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**Competitive
Carriers' Coalition**

Response – Assessment
of Telstra's Structural
Separation Undertaking
– Discussion Paper



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CCC Submission – Assessment of Telstra’s Structural Separation Undertaking

1. Executive Summary

Maddocks has prepared this submission on behalf of the Competitive Carriers’ Coalition (**CCC**) in response to the Australian Competition and Consumer Commission’s (**ACCC**) *Discussion Paper on the Assessment of Telstra’s Structural Separation Undertaking*, dated 30 August 2011 (**Discussion Paper**).

1.1 SSU must be rejected

The CCC considers that, if Telstra submitted an structural separation undertaking that meets the legislative requirements, it is capable of creating a ‘step change’ in the way Telstra deals with its wholesale customers by dramatically improving transparency and equivalence. Clearly, this would substantially enhance competition in the telecommunications market and assist to achieve the Government’s stated objectives.

The ACCC has expressed a preliminary view that Telstra’s proposed Structural Separation Undertaking (**SSU**) cannot be accepted in its current form.¹ The CCC strongly endorses this view. It is clear that the SSU must not be accepted as it does not provide for transparency and equivalence. The CCC agrees with Commission’s view that that ‘the interim equivalence and transparency measures are not supported by a clear and enforceable commitment to ‘equivalence of outcomes’.²

The SSU must be rejected by the ACCC as it simply fails to meet the mandatory legislative criteria of providing for equivalence, transparency, monitoring and compliance and doing so in an appropriate and effective manner³. The equivalence and transparency measures proposed by

¹ Discussion Paper at page 2.

² Discussion Paper at page 2.

³ Sees Section 577A(3) and 577A(5) of the *Telecommunications Act 1997* (Cth) (**Telco Act**).

Telstra in the SSU replicate the shortcomings of the current operational separation regime which the Commission has already noted is a framework that is fatally flawed and unable to promote its fundamental objectives⁴.

A 'future with and future without' assessment also demonstrates that, unless a new SSU is provided which comprehensively addresses the key issues outlined below and practically addresses Telstra's incentives and ability to discriminate against its competitors in favour of its own retail business unit, the proposed SSU must be rejected by the ACCC.

1.2 Fundamental issues with the SSU

In its current form the SSU is unacceptable. It is littered with frivolous and ineffective processes which merely provide the illusion of transparency and equivalence but which provide no real benefits to wholesale customers and fail to meet the mandated legislative requirements of providing for equivalence, transparency, monitoring and compliance in an appropriate and effective manner⁵.

While there are a plethora of inadequacies with the SSU, the fundamental problems may be summarised as follows:

- it does nothing to address the incentives and ability for Telstra to favour its own retail business unit and discriminate against its competitors;
- the key equivalence and transparency measures of the SSU, being the Independent Telecommunications Adjudicator (ITA) scheme and the Service Level rebate scheme, deliver no tangible benefits to wholesale customers and, as they stand, it is unlikely that any competitors would sign up to either scheme; and
- the organisational and ring-fencing measures are subject to significant carve-outs and exclusions, specifically the crucial area of wholesale pricing is not subject to the organisational and ring-fencing obligations.

These issues are so material and significant that they cannot be remedied by minor 'tweaking'. The centrepiece features of the SSU (such as the ITA and Service Level regime) and other key provisions regarding organisational and governance measures need to be fundamentally reimagined and restructured by Telstra if the SSU is to be accepted under Section 577A of the Telco Act.

1.3 ACCC must give clear direction to Telstra

The CCC considers that an appropriately re-crafted SSU is capable of meeting the legislative criteria. Telstra has been at pains to emphasise that it is not required to implement functional separation as part of its SSU, and the CCC agrees that this is the case. It is not necessary for the SSU to implement full, arm's length functional separation arrangements in order for it to be effective. It must however address the fundamental issues outlined below.

⁴ ACCC, *Submission to the Department of Broadband, Communications and the Digital Economy 'National Broadband Network: Regulatory Reform for 21 Century Broadband,'* June 2009 (**ACCC Reform Submission**) at page 8.

⁵ See Section 577A(3) and 577A(5) of the Telco Act.

The ACCC must take a proactive approach and promptly provide Telstra with clear direction on what amendments need to be made to the SSU in order for it to meet the mandated legislative requirements regarding equivalence, transparency, monitoring and compliance. The ACCC must instruct Telstra that an SSU will not be accepted until:

- the SSU contains absolute obligations on Telstra to achieve the 'equivalence of outcomes' with material consequences for a failure to deliver;
- the SSU contains effective ring-fencing measures, including to ensure that the Telstra department responsible for determining wholesale pricing is subject to robust ring-fencing measures;
- the SSU adequately addresses Telstra's incentives;
- the SSU provides for a 'step change' in the way Telstra deals with wholesale customers and does not merely replicate the current operational separation arrangements of the Standard Access Obligations (**SAOs**);
- the carve-outs in the SSU relating to Exempt Areas are removed;
- the initial costs for the Telstra's proposed management accounting system (**TEM**) are disclosed and open to scrutiny by wholesale customers;
- the retail-minus retail cost pricing methodology proposed for wholesale ADSL2+ is replaced with a cost-based methodology, consistent with the proposed wholesale prices for all other 'regulated services';
- it is clear that the role of the ITA is genuinely independent with real powers to investigate and impose orders and penalties on Telstra;
- the SSU contains a genuine service level regime which simulates a competitive environment and is comparable to regimes in related industries in which suppliers face genuine competition;
- the SSU provides for genuine equivalence in relation to regulated 'Telstra Exchange Building Access (**TEBA**) space'; and
- the SSU contains robust contingency provisions which provide Telstra to undertake actual structural separation or functional separation if there is a material change in the roll out to the NBN such that mandated migration does not occur substantially in the manner contemplated.

If the deficiencies of the SSU are not adequately addressed in the final SSU, the result would be a regime which provides no real benefits to competition in the telecommunications market (and hence to consumers) and creates a platform for Telstra to ramp-up its discriminatory behaviour towards its wholesale customers in the transition to the NBN.

The remainder of this submission is structured as follows:

- Part 2 – the assessment framework;
- Part 3 – assessing the impact of the SSU – A 'future with and future without' analysis;
- Part 4 – the significance of the incentives under the SSU;
- Part 5 – the key deficiencies of the SSU and proposed solutions; and
- Part 6 – summary of key recommendations.

