



Australian
Competition &
Consumer
Commission

Establishment of the Independent Telecommunications Adjudicator

Discussion Paper

March 2012

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List of acronyms and other terms

ACCC	Australian Competition and Consumer Commission
AIP	Accelerated Investigation Process
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
ITA	Independent Telecommunications Adjudicator
SSU	Structural Separation Undertaking
Telco Act	<i>Telecommunications Act 1997 (Cth)</i>

1 Overview

1.1 Introduction

On 27 February 2012, the ACCC accepted Telstra's structural separation undertaking (SSU) and approved the draft migration plan.

The SSU provides a number of commitments relating to dispute resolution, including for the establishment of an Independent Telecommunications Adjudicator (ITA).

Once established, the ITA is to provide a process for resolving complaints from wholesale customers relating to Telstra's delivery of non-price equivalence in the supply of Regulated Services and disputes relating to matters covered by Telstra's migration plan (together referred to as "ITA Disputes").¹ The intention is that the ITA will provide a fast-track dispute resolution process that will investigate and resolve disputes in a manner that is independent, impartial, and cost-effective.

A number of preconditions must be met before the ITA can commence operation. These include ACCC approval of an ITA Constitution, a Charter of Independence and of the nominee for the role of the ITA Adjudicator.

On 28 March 2012, Telstra provided the ACCC with draft versions of the ITA Constitution (the draft Constitution) and Charter of Independence (the draft Charter). The ACCC is seeking public comment on these documents which are attached to this discussion paper (Attachments A and B respectively).

1.2 Regulatory Framework

Clause 20.1 of the SSU requires that Telstra establish the ITA as a "company limited by guarantee in accordance with Schedule 5 (of the SSU) and for the purposes of section 152 EQ of the CCA".² The SSU also specifies a number of other requirements that Telstra must meet in relation to the ITA Constitution, the Charter of Independence and the appointment process for the ITA Adjudicator.

The ITA Constitution and the Charter of Independence must provide for the matters specified in paragraphs 4.1(f) and 4.2(c) of Schedule 5 of the SSU respectively. These requirements are discussed in more detail in section 3 and 4 of this paper. The ACCC must approve documents that meet these requirements.³ The ACCC may undertake consultation prior to reaching its decision in this regard.⁴

The ITA Adjudicator will have responsibility for receiving, investigating and facilitating the resolution of ITA Disputes.⁵ The effective operation of the ITA process will depend on the degree to which wholesale customers are assured of the genuine independence and practical and technical expertise of any person appointed

¹ SSU, Schedule 5, para 7.1

² SSU, clause 20.1

³ SSU, Schedule 5, para 4.1

⁴ SSU, Schedule 5, paras 4.1(g) and 4.2(d)

⁵ SSU, Schedule 5, para 4.1(f)

to the role. The ACCC intends to undertake a separate targeted consultation process with Telstra's wholesale customers on the suitability of any individual nominee.⁶

In regards to the process for the hearing of ITA Disputes, the ITA Adjudicator is required to comply with the "ITA Process" outlined under Schedule 5. Further, to participate in the scheme, wholesale customers are to agree to an ITA Deed with Telstra and the ITA.⁷

The ACCC as the ITA Adjudicator

Section 152EQ of the CCA provides that the ACCC may assist the ITA by providing information and advice as well as by making available ACCC resources and facilities, including secretariat and clerical assistance.⁸ The SSU also provides that the ACCC can operate as the ITA Adjudicator⁹ and allows for ITA Disputes to be referred between the two bodies where appropriate.¹⁰

Schedule 5 of the SSU also sets out how the ITA Adjudicator may exercise its investigatory and directions powers,¹¹ as well as the procedural requirements to be followed for the ITA Process.¹² While the ACCC may make its own rules for the practice and procedure to be followed in hearing ITA Disputes in its capacity as the ITA Adjudicator,¹³ at this stage the ACCC is consulting on the ITA Adjudicator model.

Implementation timeframe

Both the SSU and migration plan came into force on 6 March 2012. Clause 21 of the SSU requires Telstra to implement its ITA commitments within 2 months from this date.¹⁴ The ACCC has discretion to approve a request from Telstra to extend this timeframe having regard to the matters listed in clause 21.3 of the SSU.

