



NBN Co submission in response to Telstra's Consultation on Replacement Required Measures 5(A) and 5(C)-5(E)

12 October 2018

Telstra Consultation on Replacement Required Measures 5(A) and 5(C)-5(E)

NBN Co welcomes the opportunity to respond to Telstra's Consultation on Replacement Required Measures 5(A) and 5(C)-5(E): Disconnection processes for Special Services and Special Service inputs (**TSS**) (**Telstra Consultation**). This response is a public submission and we request that Telstra publishes this response on the TelstraWholesale.com website within 24 hours of receipt in order to assist other industry participants to inform their response to the Telstra Consultation.

Telecommunications infrastructure serving the Australian business market is highly competitive

NBN Co agrees with Telstra's view that "there is competitive infrastructure that can be used to supply TSS substitutes, which underlies the competitiveness of the business market more generally".¹ NBN Co is a new entrant into the business market and is offering a competitive suite of open access, wholesale-only business-grade services with a nation-wide reach. All our services are subject to regulatory oversight and the supply of services to access seekers is on a non-discriminatory basis. NBN Co's business network thus brings added competition to the telecommunications market and delivers strong consumer benefits to Australian businesses, large enterprises and government agencies as contemplated by Government Policy.

The In-Train Order process for Special Services agreed between NBN Co and Telstra will enable the successful migration of Special Services and does not restrict infrastructure competition.

The seamless and effective migration of Special Services from legacy networks is critical to the business market. NBN Co has understood the importance of this for many years, which is why NBN Co implemented the deferred disconnection arrangements for Special Services involving the White Paper Process under which:

- disconnection of Special Services is not triggered until NBN Co has published a White Paper that demonstrates how "NBN Co's product capabilities can enable the industry to develop business packages that are the same as, or better than their legacy copper based equivalents... and the capability of the **nbn**[™] access network as a suitable migration pathway for TSS services";² and
- the first disconnection date for a particular type of Special Service will not occur until at least three years after NBN Co has published the White Paper for that type of Special Service which provides sufficient migration timeframes for Special Services to the **nbn**[™] access network.³

The first White Paper, covering Ethernet-Lite and Wholesale BDSL, was released in September 2015. Businesses with those types of Special Services have had three years notice of the need to migrate to the **nbn**[™] access network or to find an alternative solution.

¹ Telstra Consultation, page 5.

² NBN Co, Temporary Special Services White Paper, Ethernet-Lite and Wholesale BDSL on the **nbn**[™] Ethernet Bitstream Service, page 3.

³ Additionally, Special Services will only be subject to disconnection where they are in an area where **nbn** has declared Ready For Service.



In the lead up to the first disconnection date for Special Services (in November 2018), Telstra and NBN Co understood that, similar to the processes for residential end users, there was a need to provide a process for those businesses who may not act on the upcoming disconnection date until the very last minute. Consequently, and as noted in the Telstra Consultation, NBN Co and Telstra agreed a set of proposed arrangements to enable successful migration of these Special Services to the **nbn**[™] access network. These arrangements are currently the subject of a separate consultation with the ACCC. Under these arrangements, the parties have agreed to:

- defer the commencement of any managed disconnection activities following the passing of the Special Services Disconnection Date on 12 November 2018 covering Ethernet-Lite and Wholesale BDSL services until 29 January 2019; and
- extend the timeframe for disconnecting Special Services beyond the initial mandatory Special Services Disconnection Date where the customer has an In-Train Order in place to migrate the Special Service to the **nbn**[™] access network.

The In-Train Order arrangements agreed between NBN Co and Telstra establish appropriate safeguards to defer Telstra's disconnection obligations under the Migration Plan and the Required Measures if the end user customer places an order with NBN Co. Such an arrangement is consistent with Telstra's commitment and obligation to structurally separate in line with Government Policy and via the Definitive Agreements as the **nbn**[™] access network is rolled out. NBN Co supports these arrangements as agreed between Telstra and NBN Co, lodged with the ACCC for approval on 10 September 2018, and anticipates that the ACCC will approve these arrangements in a timely manner.

Importantly, these arrangements do not restrict infrastructure competition in any way as any retail service provider that wishes to connect a customer to a non-**nbn**[™] access network is free to do so.

Expansion of the In-Train Order process for Special Services migrating to non-nbn[™] access networks is inconsistent with Government Policy and will not enhance successful Special Services migrations

NBN Co does not support the expansion of the In-Train Order process for Special Services migrating to non-**nbn**[™] networks as proposed in the Telstra Consultation. These proposed arrangements are:

- inconsistent with the wider migration arrangements previously approved by the ACCC;
- inconsistent with the Australian Government's policy of structural separation;
- inconsistent with commercial agreements previously agreed with NBN Co and Telstra;
- inconsistent with the Migration Plan Principles;⁴
- not required by industry for a successful migration of Special Services; and
- not supported by a number of retail service providers.