2. Assessment framework

2.1 Mandatory requirements of the SSU

There are certain mandatory criteria of the SSU. The ACCC must not accept an SSU unless it is satisfied that the SSU provides for:

- transparency and equivalence in relation to the supply of regulated services to wholesale customers and Telstra's retail business units during the period prior to Telstra's full structural separation;
- the ACCC to monitor Telstra's compliance with the SSU; and
- Telstra to have systems, procedures and processes that facilitate the ACCC's monitoring of Telstra's compliance with the SSU,

and does so in an 'appropriate and effective' manner.⁶

Each of these is an absolute obligation. Further, the reference to 'appropriate and effective manner' does not qualify each of the requirements. It is a separate requirement. The ACCC cannot, for example, accept the SSU on the basis that it appropriately and effectively provides something less than 'equivalence' and 'transparency'.

For the reasons set out in these submissions, the CCC agrees with the ACCC's preliminary view that the SSU does not meet the minimum legislative criteria and therefore cannot be accepted under Section 577A of the Telco Act.

2.2 Mandatory considerations of the ACCC

Before accepting an SSU the ACCC is required to have regard to those issues set out in section 577A(6). As noted above, the CCC considers that it is clear that the SSU fails to meet the hurdle of providing for transparency and equivalence as required by s 577A(3) and is therefore incapable of acceptance by the ACCC. Accordingly, the factors set out in 577A(6) do not need to be considered in order to reject this SSU. However, in order to consider what would be required of a new SSU in order for it to be capable of acceptance, it is appropriate to review these mandatory considerations, being:

- the matters set out in the Ministerial Criteria Instrument;
- the national interest in structural reform of the telecommunications market;
- the impact of that structural reform on consumers and the telecommunications market; and
- such other matters (if any) as the ACCC considers relevant.

⁶ Section 577A(3) and 577A(5) of the Telco Act.

2.2.1 Telstra's past conduct must be considered

In respect of the discretion given under Section 577A(6)(b) for the ACCC to have regard to 'such other matters (if any) as the ACCC considers relevant'. The ACCC has expressed the preliminary view that 'the full suite of matters set out in 577A(6) is sufficient' and that there are no other matters to which it should have regard.⁷

The CCC submits that in respect of Section 577A(6)(b) the ACCC **must have regard** to Telstra's past conduct.

Telstra's past conduct is the only genuine guide to its future conduct. Telstra has a well-documented and unparalleled history of delay, resistance to, and gaming of, the regulatory process to the detriment of competition in the telecommunications market.

During the recent telecommunications reform process the Government commented on Telstra's lack of incentive to reach agreement on reasonable access terms or to conclude negotiations speedily with access seekers:

This large number of access disputes compared to other regulated sectors demonstrates both the ability and the incentive Telstra has to pursue a litigation strategy to limit or delay competition.⁸

The ACCC needs to assume that Telstra will continue to delay, resist, and game at every opportunity, not because Telstra's management is inherently malicious, but simply because this is the rational course of action for Telstra to take as a vertically integrated incumbent and this is consistent with Telstra's past course of conduct.

Accordingly, the SSU must contain appropriate and effective mechanisms which counteract Telstra's incentives to engage in such conduct. As illustrated in this submission the current measures in the SSU are simply not sufficient to counter Telstra's incentives to discriminate against its wholesale customers in favour of its own retail business unit.

2.2.2 Abject failure of operational separation must be considered

The CCC submits that in respect of Section 577A(6)(b) of the Telco Act the ACCC must also have regard to the abject failure of operational separation, notwithstanding the high hopes that the Government, the ACCC and many industry stakeholders had for that regime when it was proposed.

The ACCC must not make the mistake of taking an overly optimistic view of Telstra's likely conduct and the likely outcomes for competition under the SSU. The CCC reminds the ACCC of the optimistic view the ACCC took regarding operational separation. At the time the ACCC said:

The government's proposed model for the operational separation of Telstra maintains the balanced approach of the existing regulatory regime. The proposal recognises that Telstra is in the unique position, through its monopoly over the local access network, of being able to stifle competition and innovation by frustrating its competitors' investment plans. For this reason, the ACCC welcomes changes which would increase transparency and equivalence in the way Telstra provides key access services to its own downstream operations relative to those of its competitors. If Telstra's final operational separation plan, which is to be developed under the legislation, reflects the government's intentions for increased transparency and equivalence, Telstra's competitors will be in a far better position to see the terms and conditions for network access that Telstra offers to its own retail units and compare these to the terms and conditions they themselves face.⁹

⁷ Discussion Paper at page 30.

⁸ Explanatory Memorandum *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* at page 20.

⁹ Mr Samuel in *The Official Committee Hansard Telstra (Transition to Full Private Ownership) Bill 2005*, Friday 9 September 2005 at ECITA 6.

Having initially endorsed operation separation, the ACCC later reflected 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.¹⁰

In accordance with Section 577A(6)(b) of the Telco Act, the ACCC must have regard to its 'before and after' views of operational separation. This case study illustrates that extremely robust measures are required to achieve the Government's legislative objectives. The ACCC must not take an optimistic view of Telstra's likely behaviour under an SSU and should focus on ensuring the SSU contains material incentives for Telstra to meet the legislative requirements regarding equivalence and transparency.

The CCC considers that the current SSU represents precisely the kind of 'improvement of the margins' to the operational separation regime referred to by the Commission above. In order to promote the fundamental objectives of transparency and equivalence, the Commission must make clear to Telstra that a fundamentally different approach is required.

3. Assessing the Impact of the SSU – the future with and without

The ACCC notes in the Discussion Paper that 'it may be useful to apply a 'future with and without' test in order to aid consideration of a number of the relevant matters that are specified in subsection 577A(6) of the Telco Act'¹¹ The CCC agrees that this analysis is helpful in assessing the SSU.

The CCC has applied the 'future with and without' analysis with reference to the issues discussed in detail above. An overview of the CCC's 'future with and without' analysis is set out in **Attachment 1**.

The CCC submits the 'future with and without' analysis as set out in **Attachment 1** demonstrates that:

- the proposed SSU does not, of itself deliver any benefits to wholesale customers or competition in the market generally because:
 - as a result of the Network and Services Exemptions, the SSU represents a 'separation' in name only. All of Telstra's networks other than the copper (and then only as the NBN is rolled out) and, to a limited extent, the HFC is exempted from the structural separation requirements.
 - Telstra's wholesale, network and retail divisions will continue to operate in an integrated fashion under common ownership. The proposed form of structural separation does not in any way reduce Telstra's incentives to engage in sabotage conduct in respect of its wholesale customers.
 - as a result there is no requirement or incentive on Telstra to transition towards a network company and a retail company, as would be the case in a conventional structural separation, rather Telstra will continue to be a vertically integrated company with corresponding incentives to discriminate against its wholesale customers.

¹⁰ ACCC Reform Submission at page 8.

¹¹ Discussion Paper at page 31.

