

**Submission on Draft Migration Plan Regulatory Instruments**

**January 2015**

The Competitive Carriers Coalition welcomes the opportunity to comment on the proposed changes to the migration plan as a result of the changed agreement between NBN Co, Telstra and the Government.

The CCC remains strongly committed to the principle of structural separation as an essential element in achieving sustainable competitive arrangements in Australian communications markets. The competitive performance of Australian markets continues to badly lag overseas markets in outcomes for consumers. The NBN policy recognises that the last mile network elements are effective natural monopolies and the best possible market structure arrangements for maximising competition is to separate the ownership and operation of these assets and require them to be managed on a non-discriminatory, wholesale-only basis.

The transition period as customers are transferred from Telstra-owned networks to NBN Co owned MTN access networks is crucial to the future level of competition in retail markets. The decision to utilise Telstra last mile assets in the fixed line network footprint means there is a greater risk of Telstra leveraging incumbency advantage to lock in consumers ahead of and during this transition than is the case in locations where the existing network is to be replaced by FTTH.

The CCC has some concerns with elements of the proposed revised arrangements between Telstra and NBN Co and the proposed variations to the Migration Plan Principles in that the CCC believes some elements have the potential to work to the disadvantage of competitors and to impede the development of competition, particularly in the HFC footprint.

Pre-Transfer Construction Arrangements

One area of concern is in relation to the agreement by Telstra to allow NBN Co access to the HFC network to engage in pre-ownership transfer construction work, and for Telstra to be able to utilise these new assets. It is unclear to the CCC why this would be necessary, but it is clear that there are very significant risks of harm to competition.

If it is NBN Co’s intention to “patch” the gaps in the HFC footprint before the ownership transfer to the extent of completing new customer lead ins, and for Telstra to be able to utilise these new lead ins to acquire new retail customers, it would, in effect, mean the taxpayer was funding an expansion of Telstra’s monopoly addressable market for HFC-based services and service bundles. This is at odds with the policy intention and contrary to the objective of sustainable competition. It would also distort the market once the ownership transfer had been completed because Telstra would have enjoyed a “running start” in terms of building market share.

The CCC notes that the draft migration plan variations include measures that appear to be intended to enable such an advantage to be “unwound” by requiring Telstra to avoid contracts that would lock in customers for more than 24 months, and that limit the termination charges Telstra can apply.

The CCC submits these constraints are wholly inadequate. If Telstra is allowed to sign retail customers to connections built by NBN Co before other RSPs there is no doubt it will benefit from being the incumbent service provider to those locations, and enjoy high market share in those locations for years to come. Other RSPs, rather than starting on a level playing field with NBN customers, would have to displace Telstra as the incumbent retailer from customers that Telstra cannot today access based on its own sunk investment.

In addition, the CCC is concerned that Telstra would leverage its unique advantage as the dominant partner in Foxtel to bundle exclusive content and broadband products to cement its incumbency.

Further, the risks to competition arising from these potential circumstances can easily be avoided.

The CCC does not believe it is necessary for NBN Co to be completing lead in to customer premises before the ownership of the HFC network transfers. The lead ins should be completed only after the completion of the transfer of ownership of the HFC network. The CCC understands from its members that this would be their preferred approach from NBN Co.

The migration plan should preclude Telstra from acquiring customers on leads ins built by Telstra. Short of this, it should require Telstra to sign customer to contracts on a month-to-month basis and preclude it from bundling broadband with Foxtel services during the transition period.

Wholesale Service on HFC and Regulatory Safeguards

The CCC is also concerned by requirements in the draft proposal to forbid Telstra from offering wholesale services on the HFC. Telstra has shown strong resistance to offering any wholesale services on the HFC network throughout its history. This suggests any proposal to wholesale HFC services are more likely to be a regulatory measure in response to evidence of serious anti-competitive conduct than a commercial decision by Telstra.

Given the rigour and high standards of evidence required by the ACCC’s Part XIC processes before a service is declared, it would seem likely that only serious evidence of anti-competitive behaviour would persuade the ACCC to take such action.

