



Optus Submission

Telstra's Structural Separation Undertaking

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Public Version

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Section 1. Introduction

- 1.1 Optus welcomes the opportunity to provide comments on Telstra's revised Structural Separation Undertaking ("SSU") of 9 December 2011.

Executive Summary

- 1.2 Optus acknowledges that Telstra has made a number of changes to its original SSU in response to some (but by no means all) of the concerns and issues raised both by the ACCC and the industry through the recent consultation processes on that SSU.
- 1.3 Notwithstanding these changes, we consider that a small number of further amendments are required to be made to the SSU if it is to deliver the improvements in equivalence over the next decade that were anticipated in the reforms to the telecommunications regulation introduced by the Competition and Consumer Act of 2010 (CCA). This outcome will also be advanced if the ACCC issues a decision to declare the wholesale ADSL service in its separate but related inquiry.
- 1.4 A critical issue which both the ACCC and industry identified with the original SSU is the absence of an overarching commitment for Telstra to deliver equivalence. Telstra proposes to address this by the inclusion of an Overarching Equivalence Obligation (OEO) within the revised SSU. The concept of an OEO is a welcome addition to the SSU. This has the potential to be the lynchpin of the SSU. If it is drafted effectively then then it can lead to real and meaningful change in behaviour by Telstra and it will provide an opportunity through time to address many other flaws in the detailed provisions of the SSU.
- 1.5 Whilst the inclusion of the OEO is a welcome step forward, Optus is concerned that some important elements of the drafting of the OEO are ambiguous and as such they are likely to undermine the effectiveness and enforceability of the OEO. This in turn would undermine the utility of the SSU and the Government's telecommunications policy reforms. Optus has outlined a small number of drafting changes to the OEO that will remove this ambiguity and significantly enhance the effectiveness and utility of the SSU. These changes should be capable of being adopted within present consultation process, but it is important that they are made before the ACCC accepts the SSU.
- 1.6 Optus also notes that the SSU does not adequately deal with price related equivalence. Accordingly, the ACCC will be required to rely on its powers under the CCA to deal with any matter relating to a breach of price equivalence. In this context we believe that prior to acceptance of the SSU it is important that the ACCC extends its price setting powers by declaring the wholesale ADSL service, which is presently under consideration in a separate inquiry.
- 1.7 Finally, this submission highlights continuing concerns with non-price and operational aspects of the revised SSU. We have also outlined recommendations to address these in the body of the submission. We encourage the ACCC to consider these recommendations.

Section 2. Overarching equivalence commitment

- 2.1 Optus remains concerned with the nature of Telstra's Overarching Equivalence Obligation ("OEO"). There are three material concerns with the proposed OEO in clause 9(a) of the revised SSU:
- (a) In order to reflect the equivalence test set out in s. 577A(3) of the Telecommunications Act 1997 (Cth), the OEO must specify equivalence between the Regulated Services provided by the Wholesale Business Unit to Wholesale Customers and the Comparable Retail Services provided by the Network Services Business Unit to the Retail Business Unit. The OEO proposed by Telstra fails to do this. The approach in clause 9(a) sets a different test. Apart from departing from the Telecommunications Act test, this weakens an important part of the advantage of separating the relevant business units in the first part of the SSU and there is no real measure of comparative "equivalence".
 - (b) The carve-outs in Clause 9(b) switches off the overarching obligation in clause 9(a) to the extent the OEO would have any one of the listed "effects" or require one of the 23 listed measures. The carve outs in 9(b) are written so that they directly contradict the requirement of equivalence. [Obviously the requirement in 9(a) will have "effects" that are similar to the effects of functional separation including the specific measures listed in 9(b). These carve-outs should be redrafted to say simply that Telstra is free to achieve the equivalence in any way it wishes but is not required to use a means associated with functional separation.]
 - (c) Optus submits that the OEO sets weak incentives for Telstra to proactively deliver equivalence.
- 2.2 Each of these issues is examined in further detail below.