- in fact, arguably Telstra’s incentive to engage in sabotage conduct is greatly increased by the desire of Telstra to consolidate its market position in the transition to the NBN. Given the form of ‘structural separation’ which has been adopted, and Telstra’s consequent continued incentive to discriminate the significance of the equivalence and transparency measures is greatly enhanced.
- Telstra’s migration obligations are only triggered as the NBN is rolled out, at which time, of course, NBN services will also be available to competitive carriers in the relevant areas.
- accordingly, the structural separation process delivers no benefit to competitors (or the market) other than the benefit potentially delivered by the interim equivalence and transparency measures;
- wholesale customers would potentially be better off without the proposed SSU and the mandated migration, as there would then be potential competitive tension between Telstra and NBN for wholesale services; and
- as illustrated in these submissions, the key equivalence and transparency measures proposed by Telstra (being the ITA scheme and the Service Level rebate) deliver no tangible benefits to wholesale customers. Accordingly, as they stand, it is unlikely that any competitors would sign up to either scheme as they deliver no real benefit.

In the Discussion Paper, the ACCC has expressed the view that ‘the most likely scenario for the future without the SSU is that Telstra would choose to undergo functional separation rather than undergo an alternative form of structural separation.’¹²

Given the analysis above, wholesale customers (and consequently consumers and the market more generally) would be better off under a ‘future without’ the proposed SSU and mandated migration. The CCC is of the view that looking at a future with or without the SSU and related arrangements, competition would likely be greatly enhanced under a functional separation scheme as such a regime would most likely provide more robust transparency and equivalence measures than under the proposed SSU. Specifically, Telstra would be required to adhere to the functional separation principles which include a requirement for Telstra to maintain ‘arm’s length functional separation between its wholesale/network business unit and its retail business units.’¹³

In addition, under a ‘future without’ the proposed SSU and related arrangements (including mandated migration), Telstra would be bound by the level playing field arrangements which have come about as a result of amendments to the Telco Act under the *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011* (the **NBN Access Act**). Under the NBN Access Act, if Telstra upgraded, altered or extended its network to supply superfast carriage services (i.e. services supplied to premises occupied or used by end-users, where the download transmission speed is normally more than 25 megabits per second) that are provided wholly or principally to residential or small business customers, it would have to do so on a wholesale only basis.¹⁴

Notwithstanding the above analysis, the CCC considers that an amended SSU which meets the minimum legislative requirements and addresses the issues set out in this submission is capable of creating a better ‘future with’ scenario and being accepted by the ACCC.

¹² Discussion Paper at page 34.

¹³ See Telco Act Section 74.

¹⁴ See (New) Part 8, Telco Act – Superfast fixed line networks, Sections 143-155 (not yet commenced) and (New) Part 7, Telco Act – Layer 2 bitstream services, Section 141 (not yet commenced).

4. SSU does not address Telstra's incentives

4.1 Equivalence and transparency measures must counter Telstra's incentives

Arguably, the incentive to engage in sabotage conduct is increased by the desire of Telstra to consolidate its market position in the transition to the NBN.

As a result of the form of 'structural separation' (i.e., mandated migration) which has been adopted, the importance of the equivalence and transparency measures in the SSU is greatly increased.

During the reform process the ACCC noted that:

A vertically integrated operator with market power has both the incentive and the ability to engage in anti-competitive conduct against downstream competitors. Such conduct includes sabotage conduct including non-price discrimination, and pricing discrimination such as vertical price squeeze conduct.¹⁵

The ACCC went on to endorse structural separation of Telstra during the transition to the NBN:

The ACCC is of the view that structural separation of Telstra is the only framework that will ensure equivalence in access during the transition phase to the NBN and is the only form of separation consistent with the type of wholesale–retail market structure the Government envisages for the NBN environment of the future.¹⁶

When expressing these views the ACCC was referring to structural separation in the conventional sense (i.e., separating Telstra's wholesale and retail business units). Conventional structural separation is effective because it directly affects the incumbent's incentives to discriminate against its competitors. A wholesale-only network operator has few incentives to discriminate against downstream rivals. As the ACCC noted:

In general, without a retail arm to which it may seek to provide an advantage, a wholesale-only operator would gain little from favouring one access seeker over another, thereby ensuring true equivalence.¹⁷

In contrast, under the proposed 'structural separation' Telstra will remain a vertically integrated incumbent with the same incentive to favour its own retail business over its wholesale customers when providing access to 'regulated services'. As the ACCC noted:

On the other hand, vertical integration of any form into downstream markets, even when subject to regulatory measures, will not ensure equivalence.¹⁸

In the absence of conventional structural separation, the proposed SSU does not effectively alter Telstra's underlying incentives, as a vertically integrated incumbent, to engage in anti-competitive behaviour and favour its own retail business over its competitors.

The ACCC must confirm to Telstra that the SSU must provide a clear and enforceable commitment to 'equivalence of outcomes' with material consequences for a failure to deliver which match or outweigh its incentive to discriminate. Only in this way will Telstra's incentive to favour its own retail business over its competitors be addressed.

¹⁵ ACCC Regulatory Reform Submission at page 68.

¹⁶ ACCC Regulatory Reform Submission at page 18.

¹⁷ ACCC Regulatory Reform Submission at page 19.

¹⁸ ACCC Regulatory Reform Submission at page 18.

4.2 How to address Telstra's incentive

The CCC submits that in order to adequately address Telstra's incentive to discriminate against its wholesale customers and favour its retail business unit, there are three core areas of the SSU which need to be addressed:

- **The ITA Scheme:** The ITA Scheme is a centrepiece feature of the SSU, however, as it currently stands it provides no real benefits to wholesale customers as it has very limited powers and jurisdiction. Further, there is no consequence on Telstra for a failure to deliver 'equivalence of outcomes.' The ITA must be given the power to make orders in the event Telstra has contravened the SSU or failed to deliver 'equivalence of outcomes.' Such powers should include an ability for the ITA to commence its own investigations, the power to make Telstra comply with its obligations under the SSU and the power to make an order for Telstra to compensate wholesale customers for any loss or damage as a result of a contravention of Telstra's obligation to provide equivalence.
- **Service Level Rebates scheme:** The Service Level rebate scheme is also a major feature of the SSU and is the key measure to provide non-price equivalence. However, as it stands it provides no benefits to wholesale customers. The service level rebate scheme could address Telstra's incentive to discriminate if the scheme actually simulated a competitive environment and was comparable to regimes in related industries in which suppliers face genuine competition. In these situations, service level rebates create a genuine incentive for suppliers to meet appropriate performance benchmarks.
- **Effective Ring-fencing:** Effective ring-fencing measures are also required to ensure that the incentive and ability to discriminate is minimised. In particular, the Telstra department responsible for determining wholesale pricing must be subject to robust ring-fencing measures. Under the SSU as presently drafted, the crucial area of wholesale pricing would fall outside the ring-fencing measures.

