# Variation of Telstra’s migration plan – regulatory instruments: exposure drafts



Telecommunications (Migration Plan Principles) Determination 2014

Telecommunications (Migration Plan – Specified Matters) Instrument 2014

**December 2014**

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## 1. Background – Structural separation of Telstra and rollout of the National Broadband Network

The structural separation of Telstra and the transition from existing fixed-line networks to the National Broadband Network (NBN) represents a significant structural change to the delivery of fixed line telecommunications services in Australia.

The regulatory framework for Telstra’s structural separation is provided under Part 33 of the *Telecommunications Act 1997* (the Telecommunications Act). Part 33 creates a framework for Telstra to voluntarily structurally separate by submitting a Structural Separation Undertaking (SSU) which is subject to review by the Australian Competition and Consumer Commission (ACCC).

Under Part 33, structural separation is defined to mean that after the designated day (either 1 July 2018 or a later day specified by the Minister) Telstra will not supply fixed-line services to retail customers in Australia using a telecommunications network over which it is in a position to exercise control unless that network or those services have been exempted by an instrument under subsections 577A(20) and (21) of the Telecommunications Act.

To facilitate its structural separation and the migration of customers to the NBN, Telstra first entered into Definitive Agreements with NBN Co in June 2011. The original Definitive Agreements were structured around the rollout of a fibre-to-the-premises (FTTP) NBN by providing for NBN Co to pay Telstra for the progressive disconnection of customers from its legacy copper and hybrid fibre-coaxial (HFC) fixed-line networks.

The ACCC accepted Telstra’s SSU under section 577A of the Telecommunications Act on 27 February 2012. The SSU commenced on 6 March 2012, with Telstra undertaking to cease supply of fixed-line voice and broadband services over its copper and HFC networks in favour of supplying them over the NBN as the new network is progressively rolled out. No change to the SSU is proposed.

A Strategic Review by NBN Co in December 2013 recommended that the NBN should be completed using a multi-technology mix (MTM) model to deliver fast broadband sooner and at less cost to taxpayers. Adopting this recommendation, the Government issued a new Statement of Expectations to NBN Co on 8 April 2014, instructing the company to determine which technologies are to be used for the NBN in any given area on a case-by-case basis, so long as the NBN is constructed within a defined cost and in compliance with certain other criteria. Technologies that may be used include FTTP, fibre-to-the-node (FTTN), fibre-to-the-basement (FTTB), HFC, fixed wireless and satellite.

To facilitate this policy shift to an MTM model NBN, Telstra and NBN Co have been negotiating amendments to the Definitive Agreements.

Part 33 of the Telecommunications Act provides that Telstra’s SSU may specify actions it will take. This can include giving the ACCC a migration plan. On 27 February 2012, the ACCC approved Telstra's draft migration plan. The first migration plan commenced on 7 March 2012 and has been subsequently varied. Telstra’s migration plan details how the company will disconnect customers from its copper and HFC networks as the NBN rollout progresses. Concurrent with the renegotiation of amendments to the Definitive Agreements, the parties have also been considering required changes to the plan to allow for the rollout of an MTM model NBN.

Given the significant changes stemming from the shift to the MTM model NBN (as reflected in the amended Definitive Agreements and other related agreements between NBN Co and Telstra), a revised migration plan will need to be submitted by Telstra to the ACCC under Part 33 of the Telecommunications Act. Accordingly, the existing ministerial instruments under subsection 577BC(2), (3) and (4) will need to be repealed and replaced to guide the regulator’s consideration of the revised migration plan. The new instruments are:

* the draft *Telecommunications (Migration Plan Principles) Determination 2014* (the Migration Plan Principles); and
* the draft *Telecommunications (Migration Plan – Specified Matters) Instrument 2014* (the Specified Matters Instrument).

The new Migration Plan Principleswould set out the mandatory elements of the varied migration plan. If the ACCC is satisfied that a varied migration plan submitted to it by Telstra complies with the Migration Plan Principles, then under the Telecommunications Act the ACCC must approve the varied plan.

