Submission on Initial Concerns with Telstra Structural Separation Undertaking

August 2011

Introduction

The Competitive Carriers' Coalition welcomes the Commission's discussion paper and strongly supports its judgement that Telstra's Structural Separation Undertaking cannot be accepted in its present form.

The CCC will continue to provide the Commission with submissions through the course of its assessment of the undertakings. This will include specific responses to questions raised in the discussion paper, where appropriate.

However, the purpose of this submission is to provide a summary of the initial concerns of the CCC membership, many of which go to the core of the undertaking.

The Independent Telecommunications Adjudicator Scheme

CCC strongly agrees with the Commission that the ITA depends on industry participation and confidence to be effective. The CCC submits that the Commission cannot regard the ITA as providing a mechanism within the SSU to satisfy Telstra's obligations to provide equivalence and transparency if it does not believe this is the case.

The CCC believes that the ITA proposal is flawed both in its fundamental design and in the detail of its operation. Without wholesale changes, the CCC members would not sign on to participate in the ITA scheme.

Some of the changes that would need to be made to the ITA proposal include.

- Independent board. The ITA must have a board independent of Telstra. Subject to further information from Telstra and discussion with the Commission, we suggest it is more likely access seekers would consider supporting an ITA if Telstra did not control the board ITA, and through that means, was not able to make budget decision to effect the ITA's role. For

example, we would propose an equal balance between access seekers and Telstra, with an independent chair, would be a more appropriate proposed arrangement. Access seekers have no confidence in an organisation that is overseen by Telstra appointed directors.

- ITA must be fully funded by Telstra for the term of the undertaking. Telstra proposes to fund the ITA for only one year after which the obligation will move to access seekers. This is tantamount to requiring victims to fund prosecutions against the perpetrators of misconduct against them!
- ITA should not be able to make orders against access seekers. This provision demonstrates that Telstra's approach to the ITA is fundamentally wrong headed. The ITA should be a mechanism to ensure that Telstra's stewardship of the monopoly access network is not abused. This is the obligation Telstra is required to meet by Government policy. The ITA should be acting as a discipline on Telstra, and there are no circumstances where it should have authority over independent access seekers.
- The ITA decisions cannot be binding on access seekers while Telstra can avoid its decisions. Any integrity that the ITA scheme might claim is completely undermined by the fact that Telstra proposes to give itself a "get out of jail free" card if its failures cost more to fix than Telstra is willing to pay. That is, the SSU provides that Telstra can avoid implementing remedies to established instances of a systemic failure to provide equivalence simply because it has set arbitrary caps on its internal costs. This means that, the bigger the failure, or the more instances of failure identified in a single year, the less likely it is that Telstra will have to implement a remedy. Access seekers would be irresponsible to participate in such a scheme. The only acceptable arrangement would be for the caps on spending to be removed entirely.
- The proposal that the ITA can only investigate claims of non equivalence where access seekers can establish a pattern of conduct or systemic failure is patently absurd. The whole point of an ITA has to be that it can bring to bear access to information and expertise that the Commission itself does not have, allowing the ITA to identify the cause of non equivalence quickly and effectively. To expect access seekers to conduct their own investigation of the underlying causes of an instance where they have observed a lack of equivalence, without access to Telstra's internal systems and in the context of information asymmetry, means that the ITA scheme would be worse than useless, but would in fact be a barrier to the effective resolution of disputes.

Other Matters

The level of service level guarantee rebates is completely unacceptable. These rebates are so low that they would create an incentive for Telstra to fail to meet its services level obligations, not an incentive for improved performance. Again, this provides an insight into the failure of Telstra to take seriously the interests of access seekers. It serves to protect and advance the interests of Telstra and as such the entire scheme should be rejected.

The CCC welcomes Telstra's commitment to publishing wholesale prices for ADSL services, but believes the proposal to price these wholesale services using a retail minus approach is unacceptable. Telstra proposes to calculate the internal cost of providing these services in order to implement a "floor" price, but it is not apparent that it proposes to publish this price. Given that Telstra proposes

to conduct this internal cost analysis it should use these costs to establish its wholesale price, not attempt to implement discredited retail minus methodologies.

The CCC strongly agrees with the Commission that the undertaking must be capable of adapting to changed circumstances. Specifically, the CCC believes that the undertaking should describe what Telstra would propose in the event that the NBN rollout were to cease before its completion.

The Commission has rightly identified the inequality of Telstra proposal to provide itself with privileged access to TEBA services by reserving space in exchanges for itself outside of the "queue".

In meetings with the CCC, Telstra representatives said that it was their intention to publish the outputs of the TEM and a timeline of implementation as soon as possible. Neither of these documents has been forthcoming.

Even putting aside the many points on which the undertaking fails to meet Telstra's obligations under the CACS Act as detailed above, access seekers cannot accept the pricing equivalence construct in the abstract and on trust. Neither can they accept an undertaking that does not clearly commit Telstra to implementation timing. Until Telstra publishes these data, the CCC submits that the assessment process should be put on hold.

Telstra's decision to seek to implement equivalence of pricing selectively (i.e not in the exempt exchange areas and by reference to the copper network in some places in the undertaking) further illustrates that Telstra has made no attempt to satisfy the core policy motivation and requirements of the Government.

The entire thrust of Government policy has been to seek to address and correct the acknowledged failure of past policies to resolve the problems caused by Telstra's monopoly control and market power in the customer access network and parts of the transmission network. The access regime, built on declaration and anti-competitive conduct processes, has failed to curb Telstra's conduct in response to its incentive and ability to discriminate against access seekers.

The requirement on Telstra to provide equivalence in the undertakings is a primary requirement, as recognised by the Commission in pointing out that an overarching statement of commitment to equivalence is absent from the undertaking.

As such, the CCC submits that the equivalence obligation should be read up to take precedence over the failed declaration-based processes, not read down to be subservient to, or at best mirror, regulatory mechanisms that policy acknowledges have failed. It is the clear intention of policy that the equivalence obligation should apply to Telstra's entire customer access network, and the transmission network where it retains market power.

The CCC submits that there is no evidence that Telstra has accepted this requirement, and until its undertaking it re-written to reflect this, it is not capable of being accepted.

Conclusion

As indicated above, this document is not intended to represent all of the many concerns that access seekers have with the SSU as published. The CCC is deeply concerned with the many exemptions and exclusions that apply to almost every aspect of the obligations Telstra has proposed for itself in the

SSU, for example. However, in view of the very short time available to assess and comment on the SSU, the CCC provides this initial summary so as to ensure that the Commission can be informed of some of the areas of greatest concern as early as possible.