These measures are discussed in further detail in section 5 below.

4.3 Other relevant considerations regarding Telstra's incentive

An ongoing theme in the Discussion Paper is the ACCC's analysis of Telstra's ability to engage in sabotage (i.e., non-price discrimination).¹⁹ The CCC agrees with the ACCC's observation that Telstra has strong incentives to engage in sabotage and such conduct is difficult to detect.²⁰

As noted in section 2.2.1 of this submission, as a requirement of Section 577A(6)(b), the ACCC should be required to consider Telstra's past conduct. Telstra's is a vertically integrated incumbent which has a well-documented history of engaging in discriminatory conduct. As the ACCC has noted:

Since June 2006 Telstra has been able to:

- supply ADSL2+ services on a retail basis only;
- ignore the ACCC's written advice on imputation testing principles;
- deflect wholesale customer complaints on the basis they were not made under the OSP;
- provide whole-of-business incentives to executives in the ring-fenced divisions; and

¹⁹ Discussion Paper at 23, 37, 38, 39, 48, 49, 53, 97 and 109.

²⁰ Discussion Paper at 109.

- require end-user customers who are customers of access seekers to provide Telstra retail units with information that is confidential to the access seeker.²¹

Telstra will pursue such sabotage conduct for so long as it is able to do so, because, as a vertically integrated incumbent it has an incentive to do so, and Telstra has a deeply entrenched culture of behaving in this fashion.

In September 2010 Telstra announced a \$1 billion investment to fund its 2010/11 strategy to, amongst other things, aggressively grow its market share.²² Telstra has a clear incentive to maximise retail market share in the lead up to the NBN. In this context the risk of Telstra engaging in sabotage conduct and price discrimination in order to favour its own retail business unit is extraordinarily high.

Accordingly, the SSU must contain robust and effective transparency and equivalence measures to counter Telstra's incentive to engage in sabotage and other discriminatory conduct.

5. Deficiencies of the proposed SSU and proposed solutions

As identified by the ACCC, the proposed SSU is riddled with deficiencies and is incapable of being accepted in its current form. The CCC has conducted a high-level review of the legislative requirements of the SSU and Telstra's compliance with those legislative requirements (see **Attachment 2**).

The CCC is firmly of the view that the ACCC must take an active role in directing Telstra to the issues that must be addressed in order for the SSU to be capable of being accepted. The CCC's key areas of concern and proposed solutions are set out below.

5.1 Equivalence and transparency measures are not merely the SAOs

Telstra has interpreted the requirement for equivalence and transparency to be of the same (or a lower) standard than the Standard Access Obligations (**SAOs**). However, the legislative requirements of Section 577A of the Telco Act clearly require a different and higher standard than that required by the SAOs. In particular, they do not incorporate the SAO's:

- 'reasonable steps' limitation; or
- carve out for own requirements,

in relation to non-price terms.

In addition, the requirement in relation to price is **equivalence**, not a reasonable price (as set out in the SAOs).²³

The ACCC must make clear that an 'appropriate and effective' manner of providing equivalence does not simply require an extension of the existing arrangements and obligations, but requires a 'step change' in the way Telstra deals with its wholesale customers.

To be capable of acceptance, an SSU must not only provide for equivalence of outcomes between wholesale customers and Telstra's retail division, it must provide effective mechanisms to ensure that:

- failures to provide equivalence are addressed; and
- it negates Telstra's incentives to 'sabotage' competition.

²¹ ACCC Regulatory Reform Submission at page at page 21

²² See Telstra Media Release *Telstra details Strategy as sales momentum builds*, 29 September 2010.

²³ See Section 152AR of the *Competition and Consumer Act 2010 (CCA)* for Standard Access Obligations

5.2 Lack of enforcement right

Under Section 152BB of the *Competition and Consumer Act 2010 (CCA)*, access seekers have a right to judicial enforcement of the SAOs. If the Federal Court is satisfied that Telstra has contravened a SAO, the Federal Court may make a number of orders including to:

- direct Telstra to comply with the SAO(s);
- direct Telstra to compensate the access seeker that suffered loss or damage as a result of the contravention; or
- any other order the Court thinks appropriate.

In contrast, the SSU does not contain any enforcement provisions if Telstra fails to provide 'equivalence of outcomes.'

Under the SSU, in the event of a dispute, access seekers must go through the complex and bureaucratic dispute resolution processes and potentially the ITA scheme (which has extremely limited power and jurisdiction). However, these processes do not provide for any material redress or consequence if Telstra fails to comply with an obligation of the SSU and no consequence if Telstra fails to provide 'equivalence of outcomes'. Critically, the ITA has no power to impose a penalty on Telstra or an award of compensation.²⁴

Given the above, the SSU is a clear **step backwards** from the enforcement provisions of the SAOs.

An SSU must not be accepted by the ACCC unless it contains material consequences for a contravention by Telstra of its obligations under the SSU including consequences for a failure to provide 'equivalence of outcomes' including a right of redress for affected wholesale customers. These enforcement powers could be given to the ITA. Such enforcement powers should be similar to the powers of the Federal Court under Section 152BB of the CCA in respect of the SAOs.

5.3 SSU should apply to Exempt Areas

The ACCC is able to incorporate provisions in access determinations which provide that any or all of the SAOs are not applicable to Telstra.²⁵ The ACCC is currently in the process of conducting an inquiry²⁶ as to whether the exempt areas relating to Wholesale Line Rental, Local Carriage Service and PSTN Originating Service (**Exempt Areas**) which form part of the interim access determinations for these declared services should be incorporated into the final access determination for these declared services.

Telstra has proposed that the SSU will not apply in respect of price for these Exempt Areas. This position is directly contrary to the requirements of the Section 577A of the Telco Act and the Parliament and Government's express requirement that the SSU must provide for equivalence in relation to the supply by Telstra of regulated services to its wholesale customers and retail business units in the period prior to Telstra's full structural separation.

Telstra is required by Section 577A of the Telco act to provide transparency and equivalence in relation to all 'regulated services'. Excluding Exempt Areas is contrary to this express legislative provision and deprives competitors of the benefits of the equivalence and transparency measures in a significant portion of the market.

²⁴ See clause 8.5(b) of the draft SSU.

²⁵ Section 152BC(3)(h) and (i) of the CCA.

²⁶ ACCC *Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services – Issues paper*, September 2011.

The Exempt Areas are not a minor carve-out of the SSU. A high proportion of the total number of wholesale services in operation for key regulated services such as WLR and LCS are located in Exempt Areas. In some cases up to 50% of an access seeker's regulated services are likely to be located in Exempt Areas.

An SSU must not be accepted until the carve-out relating to Exempt Areas is removed.