1.3 Background

The SSU requirements relating to the ITA Constitution, Charter of Independence and ITA Adjudicator either reflect the organisational and governance arrangements required for the ITA under Schedule 2 of the *Telecommunications (Acceptance of Undertaking about Structural Separation – Matters) Undertaking 2011* (the Ministerial Criteria Instrument) or were included by Telstra in response to concerns raised through the SSU consultation process. The *Telecommunications (Migration Plan Principles) Determination 2011* (the Determination) also required that the

⁶ SSU, Schedule 5, para 5.1(d) requires the ACCC to undertake "public or other consultation which it reasonably considers is necessary or expedient in relation to the appointment of the ITA Adjudicator"

⁷ SSU, Schedule 6

⁸ CCA, subsection 152EQ(2) and (3)

⁹ SSU, Schedule 5, para 9

¹⁰ SSU, Schedule 5, paras 12 and 13

¹¹ SSSU, Schedule 5, paras 10 and 11

¹² SSU, Schedule 5, para 8

¹³ SSU, Schedule 5, para 9.2

¹⁴ SSU, clause 21.1

migration plan provide for an ITA to oversee a process for the resolution of any disputes between wholesale customers and Telstra arising under the migration plan.¹⁵

The ACCC concluded that the dispute resolution arrangements in the SSU meet the requirements of the Ministerial Criteria Instrument, are “appropriate and effective” for the purposes of subsection 577A(3) of the *Telecommunications Act 1997* and satisfy the requirements of the Determination.¹⁶

2 Consultation

2.1 Overview of the consultation process

The ACCC is seeking submissions from interested parties in relation to the attached draft Constitution and Charter.

The ACCC has discretion to undertake public consultation if “considers it necessary or expedient” to reaching its decision on whether to accept or reject either draft document.¹⁷ The ACCC’s preliminary view is that the drafts provided by Telstra accord with the requirements of the SSU. However, the ACCC invites comments from interested parties on whether the draft Constitution and Charter comply with the SSU and on any other issues or concerns in respect of the draft documents.

The ACCC intends to make a final decision on the draft documents in early May 2012 in order to allow for the timely implementation of the ITA process.

2.2 Making a submission

Submissions in response to this discussion paper will be accepted until **5:00 pm on 20 April 2012**. Any submissions received after this time may not be considered.

All submissions in relation to the draft Constitution and Charter will be considered public and posted on the ACCC’s website. If stakeholders wish to submit commercial-in-confidence material to the ACCC they should submit a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or ‘[c-i-c]’.

The *ACCC-AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the Australian Energy Regulator (AER) on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC website at www.accc.gov.au

The ACCC prefers to receive electronic copies of submissions in either Adobe PDF or Microsoft Word format that is text searchable. Please send submissions to the following email address: ssu-migration@acc.gov.au

¹⁵ MPP Determination, subsection 33(2)

¹⁶ ACCC “Assessment of Telstra’s Structural Separation Undertaking and draft Migration Plan”, Final Decision, February 2012; p.166 and 107 respectively

¹⁷ SSU, Schedule 5, paras 4.1(g) and 4.2(d)

The ACCC also accepts hard copies of submissions. Any hard copy should be sent to:

Sean Riordan
General Manager
Industry Structure and Compliance, Communications Group
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001

Any questions about this consultation process should be directed to Ed Seymour at Ed.Seymour@acc.gov.au or by calling: (03) 9290 1886.

3 The draft ITA Constitution

The ITA Constitution will establish the organisational and governance arrangements for the ITA company (or the “Office of the ITA”), as well as set out the responsibilities of the ITA Directors. The rules specified in the ITA Constitution will be subject to the requirements of the SSU and the *Corporations Act 2001* (Cth). As such, the ITA Constitution will perform an important role in ensuring the effective and transparent operation of the ITA as a company.

3.1 SSU requirements

The requirements for the establishment of the ITA company are provided in clause 20 and Schedule 5 of the SSU. Telstra is responsible for establishing the company (limited by guarantee) and appointing the board of directors.