OEO test

- 2.3 The OEO differs to (and is a lesser standard than the) equivalence requirement in s. 577A(3) that ACCC must be satisfied of to accept the SSU.
- 2.4 **This represent a significant drafting flaw.** Clause 9(a) compares aspects of services and processes that support the provision of Regulated Services to Wholesale Customers (listed in (i) to (iv)) with "Comparable Retail Services Telstra provides". This is not the test in s. 577A(3). In order to reflect equivalence as contemplated in s. 577A(3)(a), the comparison must examine equivalence between the Regulated Services provided by the Wholesale Business Unit to Wholesale Customers and Comparable Retail Services provided by the Network Service Business Unit to the Retail Business Unit. Of course, there is also the overarching requirement in s. 577A(3)(b) that the ACCC must not accept the SSU unless satisfied that the undertaking provides the required level of transparency and equivalence in an appropriate and effective manner.
- 2.5 The test in clause 9(a) does not impose an acceptable equivalence standard on Telstra as it is a different and lesser standard than required under s. 577A(3). It does not make sense as a comparison. The drafting flaw raises uncertainty about how to identify and prove if the overarching equivalence obligation has been breached.
- 2.6 Optus submits that the OEO remains ineffective as its scope is unclear and it is questionable how it can be applied to be enforced against Telstra.

Recommendation

- 2.7 Optus recommends that clause 9(a) be amended to reflect the equivalence test stated in s. 577A(3) as follows:

Replace *"to the Comparable Retail Services that Telstra itself provides"* with *"to the Comparable Retail Services supplied by the Network Services Business Unit to a Retail Business Unit."*

Exceptions to the OEO

- 2.8 Optus submits that there are significant drafting flaws in clause 9(b) of the OEO. These are namely:
- (a) Switching off 9(a) to the extent the OEO would have any one of the 23 listed "effects" gives Telstra extremely broad scope not to accord equivalence. Telstra might easily make a case that a failure to accord equivalence has one of the listed effects.
 - (b) The exclusions in 9 (b) of what the equivalence obligation does not mean, make it impossible to identify what the equivalence obligation does mean.
- 2.9 The problem can be best be illustrated by examining the proposed exclusion relating to functional separation in clause 9 (b)(i). It is important to note that;
- (a) Logic would suggest that the requirement of equivalence may create the same outcome or have some "effects" that are the same as would apply to functional separation, depending of course on how the separation in each case is identified.
 - (b) However, 9(b) lists features that might pertain to functional separation (but are not exclusively characteristics of functional separation) and proceeds to provide that the equivalence requirement does not apply if it would create the same "effects". This seems to create a requirement directly contradictory to the requirement to provide equivalence.
 - (c) To the extent that it is reasonable for Telstra to say that it should not be subject to features of functional separation because the Minister says that is not the intention, it follows only that Telstra may, but should not be required to, implement features of functional separation.
 - (d) It does not follow that Telstra is not to be required to implement any element of equivalence that would have the same "effect" as functional separation. This creates an almost open-ended carve-out.
- 2.10 In Summary the drafting of the numerous and broad exclusions raises issues about how to identify and prove if the OEO has been breached. The complex structure risks being a deterrent or at the very least causing delay in investigating potential breaches. Given the limited remedies available for breach of the OEO, the ability of the ACCC to act swiftly to stop breaching conduct is crucial if Schedule 11 is to have some impact in addressing breaches.

Recommendation

- 2.11 Optus considers that the list of exceptions in clause 9 (b) is far too broad in its scope. However, to limit our proposed changes, we recommend that as a minimum the introduction to 9(b) should be reworded to read *"Without limiting the result required by the undertaking in 9(a) or*

Telstra's discretion as to how it might achieve that result, 9(a) does not require Telstra to implement functional separation in the form of:"

- 2.12 This will narrow the exceptions to the listed items and not matters that might be alleged to have similar "effects" to those matters which is practically open-ended.

