

**Establishment of the Independent Telecommunications
Adjudicator
Discussion Paper**

Submission by Herbert Geer Lawyers on behalf of:

Adam Internet,

iiNet Limited,

Internode Pty Ltd, and

TransACT Communications Pty Limited

20 April 2012

1. INTRODUCTION AND BACKGROUND

This submission is made on behalf of Adam Internet, iiNet Limited, Internode Pty Ltd and TransACT Communications Pty Limited (collectively, **our Clients**) in response to the ACCC's discussion paper of March 2012 entitled: *Establishment of the Independent Telecommunications Adjudicator (the Discussion Paper)*.

On 27 February 2012, the ACCC accepted Telstra's structural separation undertaking (**SSU**)¹. The SSU provides for the establishment of an Independent Telecommunications Adjudicator (**ITA**) by Telstra. The SSU provides that²:

- the independence of the ITA Adjudicator *'will be enshrined by a Charter of Independence that must be approved by the ACCC;* and
- the ITA Constitution must be approved by the ACCC.

The SSU provides that the ACCC must approve the ITA Constitution and Charter of Independence if they meet the requirements of clauses 4.1(f) and 4.2(c) of Schedule 5 of the SSU respectively (**the SSU Criteria**).

On 28 March 2012, Telstra submitted to the ACCC draft versions of the ITA Constitution (**the Draft Constitution**) and Charter of Independence (**the Draft Charter**) (referred to collectively as the **Draft Documents**). The ACCC has formed the preliminary view that the Draft Documents meet the requirements of the SSU³. However, the ACCC is seeking public comment from interested parties on whether the Draft Documents comply with the SSU and on any other issues or concerns in respect of the Draft Documents⁴.

Our Clients welcome the opportunity of responding to the Discussion Paper. This submission:

- provides our Clients' response to the specific questions raised in the discussion paper; and
- identifies important matters which our Clients believe could reasonably be addressed by the Draft Documents but which are not.

2. RESPONSE TO SPECIFIC QUESTIONS IN THE DISCUSSION PAPER

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?

¹ Note the capitalised terms 'ITA' and 'ITA Adjudicator' used in this submission are as defined in the SSU.

² SSU, clauses 2(b)(ii) and (iv).

³ Discussion Paper, at p.3.

⁴ *ibid.*

The effect of Clause 4.1(f) of Schedule 5 of the SSU is that the ACCC must approve the Draft Constitution if the Draft Constitution does 18 specified things. We have identified discrepancies and/or issues with five of those specified things as set out below.

Clause 4.1(f)(ii) - the ITA Constitution must vest in the ITA Adjudicator the power to resolve ITA Disputes

Clause 5.2(a) of the Draft Constitution only provides for functions and powers '*associated with the resolution of ITA Disputes*'. It is unclear why the more direct wording in Clause 4.1(f)(ii) of Schedule 5 of the SSU - i.e. '*the power to resolve ITA Disputes*' - has not been replicated. It is arguable that the wording in clause 5.2(a) of the Draft Constitution does not include the power to make a binding decision. Although the ability to make a binding decision may be implied by the opening sentence to clause 5.2 of the Draft Constitution and clause 5.2(b) of the Draft Constitution, it is submitted that clause 4.1(f)(ii) of Schedule 5 to the SSU requires an express statement to be included in the ITA Constitution that the ITA Adjudicator has the power to resolve ITA Disputes.

Clause 4.1(f)(iv) - the ITA Constitution must require the ITA Adjudicator to have regard to the law, good industry practice and what is fair and reasonable in the circumstances

Clause 5.2(b) of the Draft Constitution limits this requirement to when the ITA Adjudicator is resolving ITA disputes. Clause 4.1(f)(iv) of Schedule 5 of the SSU is not so limited and requires the ITA adjudicator to have regard to the law, good industry practice and what is fair and reasonable in the circumstances when exercising all of his/her functions and powers.

Clause 4.1(f)(ix) - the ITA Constitution must provide for the ITA Adjudicator to prepare and propose an annual budget to the ITA Directors setting out the resources and funding the ITA Adjudicator considers necessary to meet his or her functions

Clause 5.6(a) of the Draft Constitution provides that the ITA may require the ITA Adjudicator to prepare an annual budget. It is submitted that this is not consistent with clause 4.1(f)(ix) which allows the ITA to do this regardless of whether or not this is requested by the ITA.