The minimum requirements for the Constitution are outlined in paragraph 4.1(f) of Schedule 5 of the SSU. Notably, the Constitution must:

- vest the ITA Adjudicator with the power to resolve ITA Disputes;¹⁸
- require the engagement of a probity advisor to advise the Board on the operation of the ITA process;¹⁹
- limit the powers, responsibilities and role of the ITA directors and ITA members to the establishment, maintenance and administration of the ITA as a company;²⁰
- require Telstra to enable the ITA Adjudicator to access its records, systems, and personnel;²¹ and
- provide for various reporting requirements, including reporting to the ACCC, in order to ensure transparency of the ITA process.²²

3.2 ACCC preliminary view

As a general principle, the ACCC considers that the wording of the ITA Constitution should fully accord with the relevant wording of the SSU. Further, the rules of the ITA Constitution should be, to the extent permitted by law, directed to the fulfilment of the ITA Objectives set out in paragraph 3 of Schedule 5 of the SSU. This principle is encapsulated in rule 3 of the draft ITA Constitution.

The ACCC preliminary view is that the draft Constitution meets the requirements of Schedule 5 of the SSU. For example, rule 2.1 of the draft Constitution establishes the

¹⁸ SSU, Schedule 5, para 4.1(f)(ii)

¹⁹ SSU, Schedule 5, para 4.1(f)(xv)

²⁰ SSU, Schedule 5, para 4.1(f)(x)

²¹ SSU, Schedule 5, para 4.1(f)(vi)

²² SSU, Schedule 5, paras 4.1(f)(xvii) and (xviii)

ITA as a company limited by guarantee and rule 5.1 provides for the ITA Adjudicator appointment process required by the SSU.²³

However, the ACCC invites interested parties to comment on whether the draft Constitution meets the requirements of the SSU as well as on any other issues or concerns.

To assist with the preparation of submissions, the ACCC draws the attention of interested parties to the rules concerning the scope of director's duties and powers, the information security arrangements, the arrangements for the appointment of a probity advisor and the membership rules.

Directors' duties and powers

As a general principle, the ACCC considers that the ITA Constitution should not provide the ITA directors with any powers that may put them in a position of conflict with respect to their duty to run the ITA Company in accordance with the "Objects of the company" provided under rule 3 of the draft Constitution.

The ACCC notes that the draft Constitution contains a number of safeguards that otherwise limit the capacity of the ITA directors to become involved in the day-to-day operation of the ITA process. For example, rule 5.3(b) of the draft Constitution provides that the company will not be a participant in the ITA process, and must not involve itself in, or seek to influence, a decision of the Adjudicator.

Information Security arrangements

The effective resolution of an ITA dispute will require participant parties to provide confidential and commercially sensitive information to the ITA Adjudicator. However, wholesale customer confidence in the ITA scheme will be undermined if any confidential information obtained by the ITA Adjudicator, or the ITA directors can be obtained or misused by Telstra. The main information security arrangements for the protection of "Wholesale Customer Information" are provided under rule 5.8 of the draft Constitution.

The Probity Advisor

Under Paragraph 4.1(f)(xv) of Schedule 5, the ITA Board is required to appoint a suitably qualified probity advisor. It is expected that the probity advisor will assist to ensure the proper oversight of the ITA process and the Adjudicator's performance of his or her duties. The probity advisor has a number of important reporting duties under the SSU, including advising the ITA Board on:

- matters relating to the independence of the Adjudicator;
- the responsibilities of the ITA Directors; and
- the administration of the ITA Process.²⁴

²³ SSU, Schedule 5, para 5.1

The probity advisor is dealt with under rule 5.5 of the draft Constitution.

Membership

Paragraph 4.1(b) of Schedule 5 of the SSU provides that “Telstra will be the sole member of the ITA, unless otherwise decided by Telstra.” Rule 6 of the draft Constitution contemplates the potential extension of membership of the ITA to parties other than Telstra.

The ACCC understands that Telstra considers that the flexibility in the membership rules is simply to accommodate non-Telstra members in the event that Telstra may decide in the future that the ITA will not continue as a wholly owned subsidiary of Telstra. While Telstra has indicated that there is no current intention to invite any other party to become a member of the ITA Company, Telstra considers it appropriate that the foundation documents of the ITA reflect this option for which the SSU expressly provides.

Are the provisions of the draft ITA Constitution compliant with the SSU? In particular, are there any discrepancies between the requirements of paragraph 4.1(f) of Schedule 5 of the SSU and the drafting of the Constitution?