Weak incentives to comply with the OEO

- 2.13 Optus submits that the incentives for Telstra to proactively deliver equivalence are significantly undermined by the highly qualified and limited regime contained in Schedule 11 dealing with breaches of the OEO. For example:
- (a) If a breach is determined, Schedule 11 is drafted with a bias towards requiring Telstra to cease breaching conduct going forward but not to require Telstra to fix past breaches.
 - (b) The requirements on Telstra to compensate for loss or damage suffered by a breach of clause 9(a) are heavily qualified, narrow and weak. They also require the ACCC to take Federal Court action to enforce the OEO.
 - (c) Under Schedule 11, ACCC directions for the breach cannot impose any requirement having retrospective effect or retrospective consequences for breach of the OEO. This ignores any assessment as to whether retrospective action would be practicable and the most appropriate and effective remedy for the Wholesale Customer.
 - (d) Telstra has numerous avenues to use to contest an alleged breach or ACCC Rectification Direction. These can be used by Telstra to protract the period before which Telstra must stop the breaching conduct.
 - (e) As noted above, enforcement of a breach ultimately requires the ACCC to take Federal court action and Schedule 11 constrains the ACCC in the relief that may be sought.
- 2.14 Each of these in combination provides Telstra with a strong incentive not to deliver equivalence in practice. Where avoidance gives Telstra a commercial advantage it can seek to gain that advantage for as long as possible. If a breach is eventually found out (please refer to comments above on clause 9(b) relating to difficulties with identifying if there has been a breach of clause 9(a)) Telstra can commit going forward to change its ways without the threat of paying for the past damage caused. Under the SSU, Schedule 11 sets out the only way the ACCC may enforce clause 9. As Schedule 11 has insufficient deterrents to breach, numerous delay mechanisms for Telstra, weak remedies and cumbersome enforcement mechanisms, this significantly weakens any incentive for Telstra to comply with clause 9(a).

Recommendation

- 2.15 Optus recommends a simpler, more streamlined structure for Schedule 11. Appreciating the desire that at this stage changes should be kept to a minimum to facilitate acceptance of the SSU, the minimum changes Optus proposes to Schedule 11 are:
- (a) The structure needs to allow the ACCC to be able to require Telstra to stop an activity pending resolution of an alleged breach.
 - (b) Where practical and where it could be an effective or appropriate remedy, Telstra should be required to take retrospective action.

Section 3. Other matters relating to equivalence

- 3.1 Optus notes that many concerns raised in our previous submissions have not been addressed by Telstra. We do not propose to repeat all of those concerns, but we have provided a commentary on issues of concern with some of the changes that have been made.

Pricing terms

- 3.2 Optus' comments do not address the price equivalence and price transparency terms in the SSU. In Optus' view, the mechanisms used are overly complex and are unlikely to operate fairly in practice. That said, Optus considers that it is important that the ACCC retains its powers under Part XIC of the CCA to address price related issues. We also believe it is important for the declaration of wholesale ADSL to occur prior to the acceptance of the SSU.