The new Specified Matters Instrumentsets out matters that a varied migration plan must contain in addition to those specified under subsection 577BC(2) of the Telecommunications Act. This instrument also sets out matters that the varied migration plan must not contain.

A brief overview of each instrument (as proposed to be made) is provided at section 3 below.

## 2. Consultation process

The Government invites interested stakeholders to comment on the draft regulatory instruments proposed to be made under the Telecommunications Act.

Please make submissions in writing to:

Assistant Secretary
Infrastructure Deployment
Department of Communications
GPO Box 2154
CANBERRA ACT 2601

Or send by email to migration@communications.gov.au

The closing date for submissions is **5 pm Eastern Daylight-saving Time on
Wednesday, 7 January 2015.**

Written comments should include the respondent’s name, organisation (if relevant) and contact details.

Respondents should be aware that written submissions may be published on the website of the Department of Communications (www.communications.gov.au). The Department reserves the right not to publish any submission, or part of a submission, for any reason.

All submissions will be treated as non‐confidential information unless the respondent specifically requests the submission, or a part of the submission, is kept confidential, and the Department notifies the respondent in writing that it consents to that request.

Note:

1. Submissions will generally be subject to the *Freedom of Information Act 1982*.
2. Any personal information respondents provide in a submission will be used only for the purposes of consideration of issues raised in this paper. Respondents should clearly indicate in their submission if they do not wish to have their name included in any copy of that submission or part of it or any summary of submissions that the Department may publish.

## 3. Legislative basis, policy intention and outline of the structural separation instruments

### 3.1 Draft *Telecommunications (Migration Plan Principles) Determination 2014*

#### 3.1.1 Legislative basis

Paragraph 577A(1)(b) of the Telecommunications Act provides that Telstra’s SSU can specify the action that Telstra will take in connection with its structural separation. Subsection 577BC(1) provides that the specified action can include giving the ACCC a draft migration plan. As the Telecommunications Act does not permit the withdrawal of a final migration plan, Telstra intends to submit a proposed variation of its current plan to the ACCC for approval.

The requirements of a draft or final migration plan (and variation thereof) are set out at subsection 577BC(2): it must specify the action that Telstra will take in relation to the steps involved in migrating fixed-line services that it supplies to customers from a network over which it is in a position to exercise control to the NBN. It must also set out a timetable for the taking of that action, or a method for determining such a timetable. The reference to a method for determining a timetable is intended to permit Telstra to provide for the timetable for migration to relate to the progressive rollout of the NBN.

The purpose of the Migration Plan Principles, made by ministerial determination under subsection 577BB(1) of the Telecommunications Act, is to define in greater detail the matters that the migration plan must deal with and the way in which it must deal with them.

If a variation of the migration plan which has previously been approved by the ACCC complies with the Migration Plan Principles, the ACCC must approve it (refer subsection 577BF(3) of the Telecommunications Act).

In undertaking the public consultation in respect of the two draft instruments, the Government seeks to draw upon the expertise and practical experience that exists in the telecommunications sector so that an effective migration framework is in place to facilitate the smooth rollout of an MTM model NBN.

#### 3.1.2 Policy Intention

The policy objective underpinning the two draft instruments is to ensure there is an effective migration plan in place which facilitates the implementation of the MTM model NBN in a manner which expedites the rollout of the NBN and structural separation of Telstra, with minimal end-user customer disruption or disadvantage to retail service providers. The progressive migration of Telstra's fixed-line customer services to the NBN will result in substantial long-term benefits for Australia.

The progressive migration of Telstra's fixed-line customer services onto the NBN Co fixed-line network has been occurring for some time under the original migration plan. However, experience on the ground has shown that the original migration plan was less flexible than it needed to be as issues arose in the migration process which required changes to actions that Telstra takes under the migration plan. Despite this, the overall aim of undertaking structural separation to create a wholesale-only network operating across the country which is not controlled by any retail company remains an important policy goal. Separation between the network provider and retail providers will mean, and continue to mean in an MTM NBN context, better and fairer infrastructure access for service providers, greater retail competition and better services for consumers and businesses.