4 The draft Charter of Independence

The Charter of Independence will provide for the administrative arrangements and restrictions under which the ITA Adjudicator must operate to ensure that his/her decisions remain impartial. Assurance as to the ITA Adjudicator’s independence will be crucial to the effective functioning of the ITA as a dispute resolution body.

4.1 SSU requirements

The minimum requirements for the Charter of Independence are outlined in paragraph 4.2(c) of Schedule 5 of the SSU. Notably, the Charter must:

- require that the ITA Adjudicator acts independently from Telstra, Wholesale customers, NBN Co, the ACCC, and government;²⁵
- provide that the ITA Adjudicator is not to be employed by, or act as a consultant for Telstra or any Carriage Service provider within 6 months of ceasing to hold the office of ITA Adjudicator;²⁶
- require that the Adjudicator not disclose any information to the Directors about a dispute, or formally or informally consult with or seek guidance from any of the Directors about a dispute;²⁷

²⁴ SSU, Schedule 5, para 4.1(f)(xv)

²⁵ SSU, Schedule 5, para 4.2(i)

²⁶ SSU, Schedule 5, para 4.2(ii)

- require that the ITA Adjudicator disclose to the probity advisor all information necessary for them to carry out their role;²⁸
- require the ITA Adjudicator to inform Telstra of any complaint made by a party to a dispute about the independence of the Adjudicator;²⁹ and
- provide that the ITA Adjudicator will cease to hold office in specific instances, including where he or she has breached an independence direction issued by the ACCC, or misused confidential information received as part of their role as the ITA Adjudicator.³⁰

4.2 ACCC preliminary view

The ACCC considers that the Charter of Independence should provide confidence that the Adjudicator will be impartial in its decision making.

As a general principle, the ACCC considers that the Charter of Independence should fully accord with the requirements of the SSU. The ACCC is generally satisfied that the draft Charter meets the requirements of paragraph 4.2(c) of Schedule 5. For example, rule 4.2 of the draft Charter requires that the ITA Adjudicator act independently of Telstra, wholesale customers, NBN Co, the ACCC and the Government in accordance with paragraph 4.2(c)(i) of Schedule 5 of the SSU.

However, the ACCC invites interested parties to comment on whether the draft Charter meets the requirements of the SSU as well as on any other issues or concerns.

To assist with the preparation of submissions, the ACCC draws the attention of interested parties to the rules relating to the ITA Adjudicator’s remuneration and the arrangements for oversight and transparency of the ITA Adjudicator.

Remuneration

The arrangements for the remuneration of the ITA Adjudicator will be essential to ensuring that he/she remains unbiased in their decision making. To this end, any capacity for decisions on the remuneration provided to the ITA Adjudicator to be influenced by the findings he/she has reached must be avoided. Rule 6 of the draft Charter outlines a methodology for determining the remuneration of the ITA Adjudicator which includes the ITA company developing and the ACCC approving a “Remuneration Proposal”.

Transparency arrangements

The draft Charter provides some assurance as to the transparency of the ITA Adjudicator’s independence as well as some mechanisms for the ACCC to seek remediation in the event of non compliance with the independence arrangements.

²⁷ SSU, Schedule 5, para 4.2(iv)(A)

²⁸ SSU, Schedule 5, para 4.2(iv)(B)

²⁹ SSU, Schedule 5, para 4.2(xii)

³⁰ SSU, Schedule 5, paras 4.2(vi)(D) and (E) respectively

For example, if the ACCC considers that the ITA Adjudicator's performance of his or her functions has or may be compromised, the ACCC may issue an Independence Direction instructing the ITA Adjudicator to take or not take certain action it considers reasonable or necessary (rule 4.3 of the draft Charter). Breach of such a Direction may result in the termination of the ITA Adjudicator.

Furthermore, rule 7.4 of the draft Charter provides that the ACCC may issue a Conflict Direction requiring the Adjudicator to take or not to take specified action in relation to any substantiated conflict of interest. The ITA Company will maintain a register of conflicts of interest notified by the ITA Adjudicator to assist with transparency in this regard.

Are the provisions of the draft Charter of Independence consistent with the SSU? In particular, are there any discrepancies between the requirements of paragraph 4.2(c) of Schedule 5 of the SSU and the drafting of the Charter?