



Submission by AAPT Limited (13 January 2012)

to

ACCC Discussion Paper

**“Telstra’s Structural Separation Undertaking”, dated 16
December 2011**



Introduction

1. AAPT Limited (**AAPT**) welcomes the opportunity to comment on the Australian Competition and Consumer Commission discussion paper titled "*Telstra's Structural Separation Undertaking*", dated 16 December 2011 (**Discussion Paper**).
2. Although AAPT considers that Telstra's Structural Separation Undertaking (**SSU**) submitted to the ACCC on 9 December 2011 (**Revised SSU**) is a vast improvement on the original SSU (submitted on 24 August 2011), it is still not in a form that can legitimately be accepted by the ACCC. Rather, the Revised SSU still suffers from fundamental flaws which, unless adequately addressed by Telstra, means that the ACCC:
 - o cannot be satisfied that the Revised SSU provides for transparency and equivalence between Telstra's wholesale customers and Telstra's retail business unit in an appropriate and effective manner; and
 - o must therefore reject the Revised SSU.
3. In this submission, AAPT outlines the main issues which it considers are the material reasons why the Revised SSU, in its current form, cannot be accepted by the ACCC.

Executive summary

4. Since it was first lodged in August 2011, Telstra's SSU has been subjected to great scrutiny by both industry and the ACCC and AAPT commends and acknowledges Telstra and the ACCC for their efforts in achieving the various improvements contained in the Revised SSU. While it is tempting to focus on the positive outcomes (such as the potential resolution of the price equivalence issues) and ignore the 'niggly' details, the improvements themselves do not displace, and nor can they be relied upon to diminish, the fundamental flaws which still remain in the Revised SSU.
5. In these circumstances, AAPT considers it has an obligation to itself and the long term interest of its customers and end users in general to point out to the



ACCC why the Revised SSU is still not in a form which is capable of being accepted in accordance with the legislative criteria.

6. Despite the welcome inclusion of an overarching equivalence commitment (OEC) and introduction of some new enforcement mechanisms, AAPT considers that neither can be considered to be “effective” or “appropriate”. It is AAPT’s view that the:
 - o OEC is ineffective because it has limited application due to the many number of exemptions and limitations and the complexity of implementation;
 - o enforcement mechanisms are also ineffective because they are comprised of convoluted, multi-stage, bureaucratic processes which offer too many ‘outs’ for Telstra before the benefit of any corrective action can even be gained. Even where consequences can flow to Telstra, the magnitude of these are severely limited by the drafting of the Revised SSU as to have little or no impact on Telstra’s behaviour; and
 - o OEC and enforcement mechanisms both provide Telstra with excessive discretion to decide how and if the Revised SSU will apply and be enforced.

Price equivalence arrangements

7. While AAPT agrees with the ACCC that the outstanding price equivalence concerns around wholesale ADSL services, when combined with the removal of the exemption provisions from the WLR, LCS, and PSTN OA Final Access Determinations, may largely be resolved by the declaration of a wholesale ADSL layer 2 service, it is not clear whether the ADSL declaration inquiry will be completed before the Revised SSU is accepted by the ACCC. Indeed, there is no guarantee that, following completion of the inquiry, a wholesale ADSL layer 2 service will even be declared. In its Discussion Paper, the ACCC notes that:



“Provided that the outstanding price equivalence concerns around wholesale ADSL services are resolved, the ACCC is minded to accept Telstra’s revised SSU...”¹

8. AAPT agrees with the ACCC’s view that acceptance of the Revised SSU must be subject to the declaration of a wholesale ADSL layer 2 service. AAPT considers that such declaration needs to occur before the ACCC can determine whether to accept the Revised SSU.
9. Alternatively, AAPT suggests that Attachment A of the Revised SSU be amended to include that declaration of a wholesale ADSL layer 2 service is a condition precedent to the operation of the Revised SSU.
10. In any case, even if a wholesale ADSL layer 2 service were to be declared in a timely manner, AAPT still considers that the Revised SSU is far from perfect.
11. In the interest of timeliness, AAPT has chosen to focus on its main concerns about the ineffectiveness of: (1) the OEC and (2) the enforcement mechanisms contained in the Revised SSU. In both cases, it appears to AAPT that Telstra has offered improvements to the SSU on the one hand, but takes them away with the other by introducing extensive carve-outs and complex processes which unacceptably undermine their effectiveness.

What would be an effective OEC?

12. AAPT considers that an effective OEC would at the very least address the failures of operational separation by being clear and unambiguous, with minimal qualifications. The ACCC’s views appear consistent with this notion. In the discussion paper, the ACCC states:

*“The ACCC considers measures are more likely to achieve this overall objective [of ensuring equivalence] if they are **simple and straightforward, can be implemented quickly, comprise genuine, tangible commitments, and are sufficiently documented and explained.**”² [Emphasis added]*

13. Further, AAPT agrees with the ACCC’s view that:

¹ Discussion Paper, p. 5.

² Discussion Paper, p. 6.



“Whether particular measures are appropriate and effective potentially involves questions of degree and judgement.”³

14. AAPT considers that the “questions of degree and judgement”, where it arises during the operation of the SSU:
 - o should be for the ACCC to determine, not Telstra. That is, it is entirely inappropriate for Telstra to have the discretion to decide what it can or can’t be obliged to do merely because, for instance, a particular action required for Telstra to meet its OEC could be characterised as an element of functional separation; and
 - o must be considered in the context that Telstra is incentivised during the transition period to completion of the NBN to sabotage its wholesale customer, not through any malice, but rather as a commercial reality.
15. If the ACCC is minded to allow the OEC to be subject to Telstra’s qualifications, AAPT considers that discretion should be given to the ACCC to determine whether the SSU should still apply in relation to the supply of Regulated Services⁴ where it is appropriately required to ensure equivalence of outcomes. This flexibility would improve the effectiveness of the OEC and the SSU itself by ensuring that changing circumstances can be addressed. For example AAPT proposes that the OEC provisions in clause 9 of the Revised SSU be amended to allow the ACCC the discretion to determine that, notwithstanding that a particular action could be characterised as an element of both “equivalence of outcomes” and “equivalence of inputs”, it is still necessary for Telstra to satisfy its OEC.