To address these issues and facilitate the structural separation of Telstra, the objects of the Migration Plan Principles are to set out principles that provide for:

* the efficient and timely disconnection of wholesale and retail carriage services from a separating network as the NBN Co fibre network is deployed; and
* Telstra to implement disconnection processes for its copper network that ensure equivalency between its wholesale customers and retail business units.

As provided for under the Telecommunications Act, the final instruments, once made, would guide the ACCC’s consideration of the variation to Telstra’s migration plan.

The draft instruments adopt the same structure and much of the content of the 2011 Migration Pan Principles and Specified Matters Instrument. However, adjustments have been made to support the MTM rollout and improve consumer outcomes and also accommodate learnings from the rollout of the NBN to date, and interim disconnection measures agreed informally by the ACCC. These set of changes are described further below.

The amendments to the existing form of the Migration Plan Principles to be made by this new determination generally fall into the following categories:

* broadening its scope to accommodate the additional fixed-line technologies to be deployed under the MTM-model NBN (FTTP, FTTB, FTTN and HFC), including making the principles (and related key definitions) MTM-neutral, in most cases via simple language changes (e.g. “fibre services” becomes “fixed-line services”);
* clarifying matters which are and are not Telstra’s responsibility within the scope of the migration plan;
* reflecting commercial and operational changes that will be incorporated in the amended Definitive Agreements and additional commercial agreements negotiated between NBN Co and Telstra in respect of migration-related matters;
* addressing substantive policy issues identified during the initial migration period and providing mechanisms to accommodate future improvements to the migration process;
* clarifying the rules to apply to the supply by Telstra of HFC services pending migration, given the acquisition by NBN Co of Telstra’s HFC network as part of the MTM NBN policy shift;
* clarifying information security arrangements, balancing the use of different mechanisms to provide competitive outcomes;
* a range of substantive amendments to reflect procedural improvements (for example, providing greater flexibility in relation to both order stability periods and the restoration of services which should not have been disconnected);
* incorporation of the provisions to allow for the updating of required measures (other than the required measure dealing with information security) in a MTM neutral form in a streamlined manner.

#### 3.1.3 Outline

The draft Migration Plan Principles adopts the same structure as the original 2011 document, and retains the three classes of principles:

* general principles, which describe the overarching policy principles that must be met by the migration plan;
* specific principles, which set out the policy principles in greater detail and which also describe other specific requirements that are to be given effect in the migration plan; and
* procedural principles, which set out procedural matters that must be included in the plan.

##### MTM changes

Wherever possible, drafting of the new Migration Plan Principles has favoured reframing provisions as MTM-neutral, so that they apply equivalently across all HFC, FTTN, FTTB and FTTP technologies. This is consistent with the expectation that many rollout regions will comprise more than one NBN technology platform, to be determined by NBN Co. Some existing provisions have been retained or inserted for specific technologies.

##### Broader regulatory certainty

As noted earlier, a key principle in developing the revised Migration Plan Principles has been providing regulatory certainty to Telstra regarding its responsibilities under the migration plan commensurate with the structural separation reforms of the government and the stringent regulatory framework under which Telstra operates. The draft Migration Plan Principles include a list of matters which fall outside Telstra’s responsibilities, as well as matters for which Telstra’s compliance is dependent on the actions of third parties. These are provided at Schedules 2 and 3 of the determination, respectively, and will be replicated in the revised migration plan.

It is important to note that these provisions are aimed at clarifying the scope of Telstra’s responsibilities under the migration plan. These provisions are not intended to limit Telstra’s responsibilities outside of the plan, for example, as a retail service provider on the NBN. Schedules 2 and 3 are also intended to provide the telecommunications industry with greater clarity in respect of matters which fall within NBN Co’s responsibilities under the NBN MTM.

##### HFC services

The revised Migration Plan Principles include an explicit prohibition on Telstra accepting an order to supply a HFC service or to assist a retail customer to receive a HFC service where the premises to which the proposed order relates is not situated in the network footprint of its HFC network. The draft Migration Plan Principles also include terms guaranteeing flexibility for customers to acquire HFC plans from Telstra on a casual basis to allow flexibility to select an alternative provider on migration to the NBN.