5.4 Price Equivalence

One of the key features of the SSU and Telstra's monitoring of price equivalence is the TEM reporting provisions. There are a number of issues with the TEM regime:

- the utility of the TEM cannot be judged by access seekers until costs are disclosed;
- even if the TEM is initially acceptable, the CCC is concerned with how Telstra will ensure that it remains appropriate; and
- if the price equivalence measures of the TEM indicate that wholesale prices are above the internal transfer price, there is no direct consequence for Telstra as the SSU is currently structured.

Telstra's proposal to publish a national wholesale price for wholesale ADSL2+ is a welcome step forward. However, the proposed use of the retail minus retail cost pricing (**RMRC**) methodology and the service as defined are not acceptable. The CCC submits that the use of RMRC methodology is too open to gaming, the bundled structure of the ADSL service Telstra proposes in its SSU is anti-competitive and the treatment of transmission costs associated with the proposed bundling would discriminate in favour of Telstra's horizontal retail businesses. These issues are subject to detailed submissions set out in **Attachment 4**.

An SSU must not be accepted by the ACCC until initial costs are disclosed by Telstra and shown to be appropriate. In addition, Telstra must build in a mechanism to ensure that they remain appropriate (for example regular oversight by the ACCC which is best equipped to understand Telstra's pricing).

Further, for an SSU to be acceptable, if price equivalence measures such as the TEM indicate that the wholesale price is above the cost incurred by Telstra's retail business units, price reductions should flow automatically to wholesale customers.

The retail-minus retail cost pricing methodology proposed for wholesale ADSL2+ must be replaced with a cost-based methodology, consistent with the proposed wholesale prices for all other 'regulated services';

5.5 The SSU must remain 'fit for purpose'

The CCC agrees with the ACCC's preliminary view that:

the interim equivalence and transparency measures are not supported by a clear and enforceable commitment to an 'equivalence of outcomes' – which would enable wholesale customers and Telstra's retail businesses to access key input services of equivalent quality and functionality. Further, it is not clear that there are appropriate mechanisms that would ensure that the proposed measures remain fit for purpose for the duration of the interim period.²⁷

This issue would be addressed to a certain extent if the SSU actually provided for genuine and enforceable commitments to equivalence of outcomes.

In addition, like many other deficiencies of the SSU, the ITA could play a role if the ITA was genuinely independent and had the necessary powers to impose meaningful requirements on Telstra.

As the SSU is currently drafted, the ITA has no ability to make a directions or final determinations requiring Telstra to implement a specific system or process design or technology or to impose a penalty or an award of compensation.²⁸

If the ITA has the power to make such orders and require Telstra to meaningfully redress and compensate for a contravention of its obligations under the SSU or a failure to deliver equivalence of outcomes, the SSU would be more likely to remain 'fit for purpose'.

The Government and the NBN Co have prioritised the rapid roll-out of the NBN. The NBN is now well underway and enshrined in legislation . However, the SSU must adequately deal with every contingency, including a potential change in Government and a material change to the proposed roll of the NBN.

The SSU must contain robust contingency provisions which provide Telstra to undertake actual structural separation or functional separation if there is a material change in the roll out to the NBN such that mandated migration does not occur substantially in the manner contemplated.

5.6 Organisational measures

The organisational measures proposed by Telstra represent a weak separation of the network services business units and are subject to a number of inappropriate exceptions and exclusions to separation measures. For example, as presently drafted, the crucial area of wholesale pricing is a not subject to the ring-fencing measures of the SSU.

Wholesale pricing is probably the single area most susceptible to discriminatory behaviour. The CCC contends that, given the role which Telstra has represented that the TEM plays, there is no need or justification for wholesale pricing to be excluded from the ring-fencing and other organisational requirements under the SSU.

As discussed above, robust ring-fencing of Telstra's business units is an appropriate mechanism for managing Telstra's incentive to engage in sabotage and discriminatory conduct.

²⁷ Discussion Paper at 2.

²⁸ See clause 8.5(b) of the draft SSU.

Telstra might argue that the proposed arrangements are justified because they are an important part of their financial governance arrangements. However, this line of argument would mean that they are effectively ignoring the introduction of the new TEM arrangements which are meant to improve transparency of decision making processes and ensure greater autonomy of the business units.

With the introduction of TEM, the current governance arrangements are not necessary because each business unit will have a clear understanding of Telstra's costs and information about their own revenue projections. This means that each business unit can undertake its own business case assessment independent of the corporate centre and is able to determine its financial responsible for its particular Telstra activity.

The CCC proposes that exceptions and exclusions to ring fencing requirements must be eliminated or tightly limited and disclosed prior to the acceptance of the SSU. Any future exception must be subject to prior ACCC approval with industry consultation. In light of the TEM there is no justification for wholesale pricing to be excluded from the ring-fencing and other organisational requirements under the SSU.

5.7 Operational and Technical Equivalence

In the SSU, Telstra relies on a system of Service Level rebates as the sole or principal mechanism to deliver on non-price equivalence. These measures are deeply flawed and demonstrate a refusal by Telstra to genuinely engage in the regulatory reform process. In particular, the proposed services level rebates:

- are subject to many unjustified carve outs and limitations;
- are qualified by reference to the service Telstra itself receives;
- in the unlikely event a rebate was triggered, the amounts are totally meaningless. The rebates are so negligible the CCC considers them to be an affront. For example a major breach by Telstra might deliver a rebate amounting to approximately .0015% of a wholesale customer's monthly spend with Telstra²⁹);
- fail to scale with the severity of the breach; and
- wholesale customers must forgo any other rights and remedies they may have in return for the remote possibility of receiving negligible rebates.

²⁹ Based on total unavailability of the LOLO ordering system for a month for a wholesale customer lodging 1000 orders per month with a consecutive monthly spend of \$1,000,000 per month.

Telstra has provided a ridiculously imbalanced 'supplier friendly' regime that a customer would only agree to if it had no negotiating power and no alternate service provider and which provides no counter to Telstra's incentive to discriminate. The ACCC must direct Telstra to rethink this regime.

In order to be acceptable, an SSU must provide Telstra with an incentive to provide equivalence – countervailing the incentive to engage in sabotage behaviour. This can most appropriately be done by simulating a competitive environment. That is, service levels and rebates must be benchmarked against related industries in which suppliers face genuine competition.

Principles for service levels and rebates in the SSU must include the following:

- any carve outs must be objectively justifiable and narrowly defined – for example, scheduled outages must be limited to a reasonable period and subject to appropriate notice;
- service levels must be comparable with industry best practice (e.g., availability of 99+% each month for critical IT systems);
- rebate amounts must be meaningful and must constitute a material portion of the relevant monthly charges paid by the relevant wholesale customer (e.g., 2-5% of monthly fees increasing with severity of breach up to a cap of, say, 10%-30% of monthly fees);
- rebate amounts must scale with the severity of the breach; and
- a rebate scheme must not be a wholesale customer's sole and exclusive remedy (for example wholesale customers should be able to take the issue to the ITA or sue for damages in a court of law).

