



Maddocks

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**Macquarie Telecom**

Submissions – Telstra's  
Structural Separation  
Undertaking (Further  
Draft)



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## Email Letter

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 Our Ref BMCSQS:5789492

### Submission – Telstra’s Structural Separation (Further Draft)

#### 1. Introduction

Maddocks has prepared this submission on behalf of Macquarie Telecom Pty Limited (**Macquarie**) in response to the Australian Competition and Consumer Commission’s (**ACCC**) paper titled ‘Telstra’s Structural Separation Undertaking’, dated December 2011 (the **December Discussion Paper**).

Macquarie appreciates the efforts taken by the ACCC to facilitate consultation regarding Telstra’s Structural Separation Undertaking (**SSU**) and welcomes this opportunity to respond to the December Discussion Paper. During the consultation process, Macquarie has made extensive submissions to the ACCC regarding the various drafts of the SSU and related Telstra proposals both on its own behalf and as an active member of the Competitive Carriers’ Coalition (together the **Previous Submissions**).<sup>1</sup>

In Macquarie’s view the revised SSU submitted by Telstra, while it provides certain improvements over Telstra’s initial document, still fails to provide for equivalence, transparency, monitoring and compliance in an appropriate and effective manner.<sup>2</sup>

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<sup>1</sup> Macquarie’s Previous Submissions include the following, which include submissions made by the Competitive Carriers’ Coalition: Competitive Carriers’ Coalition, *Submission on Initial Concerns with Telstra Structural Separation Undertaking*, 31 August 2011; Competitive Carriers’ Coalition, *Response-Assessment of Telstra’s Structural Separation Undertaking-Discussion Paper*, 27 September 2011; Competitive Carriers’ Coalition, *Submission in Relation to the Removal of Broadband Traffic from Telstra HFC Network*, 29 September 2011, Competitive Carriers’ Coalition, *Supplementary Submission-Service level rebates* 2 November 2011; Macquarie Telecom, *Assessment of Telstra’s Structural Separation Undertaking and draft Migration Plan*, 27 September 2011; and Competitive Carriers’ Coalition *Response – Industry Forum and Further Assessment of Telstra’s Structural Separation Undertaking and Additional Proposals*, 18 November 2011.

<sup>2</sup> Sections 577A(3) and 577A(5) of the *Telecommunications Act 1997* (Cth).

In the ACCC's Discussion Paper on the Assessment of Telstra's Structural Separation Undertaking, dated 30 August 2011 (**August Discussion Paper**) regarding a previous draft of the SSU, the ACCC expressed a preliminary view that the draft of Telstra's SSU could not be accepted in its proposed form because 'the interim equivalence and transparency measures were not supported by a clear and enforceable commitment to 'equivalence of outcomes''.<sup>3</sup>

While the revised SSU now contains an overarching commitment to equivalence of outcomes, Macquarie submits it does not address those issues and concerns raised by the ACCC in its August Discussion Paper and many of the substantive concerns raised by Macquarie and extensively documented in the Previous Submissions.

Given the considerable time and resources Macquarie has expended in providing the Previous Submissions, Macquarie does not intend to revisit all of the matters which have been raised the Previous Submissions. The majority of Macquarie's concerns have not been adequately addressed and it is concerned that the SSU, in its current form, may not assist in delivering the Government's stated legislative objective 'to enhance competitive outcomes in the Australian telecommunications industry'.

Macquarie submits that the revised SSU, remains flawed and fails to meet the minimum legislative requirements because:

- it retains many of the key features of the failed operational separation regime;
- it fails to provide any counter to Telstra's incentive to favour its own retail division over its wholesale customers;
- it does not provide for appropriate and effective enforcement in the event Telstra is in breach of its obligations under the SSU and therefore, like the operational separation regime before it, does not adequately address Telstra's incentive and ability to discriminate against its competitors; and
- the service level regime fails to provide adequate incentives on Telstra and does not include any mechanisms that allow for the review and adjustments of the service levels to ensure ongoing equivalence between Telstra's wholesale customers and Telstra's retail business units.

## 2. Inadequacies of operational separation remain

Notwithstanding the changes proposed by Telstra in the revised SSU, Macquarie remains highly concerned that Telstra has focused its attention on developing complex processes and procedures, rather than providing wholesale customers with positive commitments and obligations to provide equivalence and transparency.

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<sup>3</sup> ACCC, *Assessment of Telstra's Structural Separation Undertaking and Draft Migration Plan – Discussion Paper*, 30 August 2011 at page 2.