Telstra's Consultation is inconsistent with established migration arrangements

The first White Paper relating to Ethernet-Lite and Wholesale BDSL services was released by NBN Co in September 2015 and was subsequently accepted by Telstra. Since that date, Telstra has had obligations⁵ to proactively work with both their wholesale and retail customers to inform them that:

⁴ As outlined in the *Telecommunications (Migration Plan Principles) Determination 2015*.

⁵ Obligations contained in the Migration Plan and Migration Assurance Framework.



- Telstra will be disconnecting Ethernet-Lite and Wholesale BDSL services on the Special Services Disconnection Date for those types of Special Services which were determined following the release of White Paper One; and
- to ensure continuity of service, they would need to migrate the relevant services to either the **nbn**[™] access network or an alternative network before that applicable Special Services Disconnection Date.

In the event that an end user had not migrated their Ethernet-Lite and Wholesale BDSL services away from Telstra's legacy networks by the Special Services Disconnection Date, Telstra has an obligation under the Migration Plan to disconnect those services as well as a contractual obligation as per the Definitive Agreements. This is a well-established process that applies in a similar manner for residential end users. In return for this obligation, Telstra is provided a disconnection payment (or part thereof) by NBN Co. Importantly, Telstra generally receives this disconnection payment (or part payment) regardless of whether the end user chooses to connect the Special Service to the **nbn**[™] access network or to an alternative network.

Despite having a three-year window to inform these Special Services customers about upcoming Special Services Disconnection Dates, the industry is now just over one month away from the scheduled first disconnection date for Ethernet-Lite and Wholesale BDSL covered by White Paper One. NBN Co has undertaken extensive planning and public education campaigns and is ready to connect these Special Service customers to the **nbn**[™] access network. Despite our efforts the number of eligible active Special Services subject to the 12 November 2018 disconnection date has only decreased by 14 per cent between May 2017 and May 2018.⁶ NBN Co has urged Telstra to work with its customers to migrate the relevant Special Services to the **nbn**[™] access network or alternative network.

NBN Co considers that Telstra has not been sufficiently pro-active in informing and seeking to migrate its business customers away from its legacy network in a timely fashion in advance of the upcoming disconnection date. NBN Co does not consider there is justification for now departing from the well understood industry arrangements.

Telstra's Consultation is inconsistent with Government Policy and commercial agreements previously agreed with NBN Co and Telstra

As noted by Macquarie Telecom, the Telstra Consultation "*...is not in keeping with the principle of structural separation that is at the heart of the **nbn** vision, Telstra's own undertaking and deal with the government. Now Telstra has suddenly found its wallet just as it faces the imminent threat of a level-playing field from an all-new **nbn** which would uncouple customers from Telstra's monopoly and forever free them to choose other retailers*".⁷

Additionally, NBN Co submits that the Telstra Consultation is inconsistent with ACCC approved industry migration arrangements and the wider regulatory framework. Furthermore, Telstra has agreed to a twenty year network preference arrangement in favour of NBN Co – that is, Telstra has agreed to exclusively use the **nbn**[™] fixed line network as the fixed line connection to serve premises in the **nbn**[™] fixed line footprint. We acknowledge that there are exceptions to this regime, including for the use of Telstra's P2P fibre network. However, these were always intended to be limited exceptions. Indeed, at the time of the ACCC's assessment of Telstra's Structural

⁶ Telstra Consultation, Page 4.

⁷ Comms Day, 25 September 2018.



Separation Undertaking and Migration Plan, Telstra and NBN Co jointly described the exceptions to Telstra's network preference as limited:

"NBN Co considered that a separate contractual constraint on Telstra's ability to build fibre networks was fundamental to NBN Co's ability to meet the Government's policy objective. In the absence of the provisions, Telstra would be able to build a fibre network in substitution for the copper and HFC networks which NBN Co had paid Telstra to disconnect, potentially using the PSAA payments from NBN Co to fund that network".

It is unreasonable to expect that NBN Co will pay Telstra a disconnection fee (or part of a disconnection fee) to simply reconnect these customers to its own fibre network.

Further, the regulatory and migration framework does not contemplate migration to other non-nbn™ access networks. The framework only contemplates the 'managed disconnection' of legacy networks to the nbn™ access network. These frameworks and arrangements were established despite the presence of other fibre networks including Telstra's own P2P network, and fibre networks owned by TPG and Vocus. These arrangements were subsequently approved by the ACCC as a consequence of the acceptance of Telstra's Structural Separation Undertaking and Migration Plan.