5.8 Disputes and the ITA

The ITA scheme is a key feature of the SSU. However, as it stands it is unlikely that any competitors would sign up to the ITA scheme as it delivers no real benefit. Key issues with the scheme include:

- it imposes costs on competitors including the ITA Process Fee levied on participants, the ITA Referral Fee and costs orders issued by the ITA;³⁰
- it is a complex process which is open to 'gaming' by Telstra (for example, competitors must go through an internal Telstra process which includes entering into a restrictive ITA Agreement before getting access to the ITA);
- its jurisdiction is limited to the narrowly defined 'ITA Disputes';
- it is ineffective because it lacks the power to impose any meaningful penalties or orders which act as a deterrent against Telstra's incentive to discriminate against its wholesale customers. Specifically, the ITA has no power to:
 - require Telstra to implement a specific system or process design or technology; or
 - impose a penalty or an award of compensation;³¹

³⁰ See clause 5.2 of the draft SSU.

³¹ See clause 8.5(b) of the draft SSU.

- it lacks true independence as 'the directors of the ITA will be appointed by Telstra and Telstra will be the sole member of the ITA, unless otherwise decided by Telstra.'³²
- has limited jurisdiction and scope including being limited to 'systemic breaches'.

In order to form a part of an acceptable SSU, the ITA must have meaningful powers. That is, the ITA must be able to impose obligations on Telstra that operate to curb Telstra's incentive to engage in sabotage and discriminatory conduct.

The ITA should also be able to play an active role in monitoring Telstra's compliance with the SSU, have the power to commence its own investigations against Telstra and compel Telstra to provide evidence in the event of a suspected breach of the SSU.

The ITA should be given general jurisdiction to determine when Telstra has contravened the SSU or failed to deliver 'equivalence of outcome' in any give situation.

Telstra is receiving substantial payment (\$11 Billion) for proceeding with the SSU and entering into the Definitive Agreements with the NBN.³³ Further, in its presentation to Telstra shareholders, Telstra highlighted that:

The Independent Expert's analysis shows that:

- the Value of Telstra if the Proposed Transaction proceeds is approximately \$4.7 billion greater than under the best available alternative; and
- the value differential remains substantial even under a wide range of alternatives.³⁴

Given the above and the overall benefit the SSU path provides to Telstra shareholders, there should be no excuse or lack of resource to put in place an SSU which complies with the legislative requirements and the Government's policy objectives, including complying with a robust and effective ITA scheme.

In addition, by opting to pursue the structural separation path, Telstra has committed to providing equivalence and transparency and to doing so in an appropriate and effective manner. There is no entitlement on Telstra's behalf to cavil or object to the expense or inconvenience of whatever measures the ACCC legitimately considers necessary and appropriate in order to meet the requirement to which Telstra has already committed. That is, the requirement to provide equivalence and transparency and to do so in an appropriate and effective manner.

³² See Clause 4.1(b) of the draft SSU.

³³ Telstra, Telstra's Participation in the NBN – Release of the Explanatory Memorandum – Analyst Presentation dated 1 September 2011 at Page 2 and PowerPoint slide number 4.

³⁴ Telstra, Telstra's Participation in the NBN – Release of the Explanatory Memorandum – Analyst Presentation dated 1 September 2011 at Page 3 and PowerPoint slide number 5.

5.9 TEBA

Under the proposed SSU, equivalence is not provided in relation to the regulated 'TEBA space' (as is required for 'regulated services') as Telstra, unlike wholesale customers, is able to reserve space for its own use:

Telstra may reserve Exchange Capacity in Telstra Exchange Buildings for the purposes of supplying its own retail and wholesale services (other than TEBA) where it has bona fide documented plans to use the Exchange Capacity ***within 36 months from the date of the reservation.***³⁵ [emphasis added]

The ACCC should direct Telstra that an SSU cannot be accepted unless genuine equivalence is provided in relation to regulated 'TEBA space'.

While under the SAOs, Telstra is not required to give access to access seekers to the extent such access would prevent Telstra from obtaining sufficient access to meet its reasonable requirements,³⁶ the equivalence obligations under 577A(3) of the Telco Act do not contain any such qualification.

Accordingly, clause 11.1 of the SSU regarding Telstra's reservations of exchange capacity must be removed from the SSU in order for the SSU to be capable of meeting the mandatory equivalence requirements of 577A(3) of the Telco Act.

In addition, access seekers have expressed concerns regarding equivalence obligations in respect of access to Telstra exchange space in order to interconnect with NBN Co equipment where such equipment is located in Telstra exchanges. This is clearly a critical issue which needs to be appropriately addressed in the transition to the NBN.

These issues have been dealt with in a detailed submission set out in **Attachment 3**.

³⁵ See clause 11.1 of the draft SSU.

³⁶ Section 152AR of the CCA.

6. Summary of key recommendations

This section confirm the CCC's key conclusions and recommendations.

- The SSU must be rejected by the ACCC as it simply fails to meet the mandatory legislative criteria of providing for equivalence, transparency, monitoring and compliance and doing so in an appropriate and effective manner.
- A 'future with and future without' assessment also demonstrates that, unless a new SSU is provided which comprehensively addresses the key shortcomings of the proposed SSU and practically addresses Telstra's incentives and ability to discriminate against its competitors in favour of its own retail business unit, any such SSU must also be rejected by the ACCC.
- There are many issues with the SSU, however it is fundamentally flawed because:
 - it does nothing to address the incentives and ability for Telstra to favour its own retail business unit and discriminate against its competitors;
 - the key equivalence and transparency measures of the SSU, being the ITA and Service Level rebate schemes, deliver no tangible benefits to wholesale customers and, as they stand, it is unlikely that any competitors would sign up to either scheme; and
 - the organisational and ring-fencing measures are subject to significant carve-outs and exclusions, specifically the crucial area of wholesale pricing is not subject to the organisational and ring-fencing obligations.
- An amended SSU which meets the minimum legislative requirements and addresses the issues set out in this submission is capable of creating a better 'future with' scenario.
- The ACCC must direct Telstra that an SSU will not be accepted until:
 - the SSU contains absolute obligations on Telstra to achieve the 'equivalence of outcomes' with material consequences for a failure to deliver;
 - the SSU contains effective ring-fencing measures, including to ensure that the Telstra department responsible for determining wholesale pricing is subject to robust ring-fencing measures;
 - the SSU adequately addresses Telstra's incentives to engage in sabotage and discrimination;
 - the SSU provides for a 'step change' in the way Telstra deals with wholesale customers and does not merely 'tweak' the existing operational separation and SAO regime;
 - the carve-outs in the SSU relating to Exempt Areas are removed;
 - the initial costs for the TEM are disclosed and open to scrutiny by wholesale customers;
 - the retail-minus retail cost pricing methodology proposed for wholesale ADSL2+ is replaced with a cost-based methodology, consistent with the proposed wholesale prices for all other 'regulated services';
 - the role of the ITA is genuinely independent with real powers to investigate and impose orders and penalties on Telstra;
 - the SSU contains a genuine Service Level regime which simulates a competitive environment and is comparable to regimes in related industries in which suppliers face genuine competition;
 - the SSU contains provides for genuine equivalence in relation to regulated 'TEBA space'; and
 - the SSU contains robust contingency provisions which provide Telstra to undertake actual structural separation or functional separation if there is a material change in the roll out to the NBN such that mandated migration does not occur substantially in the manner contemplated.