##### FSAM 32+

The migration process in the initial 31 Fibre NBN rollout regions, otherwise known as Fibre Service Area Modules (FSAMs), has resulted in the identification of a range of substantive policy issues relating to the migration process to support service continuity for consumers. Telstra and NBN Co have worked to develop solutions which will be applied for migrations in the thirty-second FSAM and beyond. Given the timing of the disconnection period for those additional FSAMs commences from 20 February 2015, these arrangements have already commenced, even though these are not yet reflected in a formal variation to the migration plan. The ACCC and industry have been briefed on the operational changes arising from these arrangements. The ACCC is currently seeking industry comment on the arrangements. Provisions relating to the management of Service Class 0 premises (i.e. premises where NBN Co is unable to provide services), treatment of in-train orders and communication with end-users regarding disconnection dates have been incorporated into the new draft Migration Plan Principles.

##### Information security

Both Telstra’s and NBN Co’s handling of information is a critical issue in ensuring the competition objectives of the Government’s NBN reforms are realised.

The approach to the handling of information by Telstra with regard to FTTP connections is set out in the Migration Plan Principles. That approach reflects the arrangements that are in place under the existing migration plan.

Consistent with the Government’s policy announcement of 15 December 2014, it is intended that information security for FTTN, FTTB and HFC technologies will be addressed in a number of ways, as outlined below. This reflects that both Telstra’s and NBN Co’s handling of information is important and that there are mechanisms that may be used to protect competition other than the migration plan.

A carrier licence condition will be imposed on NBN Co, requiring it to share information with all retail service providers on an equitable basis. This will be developed in 2015, subject to consultation conducted by the ACCC with industry stakeholders regarding the type of information they will require from NBN Co with the overarching object of such a licence condition to ensure symmetry between Telstra and all other retail service providers in respect of relevant NBN-rollout and related information. This will ensure that Telstra does not have any actual or perceived information advantage by virtue of its role as the owner of copper and HFC networks being acquired by NBN Co.

The Migration Plan Principles make clear that the migration plan will not limit any obligations of Telstra under Part IV or XIB of *the Competition and Consumer Act 2010* (Competition Act). Therefore, in the event that Telstra did improperly use confidential information provided to it by NBN Co for its competitive advantage, the ACCC would retain all of its existing remedies under the Competition Act to pursue Telstra.

Further, in relation to information that retail service providers give directly to Telstra, information security is comprehensively addressed in both the SSU itself and in the wholesale supply contracts which those providers have with Telstra.

The existing Definitive Agreements contain comprehensive restrictions on the use by Telstra of confidential information provided by NBN Co to Telstra. The obligations imposed on Telstra under the Definitive Agreements include that Telstra will not use confidential information provided by NBN Co to gain or exploit an unfair advantage over a retail service provider, NBN Co or a competitor of Telstra. When the Definitive Agreements are amended, these comprehensive restrictions will be retained. The Government has no reason to expect that Telstra would breach these contractual undertakings. Further, NBN Co, as a government business enterprise and with its key long term incentive to maximise retail competition, would be expected to take all appropriate action to enforce these comprehensive restrictions.

Given the ‘red tape’ reduction policy of the Government, in light of the factors outlined above, that is, the restrictions in the migration plan that will continue to apply to the FTTP rollout, the powers of the ACCC under Parts IV and XIB of the Competition Act, the obligations of Telstra under the SSU and contracts with its wholesale customers and the contractual restrictions imposed on Telstra by NBN Co, there is no compelling reason to further extend the application of the information security provisions of the current migration plan to information related to the FTTN, FTTB and HFC components of the NBN.

##### Incorporating Migration Assurance Policy outcomes

The Migration Assurance Policy (MAP) process was initiated by the Government to deliver improved migration experiences across the customer base in light of negative experiences during the initial NBN migration period. It is a whole-of-industry process, reflecting the reality that end-to-end service continuity will involve a wide variety of industry participants, not simply Telstra and NBN Co. The MAP being developed will include assurance principles and high-level guidance regarding individual stakeholder roles. In concert with the MAP an industry working committee has developed an NBN migration management guideline.