What would constitute effective enforcement mechanisms?

16. The effectiveness of an OEC is only as good as the ACCC’s ability to enforce it and to seek damages and relief for those wholesale customers suffering loss as a consequence of Telstra breaching its OEC. This is particularly important

³ Discussion Paper, p. 6.

⁴ As defined in the Revised SSU.



because wholesale customers cannot directly enforce the OEC against Telstra.⁵

17. In AAPT's view, an effective enforcement regime should:
 - o allow for direct enforcement by the ACCC;
 - o not be unduly complex, with convoluted processes to implement any corrective action; and
 - o not leave remedies at the discretion of Telstra, who will invariably be motivated to minimise any consequence it could be exposed to.
18. AAPT considers that neither the OEC enforcement process (under Schedule 11) nor the ITA process of the Revised SSU can be considered effective. In its submission supporting the Revised SSU, Telstra suggests that the fact that “more than one process may be available – inside and outside the SSU – to deal with equivalence complaints” is advantageous to wholesale customers because they “get to choose which process they consider most appropriate to resolve their complaint”.⁶ Yet AAPT would argue that this creates unduly complex and convoluted processes and builds an unnecessary initial hurdle for wholesale customers who have to decide which process would best result in effective enforcement. Such an assessment is no easy task given the confusing overlaps between the two processes, both of which are subject to their own extensive limitations on the consequences which Telstra may face and on the type and value of the relief and damages that the ACCC can seek. By no means can either process be considered a “*simple and straightforward*” process which can be “*implemented quickly*”.
19. For example AAPT notes that the Revised SSU provides that there is no breach of the OEC (and therefore no consequence for Telstra) if its non-compliance is trivial. Furthermore, the ACCC is prohibited from taking action if a complaint is vexatious or frivolous. It is not entirely clear to AAPT exactly who determines the threshold for what is “trivial” and whether a complaint is “vexatious or frivolous”. AAPT assumes it would be the ACCC or the ITA and suggests amendments be made to the Revised SSU to clarify this for the sake of certainty.

⁵ See clause 7.4 of the SSU.

⁶ Telstra, *Submission in support of revised Structural Separation Undertaking*, p. 14.



20. In AAPT's view, it should not be considered "vexatious or frivolous" where a wholesale customer approaches the ACCC because it suspects a breach of the OEC by Telstra but cannot show it due to a lack of information. In these circumstances, it should be open to that wholesale customer to directly request the ACCC to request information from Telstra under clause 24.4 of the Revised SSU in order to ascertain whether there is in fact a breach of the OEC.
21. Schedule 11 (Equivalence Enforcement Terms):
 - o AAPT considers the Equivalence Enforcement Terms of the Revised SSU do not provide for an effective enforcement mechanism. One reason is because the two-track reporting process is overly complicated and has potential to be gamed by Telstra. AAPT notes that Telstra need only submit a half-hearted fix (i.e. Rectification Proposal) after which it gains immediate mitigation of consequences (i.e. the ACCC's ability to enforce or seek relief is limited to enforcing its Rectification Direction and any damages the ACCC can seek for wholesale customer cannot be retrospective). The ability for Telstra to reduce any liability should be the exception and not the norm, as is the case in the Revised SSU.
 - o Where a complaint about a breach of the OEC originates from a competitor, Telstra effectively gets two bites of the cherry. First it can submit a Rectification Plan to the complainant wholesale customer under Telstra's own processes and, if rejected by the wholesale customer, Telstra then has another opportunity to issue a Rectification Proposal to the ACCC. It is not difficult to see that this multi-stage procedure can become a very protracted one, particularly given Telstra also has the ability to submit a revised Rectification Proposal even after it has already been accepted and there are no applicable hard time frames in place.
22. Under the ITA process, the ACCC and the ITA are inappropriately subject to the monetary caps on decisions when exercising powers as the Adjudicator. While these caps do not limit the ACCC in its other roles, including the enforcement of breaches of the OEC under Schedule 11 to the Revised SSU, this process has all the limitations discussed at paragraph 21 above. It also follows that while it is



open for a competitor to choose to avoid the limitations placed on the enforcement of the OEC under Schedule 11 by choosing the ITA process, the ITA process is subject to monetary caps. When both enforcement processes are ineffective in this way, there is a real potential for wholesale customers to find themselves faced with a “lose-lose” situation in either case.

Other issues

23. AAPT considers that further ring-fencing of functions is still required. For instance, AAPT does not consider it appropriate for marketing activities to be shared across Telstra’s Wholesale Unit and Retail Business Unit. It would be more appropriate for each business unit to have separate marketing activities.
24. In addition, AAPT is somewhat concerned that little attention has been paid to Telstra's draft Migration Plan. In this respect, AAPT refers to the concerns about the inadequacy of the Migration Plan raised in AAPT’s previous submission dated 27 September 2011 and by other stakeholders, which the ACCC should address where appropriate.

Conclusion

25. For the reasons set out above, AAPT considers that the ACCC must not accept the Revised SSU, unless the issues raised in this submission are adequately addressed by Telstra.