As previously submitted by Macquarie, the ACCC is acutely aware of fundamental issues that arise from process-driven regimes. In the Senate Estimates Committee Hearing in June 2008, the ACCC noted, in relation to the effectiveness of Telstra's operational separation:

*....in summary, we would have to say that the regime is fundamentally unduly complex. There is a lot of discretion left to Telstra. There are limited self-regulatory mechanisms and unduly convoluted processes to implement any corrective action.*<sup>4</sup>

Despite the changes made by Telstra, the SSU remains a regime which is riddled with the convoluted process driven features, undue complexities and excessive discretion which blighted the operational separation regime and lead the ACCC to declare that regime an abject failure.

### **3. SSU lacks appropriate and effective enforcement mechanisms**

Macquarie's concerns regarding the lack of appropriate and effective enforcement mechanisms in the SSU are well-documented in the Previous Submissions. Macquarie does not propose to repeat those comments here, other than to emphasise the following issues.

The compliance and enforcement mechanisms to rectify possible breaches by Telstra of the overarching commitment to equivalence outcomes are not effective because they provides Telstra with excessive discretion and, like the operational separation regime, feature a convoluted, multistage, bureaucratic process to implement any corrective action.

Specifically, Macquarie remains concerned that, in almost all instances, Telstra is entitled to propose and implement its own solutions to any transparency or equivalence issues. Further, Telstra is not subject to any retrospective penalties. Such a regime, like the operational separation regime before it, does not adequately address Telstra's incentive and ability to discriminate against its competitors.

In summary, there are a multitude of issues with the self-reporting regime. In addition to the convoluted self-reporting process which provides no real incentive for Telstra to self-report, the regime repeats those unworkable features of operational separation.

Further, Macquarie submits that, at a minimum:

- if a breach of the equivalency provisions has been raised with Telstra and Telstra has failed to provide a remedy, or has provided a remedy which is subsequently found to be inadequate, the ITA, or the ACCC acting as ITA, must be entitled to impose its own remedy on Telstra.
- any remedy for a breach of its obligations which is imposed on Telstra should be able to be backdated to the time at which the breach occurred.

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<sup>4</sup> Graeme Samuel (Chairman, ACCC) Senate Estimates Standing Committee on Economics, 5 June 2008 as referred to in the ACCC's *Submission to the Department of Broadband, Communications and the Digital Economy 'National Broadband Network: Regulatory Reform for 21st Century Broadband'*, June 2009, at page 153.

#### 4. Service Level regime is of no value

Macquarie has provided extensive submissions regarding the multitude of issues with Telstra's proposed service level regime. Macquarie does not propose to repeat those comments here, other than to emphasise the following points:

- the majority of the concerns raised by Macquarie regarding the service level regime have not been addressed;
- the service level regime proposed by Telstra is open to gaming and manipulation and does not provide appropriate mechanisms to countervail Telstra's incentive to engage in sabotage behaviour; and
- the service level regime should include mechanisms which allow for regular monitoring, review and adjustment. If the service levels which Telstra is actually providing to its retail business unit are better than the service levels being provided to Telstra's wholesale customers, then in order to ensure Telstra provides equivalence in an appropriate and effective manner, the service levels being provided to Telstra's wholesale customers should be adjusted to correspond to service levels being received by Telstra's retail business units.

In respect of a mechanism which allows for regular monitoring, review and adjustment Service Levels to ensure equivalence, Macquarie submits that the follow clause should be inserted into the SSU:

##### ***New clause 17.3 Reporting and review of Service Levels***

*"The Service Levels must be reviewed by Telstra at the end of each Quarter. If the service levels which Telstra has actually provided to its Retail Business Units for Comparable Retail Services is more favourable than the applicable benchmark set out in the Service Levels for two consecutive Quarters then the Service Levels under this SSU must be adjusted to be no less favourable than the service levels which Telstra actually provides to its Retail Business Units for Comparable Retail Services."*

#### 5. Optus Submissions

Macquarie has had the benefit of reviewing the draft submissions prepared by Optus in response to the December Discussion Paper (**Optus Submission**). Macquarie supports the drafting amendments to the SSU proposed by Optus in the Optus Submissions.

If you have any questions regarding these submissions, please do not hesitate to contact Brendan Coady on (02) 9225 6258.

Yours faithfully

Maddocks

Transmission authorised by:

Brendan Coady, Partner