The intention to only disconnect legacy networks to the nbn™ access network is illustrated in several key areas of the Migration plan including:

- the objectives of the Migration Plan are (in part) to provide an efficient and timely disconnection of wholesale and retail non-exempt services from a separating network as the nbn™ fixed line network is deployed and for those services to be migrated to the nbn™ access network;⁸ and
- the Migration Plan defines Migration as "the process of disconnecting of Copper Services or HFC Services at a Premises and connection to the NBN Fixed Line Network at the same Premises". It specifically does not contemplate migration of services to other networks.⁹

Telstra's Consultation is inconsistent with the Migration Plan Principles

An In-Train Order process which does not involve a connection to the nbn™ access network is inconsistent with the Migration Plan Principles. The definition of In-Train Order premises in the Migration Plan Principles is any of the following:

*"(a) a premises in respect of which NBN Co notifies Telstra that, before the disconnection date for the rollout region in which that premises is located, **an order for connection to the NBN Co fixed-line network** has been received but connection has not been contemplated by the disconnection date for that rollout region;*

*(b) a premises in respect of which NBN Co notifies Telstra that **an order for connection to the NBN Co fixed-line network** has been received between the disconnection dates for the rollout region in which the premises is located and 25 business days after the disconnection date for that rollout region; or*

⁸ Migration Plan, Clause 2.1.

⁹ Migration Plan, Schedule 10, Dictionary, at Page 260.



(c) a premises which becomes connected to the NBN Co fixed-line network within one month before the disconnection for the rollout region in which that premises is located".¹⁰

Further, the definition of Migration in the Migration Plan Principles is *"the process of disconnecting copper services or [HFC] carriage services at a premises and connection to the NBN Co fixed-line network at the same premises"*.¹¹

Given this clear inconsistency with the Migration Plan Principles and that the ACCC "may object to a proposed, new, replacement or varied Schedule if it is not compliant with the Migration Plan Principles",¹² NBN Co believes that Telstra's proposed Varied Schedule must be disallowed by the ACCC.

Not only is the Telstra Consultation inconsistent with the Migration Plan Principles but it is also inconsistent with the provisions in the Migration Plan which Telstra are required to consider when amending a Required Measure. In particular, the Migration Plan clearly provides that "In developing or amending any new, replacement or varied Schedule, Telstra will ensure that such Schedule is developed consistently with, and does not limit or restrict any obligation owed by Telstra to NBN Co under, a Definitive Agreement, including in respect of any applicable disconnection timeframes".¹³ However, the Telstra Consultation also notes that "the Definitive Agreements do not currently provide for an In-Train Order period in respect of orders to migrate TSS to a network other than the nbn"¹⁴ which highlights that the Telstra Consultation is inconsistent with obligations owed by Telstra to NBN Co under the Definitive Agreements and therefore also inconsistent with relevant provisions of the Telstra Migration Plan.

NBN Co notes that in the Telstra Consultation, Telstra has outlined two ways that the Telstra Consultation is, in Telstra's view, consistent with the Migration Plan Principles. Specifically Telstra argues that its Consultation is consistent with Specific Principles 18 and 28 as well as General Principle 10.¹⁵ NBN Co submits that Telstra's claims of compliance with Specific Principles 18 and 28 and General Principle 10 are meaningless given that Telstra's proposed In-Train Order process offers no greater compliance with these specific Migration Plan Principles relative to the In-Train Order process agreed between NBN Co and Telstra that is currently being considered by the ACCC.

Telstra Consultation is not required by industry for a successful migration of Special Services and not supported by a number of RSPs

¹⁰ Migration Plan Principles Determination, Part 1, Section 5 Definitions and Interpretations at Page 10.

¹¹ Migration Plan Principles Determination, Part 1, Section 5 Definitions and Interpretations at Page 12.

¹² Telstra's Migration Plan, clause 5.2(g), as approved by the ACCC on 6 March 2018.

¹³ Migration Plan, Clause 5.3(b).

¹⁴ Telstra Consultation Page 6.

¹⁵ Specific Principle 18 and General Principle 10, require Telstra to ensure that disconnection occurs in way that minimises disruption to the supply of fixed-line carriage services. Specific Principle 28 for Required Measures and replacement schedules requires Telstra to set out a process, and associated timetable, under which Telstra will provide the ACCC with prior written notice of, and an opportunity for the ACCC to disallow, a replacement schedule to incorporate processes associated with the disconnection of Special Services.



As stated in this submission, NBN Co does not consider that it is necessary for any In-Train Order for Special Services to be extended to non-**nbn**[™] access networks. The industry has had three years to migrate these services, NBN Co is ready to meet all service requests at locations subject to disconnection and end user customers are free to migrate to an alternative non-**nbn**[™] access network at any time.

NBN Co notes that in the Telstra Consultation, Telstra requested that industry provide views on the extension of the In-Train Order process for Special Services to non-**nbn**[™] access networks. Over recent weeks this has generated some media interest and several retail service providers have indicated that they do not support the Telstra Consultation, including Aussie Broadband, Launtel, Superloop, Macquarie and Vocus.¹⁶

Accordingly, NBN Co has no intention of agreeing changes to its commercial arrangements with Telstra which would reflect its proposed variation.

NBN Co would be more than happy to discuss any aspect of this submission with Telstra or any other industry participants. Please reach out to Sarah Alderson (Sarahalderson@nbnco.com.au) to discuss.

¹⁶ Including Aussie Broadband and Launtel (Comms Day 20 September 2018), Superloop and Macquarie Telecom (Comms Day 25 September 2018) and Vocus (Comms Day 4 October 2018).