Restrictions on sharing information

- 3.3 In a number of places in the SSU, the restrictions placed on Telstra not to share or use across Telstra business units information that may give Telstra an advantage over its Wholesale Customers could be strengthened to provide Wholesale Customers with better protection. For example:
- (a) The carve-out in clause 8.4 and qualifications in clause 8.9 should be expressly subject to clause 10 (ie, in the same way as the introductory wording to clause 8.3).
 - (b) The appropriateness of retaining the word "unfair" in clause 10.3 should be reconsidered. It prohibits use or disclosure of Protected Information relating to a Wholesale Customer in a manner likely to enable a Retail Business Unit to gain or exploit an unfair commercial advantage over that Wholesale Customer in any market. What is unfair is open to differing views making this a hard test under which to establish a breach.
 - (c) The ambit of clause 10.4(c)(ii) should be reconsidered. Allowing disclosure and use of Protected Information by an employee outside one of the Separated Business Units for "undertaking responsibilities related to company-wide pricing" could allow the employee to take into account factors that may give Telstra a commercial advantage over its competitors. Optus recommends assessing the pricing purposes for which Telstra claims it needs to use the information and, if appropriate, to include these as limitations in the SSU and/or consider what other steps should be taken to provide equivalence and transparency on those issues to Wholesale Customers. This comment is also relevant to the new exception in clause 10.5(c) applying to the group Managing Director or equivalent with responsibilities for company-wide pricing decisions and their direct report employees.
 - (d) The above point also highlights that there should be a requirement for Telstra to ensure that Telstra leadership (who will have responsibilities across business units) do not take into account information relating to a Wholesale Customer in strategic planning and making decisions for Telstra's retail business.

Dispute Resolution Process

- 3.4 Optus remains concerned with the dispute resolution process proposed by Telstra. This applies in particular to the Independent Telecommunications Adjudicator (ITA) process.
- 3.5 Optus submits that the ITA process is set up to favour Telstra even if the ACCC is the adjudicator.

- 3.6 Whilst Telstra has now amended the SSU so that wholesale customers may elect the ACCC to act as an optional alternative to the ITA, the ACCC is still bound to follow the ITA process outlined in the SSU.¹
- 3.7 As all ITA disputes are to be assessed with reference to clause 9(a) and 9(b) (ie the overarching equivalence provision), the ITA process could become practically unusable unless clauses 9(a) and 9(b) are amended as set out earlier in this submission.
- 3.8 Further, Telstra has not made changes to the stipulation that wholesale customers may only raise their complaints to the ITA if they have gone through Telstra's Accelerated Investigation Process (AIP) as a first step and this has failed to resolve the issue. This requirement adds delay to the process of resolution of disputes. The delay will be significant if the parties fail to reach an agreement under the AIP and ITA processes and decide to take the matter to the ACCC under the CCA.
- 3.9 Telstra also has not made changes to its proposed funding arrangements for the ITA. It is unreasonable to require access seekers to contribute to Telstra's cost of compliance with its obligation.

Equivalence and Transparency metrics

- 3.10 Whilst Telstra has made some changes to the equivalence and transparency metrics, Optus remains concerned that the metrics will still not appropriately demonstrate that the quality, delivery and timeliness of services provided to Telstra's wholesale customers are equivalent to those provided to Telstra Retail.
- 3.11 The relevant changes are outlined in clause 16 and Schedule 3 of the SSU. Under clause 16.2, Telstra will be required to provide to the ACCC and the ITA adjudicator an Operational Equivalence Report which reports on *Telstra's averaged cycle time* to perform against the metrics for each relevant regulated service and its comparable retail service in each quarter.
- 3.12 As these metrics are measured averaged over a quarter, Optus considers that any systemic issues will be masked. Telstra therefore should reveal the actual volume of services that fall within the certain provisioning and rectification timeframes to the ACCC.
- 3.13 Further, under clause 16.1(c) Telstra will be required to report on its performance against the metrics in relation to its wholesale customers and to its retail unit. This requirement however does not apply to metrics 12-16 and metric 20, i.e. metrics relating to LSS, ULLS and TEBA. Instead, Telstra will only be required to report its performance for these metrics against specified service targets. This is a significant carve-out that should be removed.
- 3.14 In addition, we continue to have the following concerns with the inadequacy of the metrics:
- (a) All NBN related activities are carved out under Schedule 3 paragraph 10. The metrics should continue to apply to Telstra's services prior to migration to the NBN;
 - (b) All metrics' service levels are measured based on percentages, which are low thresholds that Telstra will always be able to meet. This will not incentivise Telstra to change its behaviour;

