	digital subscriber line access multiplexer
DTCS	domestic transmission capacity service
EOI	equivalence of input
EOO	equivalence of outcomes
FTTP	fibre to the premises
GPON	gigabit passive optical network
HFC	hybrid fibre-coaxial
ISP	internet service provider
ITA	Independent Telecommunications Adjudicator
LNP	local number portability
LSS	line sharing service
LTIE	long term interests of end-users
NBN	national broadband network

NNI	Network-Network Interface
OSP	Operational Separation Plan
P2P	point-to-point
PEF	Price Equivalence Framework
POI	point of interconnection
PON	passive optical network
PSTN	public switched telephone network
RAF	Regulatory accounting framework
RSP	retail service provider
SAE	Substantial Adverse Event
SAOs	Standard Access Obligations
SAU	Special Access Undertaking
SIO	services in operation
SSIs	special service inputs
SSU	structural separation undertaking
TEBA	Telstra Exchange Building Access
TEM	Telstra Economic Model
TCD	Telstra Committed Date
ULLS	unconditioned local loop service
UNI	User Network Interface
USO	universal service obligation
WLR	wholesale line rental

List of abbreviations

Abbreviation	Full reference
ACCC Regulatory Reform Submission	ACCC, submission to the Department of Broadband, Communications and the Digital Economy, <i>National Broadband Network: Regulatory Reform for 21st Century Broadband</i> , June 2009
August discussion paper	ACCC, <i>Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan: Discussion Paper</i> , 30 August 2011
CACS Act	<i>Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010</i> (Cth)
CACS Bill	<i>Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010</i> (Cth)
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
Convergence Review Emerging Issues Paper	Department of Broadband, Communications and the Digital Economy, <i>Convergence Review- Emerging Issues Paper</i> , April 2011
December SSU	Telstra, (draft) Structural Separation Undertaking, dated 9 December 2011
December discussion paper	ACCC, <i>Telstra's Structural Separation Undertaking: Discussion Paper</i> , December 2011
Definitive Agreements	Contractual arrangements between Telstra and NBN Co, as defined in Attachment A4
(the) Determination	<i>Telecommunications (Migration Plan Principles) Determination 2011</i>
(the) draft Plan	Telstra's draft Migration Plan, dated 24 August 2011
FOXTEL SAU	Foxtel special access undertaking for the Digital Set Top Unit Service (December 2006)
Foxtel-Austar Statement of Issues	Statement of Issues – FOXTEL – proposed acquisition of Austar United Communications Limited, 22 July 2011.
FSR 2nd position paper	ACCC, <i>Fixed Services Review- A Second Position Paper</i> , April 2007.
Hilmer Report	Independent Committee of Inquiry, National Competition Policy, 1993

Abbreviation	Full reference
Implementation Study	McKinsey & Company and KPMG, <i>National Broadband Network Implementation Study</i> , released 6 May 2010
July SSU	Telstra, (draft) Structural Separation Undertaking, dated 29 July 2011
Ministerial Criteria Instrument	<i>Telecommunications (Acceptance of Undertaking about Structural Separation – Matters) Instrument 2011</i>
NBN Access Act	<i>Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011</i>
NBN Co	NBN Co Limited
NBN Companies Act	<i>National Broadband Network Companies Act 2011</i>
NBN Co Corporate Plan	NBN Co Limited Corporate Plan 2011-2013
NBN Co Migration Guide	NBN Co, <i>Migrating to the National Broadband Network—An information guide</i>
Networks and Services Instrument	<i>Telecommunication (Structural Separation – Networks and Services Exemption) Instrument (No. 1) 2011</i>
Regulated Services	Services defined as regulated services by clause 71 of Schedule 1 of the Telco Act
Regulated Services Determination	<i>Telecommunications (Regulated Services) Determination (No. 1) 2011</i>
Regulatory Reform Discussion Paper	DBCDE, <i>National Broadband Network: Regulatory Reform for 21st Century Broadband</i> , Discussion Paper, April 2009
Specified Matters Instrument	<i>Telecommunications (Migration Plan – Specified Matters) Instrument 2011</i>
SOE	Senators The Honorary Penny Wong and Stephen Conroy, <i>Statement of Expectations</i> issued to NBN Co Limited, 17 Dec 2010
SSU	Telstra’s Structural Separation Undertaking dated 23 February 2012
Telco Act	<i>Telecommunications Act 1997 (Cth)</i>