Clause 4.1(f)(x) - to the extent permitted by law, the ITA Constitution must limit the functions, powers, responsibilities and role of the ITA Directors and ITA members to matters relating to the establishment, maintenance and administration of the ITA as a corporate entity

The Draft Constitution does not contain a clause that expressly replicates clause 4.1(f)(x) of Schedule 5 of the SSU.

Clause 4.1(f)(xiv) - the ITA Constitution must require that any amendment to the Charter of Independence be approved by the ACCC before that amendment is made

Although clause 5.4(b) of the Draft Constitution provides that any variation to the Charter of Independence is taken to be adopted by the ITA when approved by the

ACCC, there is no express requirement in the Draft Constitution that amendments to the Charter of Independence must be submitted to the ACCC for approval.

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?

As regards the substance of the Draft Charter, the Draft Charter does appear to include all of the 15 things that are specified in clause 4.2(c) of Schedule 5 of the SSU. However, notwithstanding this, it is respectfully submitted that the Draft Charter does not meet the requirements of the SSU. This is because the SSU clearly provides that it is the ITA and not Telstra that is required to draw up the Charter of Independence after the ITA has been established and its constitution has been approved by the ACCC⁵. In other words, the SSU requires a two stage process as follows:

1. The ITA is established by Telstra and the ITA constitution is approved by the ACCC.
2. The ITA turns its mind to what should be included in the Charter of Independence, draws up the Charter of Independence without involvement from Telstra and submits it to the ACCC for approval.

It is submitted that this is not just a matter of formality, it is an important point of principle because the fact that Telstra has effectively usurped the functions of the ITA as regards stage 2 above does not bode well for the independence (or at least the perceived independence) of the ITA scheme. The whole point of having the ITA is to ensure that the ITA Adjudicator is at least at arms length from Telstra. If Telstra treats the ITA as being synonymous with Telstra (allowing Telstra to perform the ITA's functions), this arms length distance between Telstra and the ITA Adjudicator will be lost.

3. IMPORTANT MATTERS NOT ADDRESSED

It is submitted that the nature of the SSU Criteria (which involves consideration of an exhaustive check list of specific factors which are not subject to any overriding policy objective - e.g. the LTIE) means that it is possible for important matters to 'slip between the cracks' and not be addressed. Our Clients have identified two such matters as follows:

- the extent to which wholesale customers who do not elect to use the ITA Adjudicator will be required to fund the ITA Adjudicator; and
- the ability of the Probity Adviser to influence the ITA Adjudicator.

Each of these will be considered in turn.

⁵ See clause 4.2(a) of Schedule 5 of the SSU.

The extent to which wholesale customers who do not elect to use the ITA Adjudicator will be required to fund the ITA Adjudicator

The ITA Adjudicator has jurisdiction to resolve 'ITA Disputes'. An 'ITA Dispute' is defined as⁶:

- an Equivalence Complaint; or
- any dispute referred to the Adjudicator by a wholesale customer under clause 31 of the Migration Plan.

As part of its consultation relating to the SSU, the ACCC received a number of submissions that addressed issues relating to the ITA scheme. Many of these submissions were critical of the ITA scheme proposed by Telstra, and called on dispute resolution functions to be exercised by the ACCC⁷. As regards disputes arising under the Migration Plan, the ACCC concluded as follows (emphasis added)⁸:

*As a result of the amendments made to the ITA Scheme under Schedule 5 of the SSU, the ACCC considers that the draft Plan satisfies the requirements of section 33 of the Determination. That is, **the draft Plan provides for adequate dispute resolution by offering wholesale customers the option of bringing their disputes to the ACCC rather than the ITA.***

This clearly implies that if the only avenue of dispute resolution was the ITA, the Migration Plan would not provide for adequate dispute resolution.

As regards ITA Disputes generally, the ACCC concluded as follows⁹:

The availability of the ACCC as an alternative Adjudicator ameliorates concerns over any impeding effect that procedural shortcomings may have on the ITA's capacity to operate as an effective dispute resolution mechanism. In this regard, when operating in its capacity as Adjudicator, the ACCC is able to develop its own procedural rules for the hearing of ITA disputes.

Accordingly, clause 6.1 of Schedule 5 of the SSU provides:

When an ITA Dispute is referred to the ITA Process, the referring party may elect whether the Adjudicator responsible for hearing the ITA Dispute is:

- (a) the ITA Adjudicator; or*
- (b) the ACCC.*

'Adjudicator' is defined in the SSU as¹⁰:

- (a) the ITA Adjudicator; or*
- (b) the ACCC*

as the case permits or requires.

⁶ See clause 7.1 of Schedule 5 of the SSU.