¹ Schedule 5, para 6.2

- (c) The metrics do not include the ULLS provisioning process and enhanced service assurance terms. The metrics only include ULLS cutover appointments and basic fault restoration;
- (d) In respect of Metric 15, whilst Telstra has improved the ULLS appointment days from 5 business days to 3 business days, Optus does not consider the change will provide wholesale customers an adequate timeframe to meet the customer service guarantee (CSG) of 5 business days for metropolitan customers. The date of submission is not counted towards the 3 business days, and secondly the SQ process would take an additional 2 business days. Given this, it would take at least 6 business days to activate a service even when Telstra offers an appointment 3 business days after the request is received. Optus therefore submits that Telstra should change the appointment days metric to 2 business days.
- (e) In respect of Metric 18, Optus does not consider Telstra's proposed metric of 1 business day is acceptable. **CiC**
- (f) In respect of Metric 20, Optus submits that the TEBA metrics should be expanded to include all five steps involved in the TEBA ordering process. The Joint Completion Inspection (JCI) is only one of the steps involved. To report only on the JCI will not measure equivalence. The other steps include preliminary study request (PSR), design and construction proposal (D&CP), TEBA D&CP assessment and TEBA construction.
- (g) In respect of Metric 21, Measurement should extend to all wholesale systems including Linx Online Service, ebill, LOLIG and ULLCIS, not simply LOLO. Optus considers that all systems associated with the supply and maintenance of services should be benchmarked.

Service Quality and Operational Equivalence

- 3.15 Whilst Telstra has now included two additional clauses in the SSU about service qualification, i.e clause 11.8 and clause 13.5, Telstra has not included service qualification (SQ) in the metrics. It is therefore still unclear what equivalence standard will be provided for the ULLS SQ.
- 3.16 Optus submits that the two additional commitments Telstra has made are not sufficient to ensure equivalence between Telstra and wholesale customers. Optus reiterates its concerns regarding the SQ process. Optus experiences a high rejection rate across all orders for ULLS and is charged a fee for each order rejection. The two common rejection reasons include "complex service" on the line and "address mismatches". It may take weeks before the "complex service" is removed. In contrast Telstra's Retail can remove these complex services at Point of Sale.
- 3.17 Similarly, unlike Telstra's retail business units, wholesale customers do not have the ability to access the "correct address" for all end users.
- 3.18 Under clause 11.8, Telstra must publish processes and systems used for SQ, service activation and provision and fault rectification for each regulated service and its *Comparable Retail service*. Comparable retail service is defined under Schedule 1. It stated that:

"ULLS –for the purpose of Fault Detection, Handling and Rectification only, the comparable retail service is the component of the Basic Telephone Service comprising a continuous metallic twisted pair between a Telstra local exchange MDF and the network boundary point at an end user premise."

- 3.19 Telstra has not provided any comparable retail service against ULLS for the purpose of provisioning and activation. Optus considers that the comparable retail services would be retail line rental and BigPond ADSL Layer 2 Service.
- 3.20 Further, Telstra's metric for ULLS only provides for basic fault restoration. Telstra will therefore not be required to publish the processes and systems used for enhanced service levels. Enhanced service levels are typically purchased by wholesale customers to service end users who require a faster fault rectification time. The current commitment therefore is unlikely to reveal any real difference between Telstra retail and its wholesale customers in this respect.
- 3.21 Under clause 13.5 Telstra undertakes that the systems used to process SQ requests from wholesale customers will be equivalent to those systems used for Telstra Retail in terms of reliability and response accuracy. Telstra also commits that if a new SQ system is used, it will use the same SQ system for wholesale customers and Telstra retail.² However, the current commitment does not extend to the ULLS service.
- 3.22 Further, it is unclear when Telstra will set up a new SQ system. Optus submits that in ensuring the functionality is suitable for wholesale customers, Telstra should liaise with wholesale customers in developing the SQ system including with respect to the capabilities of the system and the relevant timeframe.

² Clause 13.5 of Telstra SSU