The overall aim of the MAP is to develop processes and solutions to protect customers and support service continuity as the NBN is progressively rolled out. Some of these may fall within the scope of Telstra’s responsibilities under the migration plan. Because of the relative timing of the development of the new Migration Plan Principles and the MAP process (which is an ongoing process that is likely to be finalised in mid-2015), the specific MAP outcomes have not been able to be reflected in Telstra’s proposed variation to the migration plan. Therefore, the proposed Migration Plan Principles would require Telstra to review the MAP Statement (and any updates) and, should it determine that any parts of the Statement relate to its obligations under the migration plan and require the plan to be varied, write to the Minister identifying those parts and submit a proposed variation to the ACCC for consideration. This approach embeds the process to vary the plan to reflect MAP outcomes.

### 3.2 Draft Telecommunications (Migration Plan—Specified Matters) Instrument 2014

#### 3.2.1 Legislative basis

In addition to the matters specified under subsection 577BC(2), a draft or final migration plan (including a variation of the final migration plan) must contain provisions dealing with other matters specified by the Minister in a written instrument under subsection 577BC(3) and must not contain provisions dealing with matters set out in an instrument under subsection 577BC(4). Terms used in the draft Specified Matters Instrument will have the same meaning as in the proposed Migration Plan Principles.

#### 3.2.2 Policy Intention

The purpose of the Specified Matters Instrument is to clearly define the scope of the migration plan to enable it to include provisions implementing all the Migration Plan Principles. The instrument also specifically precludes the migration plan from dealing with particular matters which could otherwise be argued as falling within its scope, such as terms and conditions of access to the NBN.

Taken in conjunction with the Migration Plan Principles, the new Specified Matters Instrument is intended to guide the ACCC’s consideration of the variation to Telstra’s migration plan. Drafting of the new Specified Matters Instrument is based on the 2011 Instrument currently in force.

#### 3.2.3 Outline

The table at section 5 of the draft instrument sets out the matters that the migration plan must deal with. In addition to those matters that had been provided for under the original 2011 instrument (including some minor adjustments to those items to reflect the MTM NBN), a number of additional new matters have been specified. Key matters include:

* the specification of matters which are not Telstra’s responsibility within the scope of the revised migration plan;
* the specification of interdependencies between Telstra’s responsibilities under the revised plan and the actions of third parties;
* the circumstances in which Telstra will be involved, if any, in the use by NBN Co of existing hybrid fibre-coaxial or copper lines to pull through other types of lines forming part of the NBN Co fixed-line network;
* a process for Telstra to review the migration plan and determine if any variations to the plan are required to reflect any parts of the MAP Statement with which Telstra agrees (this item, which is also specifically addressed in the draft Migration Plan Principles, is included for the avoidance of doubt);
* a prohibition on the supply of wholesale carriage services by Telstra using any hybrid fibre-coaxial network controlled by Telstra (this item, which is also specifically addressed in the draft Migration Plan Principles, is included for the avoidance of doubt);
* the disconnection, or continuation, of copper services and hybrid fibre-coaxial services to common areas within multi-dwelling units;
* any requirements (including pricing) relating to Telstra’s supply of carriage services to retail customers over a hybrid fibre-coaxial network controlled by Telstra;
* measure to ensure the equivalent treatment of wholesale customers and retail business units under processes Telstra will use to disconnect services from a separating network; and
* the incorporation of existing required measures 1- 4, as approved by the ACCC, into a form of the migration plan comprising MTM variations (including processes for updating or amending the plan).

Section 6 of the draft instrument details 4 matters which the migration plan must not deal with, being:

* terms and conditions relating to the supply by NBN Co to Telstra of services using the national broadband network;
* terms and conditions relating to access to eligible services supplied by Telstra over the national broadband network;
* 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; and
* any design, construction and maintenance agreements entered into between NBN Co and Telstra for the MTM model NBN.

The first three matters were also contained in the original 2011 Specified Matters Instrument. The fourth matter is not of a type that should be dealt with under the migration plan.