⁷ See *Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan Final Decision February 2012 Public Version*, at p.107.

⁸ *ibid.*

⁹ *Ibid.*, at p. 168.

¹⁰ See Schedule 1 of the SSU.

As regards fees, clause 9.2(d) and clause 7.2(a)(iii) of Schedule 5 of the SSU are relevant. Clause 9.2(d) of Schedule 5 provides as follows:

The ACCC may specify fees payable by a party to an ITA Dispute in respect of the ACCC's performance of the function of Adjudicator for an ITA Dispute.

Clause 7.2(a)(iii) of Schedule 5 of the SSU provides that before the Adjudicator is allowed to accept an ITA dispute, the Adjudicator must be satisfied (emphasis added):

where the Adjudicator is the ITA Adjudicator:

- (A) Telstra and the Wholesale Customer have each paid the annual ITA Process Fee; and*
- (B) Telstra or the relevant Wholesale Customer has paid the ITA Referral Fee (whichever is the referring party);*

It is submitted that it is clearly implicit from these provisions that where the ACCC is the Adjudicator, any fees should be set by, and paid to, the ACCC. However, the effect of clause 7.2(ii) of Schedule 5 of the SSU is that the ACCC cannot accept an ITA Dispute unless it is satisfied that an ITA Deed is in force between Telstra and the wholesale customer concerned. One of the requirements of the ITA Deed is that the wholesale customer must agree to pay to the ITA (i.e. the company set up by Telstra)¹¹ the ITA Referral Fee and an annual ITA Process Fee¹². The ITA Deed does not allow any exceptions to this commitment nor does it allow a wholesale customer to withdraw from the commitment to pay the annual ITA Process Fee.

Therefore, a wholesale customer cannot bring an ITA Dispute to the ACCC unless the wholesale customer agrees to be liable to pay, in addition to any fees that the ACCC may impose, annual fees to the ITA until the termination of the ITA Deed¹³. Our Clients believe that such an outcome is unreasonable and unsatisfactory, particularly as the ACCC is of the view that wholesale customers should not be compelled to use the ITA Adjudicator to resolve ITA Disputes¹⁴. In light of this our Clients believe it would be appropriate for the ITA Constitution to address this issue and include a provision that prohibits the ITA from charging a wholesale customer fees unless that wholesale customer has nominated the ITA Adjudicator as the Adjudicator. Our Clients suggest that an additional clause to clause 5.6 of the Draft Constitution be included as follows:

(c) The ITA will not impose any charges on any wholesale customer who has not nominated the ITA Adjudicator to act as the Adjudicator.

The ability of the probity adviser to influence the ITA Adjudicator

Clause 4(f)(xv) of Schedule 5 of the SSU requires the ITA directors to:

¹¹ 'ITA' is defined in the SSU as *'the limited by guarantee company to be established under clause 20.1(a)'* - see Schedule 1 of the SSU.

¹² See clauses 2.5 and 2.6 of the ITA Deed (the ITA Deed is set out in Schedule 6 of the SSU).

¹³ The ITA Deed terminates automatically on the earlier of the 'Designated Day' or the date on which Part D of the SSU ceases to apply to Telstra.

¹⁴ It should be noted that in the case of disputes under clause 31 of the Migration Plan, the only dispute resolution mechanism available is the ITA Process.

engage a suitably qualified probity adviser approved by the ACCC who is to provide the ITA Directors with advice on matters relating to the independence of the ITA Adjudicator, the responsibilities of the ITA Directors, the operation and administration of the ITA Process in accordance with its objectives, the constitution of the ITA and the Charter of Independence and other matters the ITA Directors consider appropriate.

Accordingly, clause 5.5(a) of the Draft Constitution provides:

As soon as reasonably practicable, the company must appoint a suitably qualified probity advisor approved by the ACCC to provide advice to the board on matters relating to the independence of the ITA Adjudicator, the responsibilities of the board, the operation and administration of the ITA Process in accordance with the Charter of Independence and other matters the board considers appropriate.

Given the evaluative role that the probity adviser has regarding the performance of the ITA Adjudicator, our Clients are concerned that the probity adviser could have the potential to exert influence over the ITA Adjudicator. In light of this, our Clients believe that the Draft Documents should contain suitable principles and/or commitments that would prevent the probity adviser from exerting any influence over the ITA Adjudicator. This would, at a minimum, require a prohibition on the probity adviser giving any advice or direction to the ITA Adjudicator either directly or indirectly as regards the resolution of ITA Disputes or the operation of the ITA Process.

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