It is not clear to the CCC why the Government would have any interest in or find it necessary to remove this important regulatory competition safeguard in relation to the HFC. The ACCC should empowered to act without constraint in response to evidence that Telstra is acting in ways that are not in the long term interest of end users. Removing the ability of the ACCC to exercise its Part XIC powers does not seem necessary. However, doing so risks providing a signal to Telstra that opportunities to exploit market power opportunities in relation to its HFC network are likely to be profitable.

Information Security Obligations

Another area of concern is the proposal to confine the obligations on Telstra to report on the performance of its information security systems only in the FTTH footprint area. The CCC sees this issue in the context of the sorry history of Telstra’s misuse of competitors’ data and the increased potential for it to gain advantage under a MTM network approach.

In the face of competitors’ complaints, Telstra has habitually denied misusing competitors’ information, just as it denied deliberately acting to frustrate competitors exercising their rights to access exchanges, and denied its internal information systems disadvantaged competitors seeking to provide ULLS-based services. All of these complaints were eventually proved, but only after either whistle blowers, targeted information gathering exercises by the ACCC or the operation of equivalence obligations on Telstra, and sometimes only many years after allegations were first raised.

The importance of Telstra’s obligations under the present migration plan is that they place a positive obligation on Telstra. This is important to overcome information asymmetry problem.

This history illustrates the enormous difficulties created by the information asymmetry inherent in the situation where a vertically integrated Telstra has crucial information relating to the monopoly access network assets and a retail business operating in competition to those who require access to those assets.

The fact that the systematic discrimination against access seekers ordering broadband services was only exposed two years after equivalence obligations were agreed between Telstra and the ACCC and after years of denial by Telstra provides a powerful example of reliance on the ACCC’s Part XIB and XIC powers, and contractual agreements between Telstra and NBN Co cannot be expected to be effective in identifying situations where Telstra takes advantage of its position of privileged access to information from both NBN Co and RSPs.

Further, the protection under the NBN information protection regime is against “gaining and unfair advantage” while the protections in the CCA are against “substantial lessening of competition”. This reflects the recognition in the original regime that there were powerful incentives for Telstra to seek to maximise its retail market position through the transition period, and that such an outcome had potentially very serious and on going implications for the competitive environment.

Nor does requiring NBN Co to provide all RSPs with equal access to information about its plans address the concerns about what Telstra does with the privileged information of wholesale customers that Telstra holds.

Limitations on Telstra’s Liability to Meet Migration Plan Obligations

The proposal to clarify areas where Telstra is not responsible for failure to meet its obligations because of the actions or inactions of others is fraught with risk. Failure to meet obligations in these circumstances will become the responsibility of no one and consumers will therefore be left poorly served and with no recourse.

While it might be the case that Telstra is dependent on NBN Co meeting obligations in order for Telstra to meet its own, this is similar to the situation that has faced access seekers in meeting their CSG obligations since those consumer protections were introduced. That is, access seekers have not been able to avoid their obligations to consumers even in circumstances where Telstra has failed to provide wholesale services in timeframes that met downstream retail obligations.

The proposal that Telstra should be able to avoid penalty for meeting obligations because NBN Co has failed to meet its obligations risks creating a situation where no one takes responsibility for failure. Rather than provide the ability for Telstra to pass the buck to NBN Co which in turn is under no obligation to remedy its failure.

Rather than allowing this situation to arise, the CCC recommends that in situation where Telstra can show it was unable to meet its obligations under the migration plan due to failure by NBN Co, the ACCC be empowered to take action against NBN Co. This would avoid the risk of the migration plan performance obligations being rendered irrelevant.

Conclusion

The CCC remains committed to the important policy principle of the structural separation of the Australian communications network, and the NBN as the vehicle to deliver it.

The period of transition from Telstra’s monopoly over the national access network to the NBN is sensitive, likely to lend itself to incentives on the part of incumbents inconsistent with the LTIE, and will set the tone for the level of retail competitive intensity for some years.

Telstra and NBN Co will be motivated primarily by their business interests in this period – one to maintain its retail dominance and the other to build and monetise infrastructure as quickly as possible – and these might not align with the best competitive outcome. It is therefore crucial that policy makers and regulators are protecting and advancing the interests of competition and consumers above those of the parties to the commercial agreement and that the regulator is properly empowered to protect those interests were necessary.

The CCC submits the migration plan draft directions should be changed to address the concerns described above in order to ensure the interests of competition and consumers are given proper priority.