Attachment 1

Future With and Future Without the Proposed SSU

Issue	Current Situation	SSU + Migration Plan (Future With)	Functional Separation (Future Without)
Transparency and Equivalence of standards of supply	Standard Access Obligations and Operational Separation.	<ul style="list-style-type: none"> ▪ Ineffective ITA scheme. ▪ Meaningless Service level rebate scheme. ▪ No consequence for Telstra for failure to comply. ▪ No direct right to enforce. 	<ul style="list-style-type: none"> ▪ Equivalence in relation to supply. ▪ Telstra to maintain arm's length functional separation. ▪ Greater transparency facilitates equivalence.
Transparency and Equivalence of price	<ul style="list-style-type: none"> ▪ Standard Access Obligations and Operational Separation. ▪ Access determinations set by ACCC. 	<ul style="list-style-type: none"> ▪ Access Determinations set by ACCC. ▪ Considerable carve outs and exemptions. ▪ No requirement to take positive steps to remedy lack of equivalence. ▪ No consequences of failure to provide equivalence. ▪ Utility of TEM unknown. 	<ul style="list-style-type: none"> ▪ Access determinations set by ACCC ▪ Equivalence in relation to supply. ▪ Telstra to maintain arm's length functional separation. ▪ Greater price transparency.
Systems and Process	Standard Access Obligations and Operational Separation.	<ul style="list-style-type: none"> ▪ No real change. ▪ Service Levels ineffective – many limitations. ▪ No incentive on Telstra to provide equivalence. ▪ Complaints can only be lodged in relation to systematic breaches. ▪ Information asymmetry. ▪ TEBA space issues. 	<ul style="list-style-type: none"> ▪ Telstra should have systems and processes, and procedures that relate to compliance, monitoring, performance measures, audit and other checks. ▪ Restrictions on consulting Telstra's retail business unit unless it also consults Telstra's wholesale customers at the same time and in the same manner.
Disputes	Can enforce Standard Access Obligations in Federal Court.	<ul style="list-style-type: none"> ▪ Ineffective ITA scheme (wholesale customers would not sign up in current form). ▪ Failure to provide equivalence is not a breach of the SSU. ▪ Required to forgo other rights in order to participate in rebate scheme (wholesale customers would not sign up in current form). ▪ No direct right of enforcement. 	<ul style="list-style-type: none"> ▪ Functional separation arrangements provide greater transparency.
Incentive to engage in 'sabotage' behaviour	High.	<ul style="list-style-type: none"> ▪ High (same as current situation). ▪ No requirement or incentive on Telstra to transition towards a network company and a retail company, as was anticipated in the legislation. ▪ Telstra will continue to be a vertically integrated company with corresponding incentives to discriminate against its wholesale customers. 	<ul style="list-style-type: none"> ▪ High, however ability to actually engage in 'sabotage' behaviour is potentially reduced because of more robust transparency measures.
NBN Roll Out	Not applicable.	<ul style="list-style-type: none"> ▪ Migration will occur. ▪ Definitive Agreements. ▪ Possible accelerated roll out of NBN. ▪ Lower costs. 	<ul style="list-style-type: none"> ▪ Possible delays to roll out of NBN.
		<ul style="list-style-type: none"> ▪ No competition at the CAN level. 	<ul style="list-style-type: none"> ▪ NBN will still proceed, however higher costs (note: Implementation Study indicates that NBN can proceed without Telstra deal) ▪ Possible competition between wholesale providers (competitive tension between Telstra and NBN Co). ▪ If Telstra upgrades its network to a superfast network to compete with the NBN, that network would have to be provided by Telstra on a wholesale only basis under the NBN Access Act.
Restrictions on Telstra	None.	None.	<ul style="list-style-type: none"> ▪ Excluded spectrum regime.

KEY

Likely Negative Outcome
Neutral Outcome
Potentially Positive Outcome

Attachment 2

Compliance of SSU with Requirements

1. Key Legislative Requirements from *Telecommunications Act 1997* (Telco Act)

1.1 Transparency and equivalence (Section 577A(3)) and Monitoring of Compliance (Section 577A(5))

The ACCC must not accept an undertaking unless it provides for:

- transparency and equivalence;
 - the ACCC to monitor Telstra's compliance with the undertaking; and
 - Telstra to have systems, procedures and processes that promote and facilitate the ACCC's monitoring of Telstra's compliance with the undertaking,
- and does so in an **appropriate and effective** manner.

1.2 Equivalence (Section 69 Part 9 Schedule 1)

equivalence means:

- (a) equivalence in relation to terms and conditions relating to price or a method of ascertaining price; and
- (b) equivalence in relation to other terms and conditions

