F Larmour,
[redacted]

To: ACCC
ssu-migration@accc.gov.au
(via email)

11th January 2012

Submission regarding Telstra's SSU (Structural Separation Undertaking)

Dear ACCC,

In recent months I have experienced an extraordinary litany of technical, administrative and procedural problems in my capacity as a private rural user of Telstra's monopoly fixed line phone service. I now have deep concerns about Telstra's modus operandi and about whether any regime of regulatory oversight can ensure fairness. Consequently I have had a good look at the SSU.

Nomatter what safeguards are included in any agreement about structural separation, it is very likely that some known problem areas will be given less attention than they deserve and some as yet unknown problem areas will not become apparent until after formal agreements have been set in concrete. Thus it can be deduced with confidence that any SSU of the type proposed is probably flawed. I have identified two fundamental issues that are absent from the SSU and one issue that has not been addressed adequately. The purpose of this submission is to bring these three flaws to your attention.

I do not presume to offer definitive solutions to the issues that I have identified. It would be the responsibility of others, including the ACCC, to analyse a range of possible solutions to counteract the flaws. Effective and reasonable outcomes will require dialogue between all relevant parties. In this submission, where I have outlined solutions they are merely suggestions.

Flaw 1. Lack of a dynamic component.

To ensure that it works as intended, any structural separation agreement must be able to adapt dynamically to any new or unforeseen situation as it arises. The only real solution to this problem is to have an SSU that is not fixed, but instead has a dynamic component. In other words, an additional dynamic safeguard should be included as an essential component of any structural separation agreement. Telstra's proposed Overarching Equivalence Commitment defines specific issues that may be of concern, but an additional dynamic component is also required, for example to deal with unknown future issues that are not evident at the present time.

I suggest that a permanent independent tribunal be created with the power to modify the regulations relating to structural separation. The tribunal would examine grievances arising from circumstances where it is claimed that Telstra has departed from the intention and spirit of the SSU in a way that is not covered by the powers of the ACCC. The tribunal would then unilaterally, with exact reference to the intention and spirit of the SSU and using common sense and acting for the common good, modify the regulations including the SSU to remedy any defect or omission.

To facilitate this, the SSU would have to include a definition of the intention and spirit of the SSU. The task of defining the intention and spirit of the SSU should not be very difficult or very time-consuming. The definition of the intention and the spirit of the SSU should be negotiated between the ACCC and Telstra, using the proposed Overarching Equivalence Commitment as a starting point. If any obstacles were to emerge during such negotiations then this would indicate that Telstra's current proposed SSU is fundamentally flawed.

Flaw 2. Lack of consideration of knock-on effects of equivalence failures on consumer end-users.

If structural separation is defective then consumers will be losers just as much as Telstra's retail competitors will be losers. Therefore, in cases where it can be shown that the monopoly wholesaler has acted in a way that has unreasonably reduced the potential options available to consumers, the disadvantaged consumers should be entitled to compensation for loss of opportunity.

The mechanisms of the planned structural separation appear to concentrate on protecting the interests of Telstra's competitors, without regard to consequential effects on consumers resulting from equivalence failures.

In my opinion, there will undoubtedly be ways in which Telstra could game the system if Telstra hypothetically wished to do so. For a hypothetical example, where the wholesaler makes it difficult for a telco to offer services by causing delays based on false pretexts, retail consumers lacking other options might lock themselves into inferior service contracts. For another hypothetical example, where the wholesaler creates many obstacles some telcos might abandon all efforts to provide retail services in some areas.

Although the concept of penalties for opportunities lost to individual consumers would potentially benefit all telecomms consumers, I make this point with particular regard to the subset of end-users who reside in rural areas. They are already substantially disadvantaged in comparison with suburban end-users with respect to the range and quality of available telco services. Furthermore under the NBN rural residents will suffer another relative disadvantage in that most of them will not get optic fibre but may instead get a less desirable technology such as wireless. It is rural residents who will suffer the most if structural separation is defective.

An advantage of a penalty system that forces Telstra to consider the interests of end-users is that it would help to discourage any temptation to play cynical procedural and administrative games that could unfairly disadvantage Telstra's competitors.

Flaw 3. Inadequate regulatory oversight.

Current proposals for structural separation are deficient in that the degree of regulatory oversight needs to be an order of magnitude stronger than appears to be envisaged in order to ensure that there is any possibility of fair equivalence. In my opinion, vague hopes for cultural change are at best laughable.

In general, burdens of proof should be weakened, time limits should be shortened and penalties should be dramatically increased to act as genuine deterrents against wrongdoing. Also it should go without saying that any adjudicator must be entirely independent of Telstra.

In particular I strongly recommend the inclusion of a new type of offence. This would be where a series of apparently unrelated problems of any nature has occurred, where each problem on its own does not necessarily risk potential penalty to Telstra. Types of problems can include but are not limited to unnecessary delays, technical faults, procedural absurdities, administrative errors, misinformation, false assertions and false pretexts. If one customer or group of customers experiences a series of problems at the hands of Telstra, apparently by pure coincidence, then the pattern of problems should automatically be deemed to be systematic and deliberate without any burden of proof whatsoever being required. Extremely high penalties should apply in cases of this type. Thus, where one customer or group of customers is being serially disadvantaged by Telstra then Telstra will be obliged to progressively improve its performance to avoid severe repercussions.

Yours sincerely,

F Larmour