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Sean Riordan
General Manager
Industry Structure and Compliance, Communications Group
Australian Competition and Consumer Commission

By email

ssu-migration@acc.gov.au

Establishment of the Independent Telecommunications Adjudicator

Dear Sean,

Macquarie Telecom Pty Limited ("**Macquarie**") appreciates the opportunity to make this submission to the Australian Competition and Consumer Commission ("**ACCC**") in relation to the ACCC's discussion paper concerning the above.¹ Telstra is obliged to establish the Independent Telecommunications Adjudicator ("**ITA**") pursuant to Telstra's structural separation undertaking ("**SSU**"). *Inter alia*, the establishment of the ITA requires the ACCC to approve (i) a draft constitution of the ITA ("**ITA Constitution**") and (ii) a draft Charter of Independence. The ACCC has now been provided with such materials and must decide whether these materials fulfil specific requirements as set out in the SSU. If these requirements are met, the ACCC must approve these materials.

This submission addresses the consultation questions raised in the Discussion Paper. For ease of reference, each question has been reproduced in a shaded text box which is then followed by Macquarie's response.

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?

The SSU at paragraph 4.1(f) of Schedule 5 sets out 17 requirements that the ITA Constitution must fulfil in order that the ACCC may approve the ITA Constitution. Macquarie notes some potential discrepancies between with the ITA Constitution and the requirements of paragraph 4.1(f) of Schedule 5. Such discrepancies are addressed below by relevant requirement.

Appointment of ITA Adjudicator

Macquarie notes that rule 5.1(b)(i) of the ITA Constitution provides that the company must not appoint a person as the ITA Adjudicator unless that person has been nominated to the ACCC. Macquarie is concerned that the ITA Constitution only provides that a person must be nominated to the ACCC before being appointed as ITA Adjudicator and not whether such nomination has actually been accepted by the ACCC.

¹ ACCC, Establishment of the Independent Telecommunications Adjudicator, Discussion Paper, March 2012, ("**Discussion Paper**")

Power to Resolve Disputes

Macquarie notes that rule 5.2(a) of the ITA Constitution provides that the ITA will perform the “functions and powers associated with the resolution of ITA Disputes”. Macquarie would prefer that the wording of the ITA Constitution be closer that of the SSU. For example, the ITA Constitution at rule 5.2(a) could be worded as “functions and powers to resolve ITA Disputes”.

Regard to the Law, Good Industry Practice and What is Fair

Macquarie notes that the requirement of paragraph 4.1(f)(iv) of the SSU is open-ended. The ITA Constitution at rule 5.2(b) provides that this requirement is limited to instances “when resolving ITA Disputes.” Macquarie considers that this qualification in relation to this matter is not aligned with the requirement of the SSU.

Pursuit of Fair, Just, Economical and Expeditious Resolution of ITA Disputes

Macquarie notes that the ITA Constitution appears to have a typographical error in rule 5.2(c) which expresses this requirement as “ ... a duty to pursue fair, just economical and expeditious ... ”. That is, there is no comma between the words “just” and “economical”.

Prepare and Propose an Annual Budget

The SSU at paragraph 4.1(f)(ix) requires the ITA Adjudicator to prepare and propose an annual budget to the ITA Directors. The ITA Constitution at rule 5.6(a) provides that the company may require the ITA Adjudicator to prepare an annual budget. That is, the preparation of an annual budget is discretionary under the ITA Constitution and need not be proposed to the ITA Directors. Macquarie considers that in relation to this matter, the ITA Constitution is not aligned with the requirement of the SSU.

Charter of Independence

The SSU at paragraph 4.1(f)(xii) requires the ITA Constitution to provide for an ACCC approved Charter of Independence to be adopted by the ITA Directors. Macquarie notes that the SSU at paragraph 4.2(a) provides for Telstra to request the ITA to provide a Charter of Independence to the ACCC and provides at paragraph 4.2(b) for the ACCC to receive a Charter of Independence from the ITA. Macquarie is concerned that it is in fact Telstra (and not the ITA) that has provided the ACCC with the Charter of Independence and that the ACCC has received the Charter of Independence from Telstra (and not the ITA). Macquarie considers that in relation to this matter, the process which has taken place is not aligned with the requirements of the SSU.

Amendment to the Charter of Independence

The SSU at paragraph 4.1(f)(xiv) requires the ITA Constitution to provide for any amendment to the Charter of Independence “be approved by the ACCC before that amendment is made”. The ITA Constitution at rule 5.3(b) provides that any variation to the Charter of Independence is taken to adopted when approved by the ACCC. Macquarie submits that the ITA Constitution is not aligned with the SSU requirement. This is because it would appear to allow an amendment to be made to the ITA Constitution which must be subsequently approved by the ACCC to have effect. By contrast, the SSU requirement is that ACCC approval must precede an amendment to the ITA Constitution.



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?

The SSU at paragraph 4.2(c) of Schedule 5 sets out 15 requirements that the Charter of Independence must fulfil in order that the ACCC may approve the Charter of Independence. Macquarie notes an instance in which a requirement of the SSU is not aligned with the Charter of Independence.

In particular, paragraph 4.2(c)(vi) of the SSU sets out eight circumstances in which the ITA Adjudicator will cease to hold office. Macquarie is concerned that all but one of these circumstances is provided for in clause 5(b) of the Charter of Independence. The missing circumstance is specified at paragraph 4.2(c)(vi)(H), i.e., "on any other grounds specified in the Charter of Independence approved by the ACCC."

Closing

Macquarie would be pleased to elaborate on its views expressed in this submission. Should you have any queries concerning this submission please feel free to contact me.

Yours sincerely

Chris Zull
Senior Manager - Regulatory & Government

T 03 9206 6848
E czull@macquarietelecom.com