2. Assessment of Proposed Structural Separation Undertaking

Requirements and reference	SSU (Telstra's position)	Compliance with Requirement
Transparency and Reporting		
Whether the undertaking provides for the ACCC to be provided with written copies of all contracts, arrangements or understandings entered into by Telstra (Section 4(e))	Telstra has included a clause to this effect. It has also provided the ACCC with the Definitive Agreements (with NBN).	Comply
Regular reporting and appropriate oversight by Telstra of its compliance with the undertaking (Section 4(f)(i) and 4(f)(ii))	Telstra to publish quarterly TEM report which will show the extent to which pricing is equivalent. Telstra to publish quarterly report on Equivalence and Transparency measures and will provide a confidential report to the ACCC regarding whether there is an adverse variance. This reporting will allow the ACCC to assess non-price equivalence compliance. Annual compliance report also to be provided and more extensive reporting in Telstra's annual report.	<ul style="list-style-type: none"> ▪ TEM requires further analysis. ▪ Risk that TEM is inaccurate / unreliable. ▪ 5% variation for substantiation high. ▪ Oversight of compliance is inadequate as there are no positive obligations to remedy non-compliance. ▪ There is no immediate consequence or remedy if TEM shows variance.
ACCC may consult with wholesale customers and other stakeholders about Telstra's compliance with the undertaking (Section 4(f)(iii)) Power for ACCC to disclose information provided by Telstra (other than confidential information) (Section 4(f)(iv))	Subject to legitimate confidentiality restrictions, the ACCC can consult and disclose.	Access Seekers get limited, second-hand access to information, making it difficult to have sufficient information to lodge 'Equivalence Disputes'.
Equivalence in Relation to Price		
Assurance to wholesale customers that Telstra is meeting its obligations under the undertaking (Section 4(f)(v)) Equivalence in relation to terms and conditions relating to price and method for ascertaining price (Section 4(g)(i))	TEM report to show the extent to which pricing is equivalent. Where the TEM report shows a difference of +/- 5%, Telstra to provide the ACCC a 'substantiation report'. ACCC regulated price reviews could be used to better align pricing.	<ul style="list-style-type: none"> ▪ No requirement to take positive steps to remedy lack of equivalence. ▪ No consequences for failure to provide equivalence. ▪ Utility of TEM unknown? ▪ Is retail minus appropriate for ADSL2+?
Enforcement of Equivalent Standards of Supply		
Enforcement of equivalent standards of supply (including service level guarantees) (Section 4(g)(iii))	Measures for each Regulated Service. Rebates payable automatically for adverse performance (generally 2%). Wholesale customers to opt into Service Level regime (in which case rebates are sole and exclusive remedy) or may elect not to participate and rely on contractual and statutory remedies.	<ul style="list-style-type: none"> ▪ No enforcement mechanisms other than SLG. ▪ Many carve outs to SLGs. ▪ SLGs nugatory. ▪ No consequence for Telstra of failure to comply.
Equivalent Notification		
Equivalent notification (Section 4(g)(v))	Telstra to provide notifications in relation to planned events; availability of ADSL capability; exchange service information; major service impacting network incidents; other general services or provisioning matters; and disaster recovery plan information in accordance with processes and timeframes set out in Schedule 4.	<ul style="list-style-type: none"> ▪ Some elements uncertain, e.g., OSS notifications in accordance with 'procedures in place from time to time' (Schedule 4, s.8). ▪ Some notifications inappropriately limited to copper network.
Equivalent Systems		



Attachment 3 – Exchange Access for NBN POI's

Relevant Questions from Discussion Paper

Q2: Do you consider that Telstra's ongoing ownership and control of passive infrastructure required by other access seekers to interconnect with the NBN is likely to impede the realisation of any of the expected benefits to competition from the structural reform? Please provide evidence that supports your reasoning.

Q4: What do you think will be the likely impact of the SSU coming into force for competition in: (a) fixed access markets; (b) transmission capacity markets; (c) downstream (wholesale or retail) fixed voice and broadband markets; and (d) any other relevant telecommunications markets?

Q40: Are the proposed arrangements for TEBA (in relation to the supply of active declared services provided by Telstra) appropriate and effective in providing for equivalence and transparency?

1. Context

Based on the Government's decision to apply a semi-distributed POI model for the NBN rollout, a highly competitive and innovative market for NBN POI connectivity has the potential to emerge. This model also underwrites incentives for transmission providers to further invest in network enhancements and extensions to support Australia's wider information infrastructure requirements. A number of companies have made announcements about their intention to participate and compete in this market.

In May 2011, the ACCC published a revised list of 121 POI's to the NBN. Consistent with the Planning Rules, a majority of these [111 out of 121] will be located at Telstra exchange buildings. The Planning Rules also state that NBN Co will be able to obtain access to those exchanges on the conditions provided for in the Definitive Agreements with Telstra.

The limited publicly available information that has been provided in this regard with the release of the Definitive Agreements indicates that:

- The Infrastructure Services Agreement (ISA) contains the detailed terms for the long term provision of access to three types of infrastructure and related services by Telstra to NBN Co: dark fibre links, rack spaces in exchanges, ducts and associated duct infrastructure. Telstra retains property in all infrastructure categories except for those Lead in Conduits which become NBN Co property once used.
- With respect to exchange access services specifically, Telstra agrees to provide NBN Co with the right to access, occupy and use rack spaces in Telstra exchange buildings. NBN Co has the right to sub-licence these exchange spaces to access seekers to enable them to interconnect with the NBN.
- Telstra is responsible for the provision and remediation of a specified list of exchange spaces and associated exchange buildings to be used by NBN Co up to agreed fitness standards. Telstra must also provide ongoing maintenance and repair of those buildings.

The ACCC noted in its Discussion Paper³⁷ that the application of the SSU has the potential to lead to a competitively neutral environment for the supply of fixed-line telecommunications services by diminishing over time the extent to which Telstra is able to control key upstream infrastructure. That said, the ACCC also noted that Telstra will continue to be integrated in certain areas, including through its ongoing ownership of its passive and transmission infrastructure relevant to the supply of NBN-based services. This includes:

- Access to space within the Telstra exchanges in order to interconnect with the NBN (which access seekers will be able to obtain from NBN Co or from Telstra)
- Access to ducts or external interconnection cable in order to interconnect transmission facilities at Telstra exchanges (which access seekers will be required to seek either regulated or commercial access directly from Telstra).

The POI 'competition criteria' and Planning Rules have been designed to coincide with locating POI's in areas where there is contestable backhaul, specifically in this context a minimum of 2 backhaul transmission operators. That said, in many cases transmission operators will require access to both TEBA space and ducts/external interconnection cables in order to interconnect with the NBN at certain POI's.

NBN POI access appears to be similar to the current access requirements of transmission operators when serving DSLAM backhaul. There are many shortcomings with the current arrangements.

For example, competitive operators in this space currently provide many hundreds of separate connections into exchanges. In many of these exchanges single operators have had to deliver separate cables into the same exchange i.e. one for each and every customer, this has occurred because of a large number of limitations places upon access seekers over many years; these included;

- Asymmetry of information with respect to exchange planning
- Long embargo periods on exchanges subject to future change or expansion
- An inability to cross connect between access seekers in the TEBA space
- Reservation of duct space by the exchange owner
- Requirements to pay for capital expansions required for incremental capacity increases
- Inability to reserve duct space for additional cables, even when that duct space has been paid for by the access seeker
- Being forced to pay duct rental on ducts that have been constructed by the access seeker
- Requirements to pay for duct rental prior to using it
- Lack of access or provision for common Optical Distribution Frames
- Rules around access to tunnels and the use of tunnels for access
- Limitations on access to pits and pipes surrounding the exchanges
- The application process and time periods for approvals
- Lack of explanation on rejected access requests.

³⁷ Discussion paper at pages 39-40.

