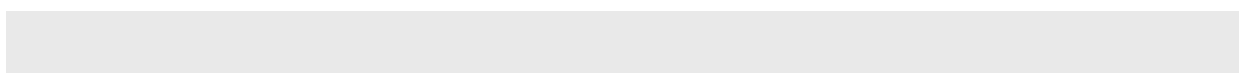


TELSTRA CORPORATION LIMITED

Submission in support of the revised Structural Separation Undertaking given by Telstra Corporation Limited to the Australian Competition and Consumer Commission under section 577A of the Telecommunications Act 1997

9 December 2011



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1 Summary

On 29 July 2011, Telstra provided the Australian Competition and Consumer Commission (**ACCC**) with a proposed Structural Separation Undertaking (the **SSU**) under Section 577A of the *Telecommunications Act 1997* (Cth) (the **Telco Act**), together with a Migration Plan (the **Plan**). Telstra also provided a paper setting out the key features of the SSU and the Plan.

On 30 August 2011, the ACCC released a Discussion Paper commenting on the SSU and Plan seeking submissions from the industry and public.

Telstra has engaged extensively and constructively with the ACCC and the industry in good faith about the provisions of the SSU regarding equivalence and transparency in the period before the Designated Day.

Discussions with the ACCC commenced in May this year, before Telstra entered into the Definitive Agreements with NBN Co and the Commonwealth and before Telstra lodged the SSU with the ACCC.

Since lodging the SSU in July, Telstra has engaged in more detailed and intensive consultations on its terms with both the ACCC and the industry, including holding a number of industry information sessions and actively participating in an industry forum on the SSU conducted by the ACCC.

The objective of these discussions was to ensure that any equivalence and transparency concerns were addressed through effective, practical commitments in the SSU consistent with the legislative guidance provided by the Government.

As a result of these further consultations, Telstra has incorporated a number of further equivalence and transparency commitments in a revised SSU which Telstra re-lodged on 9 December 2011. These further commitments include:

- An overarching equivalence commitment covering the supply of Regulated Services (including price terms);
- A clarification that the SSU does not constrain the ACCC's powers to a greater extent than provided by law;
- Further commitments on organisational structure and information security arrangements;
- Further commitments on service quality and operational equivalence;
- Further options for the resolution of equivalence complaints;
- Further commitments on the provision of Telstra exchange access, including processes for reservation of exchange space by wholesale customers;
- Further commitments on Wholesale DSL price and non-price equivalence; and
- Further commitments on transparency and reporting to the ACCC, including Telstra's reservation of space in key exchanges for its own retail or wholesale use.

These changes were made because they were consistent with Telstra's underlying approach to the SSU: to address issues of ACCC and industry concern but not to exceed the legislative guidance precluding measures that constituted functional separation.

Telstra believes that the SSU as revised meets the requirements of section 577A of the Telco Act, and is consistent with the guidance provided by the Government as it:

- commits to structural separation from the Designated Day;
- puts in place appropriate and effective measures to ensure transparency and equivalence during the migration periods in the supply of Regulated Services to Wholesale Customers and Retail Business Units; and
- includes appropriate and effective mechanisms to enable the ACCC to monitor Telstra's compliance with the Undertaking.

This Submission explains and provides background to the key amendments which have been made to the revised SSU.

2 Commencement and Implementation Periods

Under section 577AA of the Telco Act, Telstra can nominate events as conditions precedent to the SSU coming into effect. A condition precedent to the SSU as originally lodged was passage by Telstra shareholders of a resolution approving Telstra co-operating with the NBN and the Commonwealth by implementing its obligations under the Definitive Agreements. The shareholders' resolution was passed on 18 October 2011.

Accordingly, the SSU now deletes the condition precedent relating to the shareholder vote. The SSU will come into effect when the ACCC accepts the SSU and each of the following events occur¹, namely:

- the approval of the draft migration plan by the ACCC under section 577BDA or 577BDC of the Telco Act;
- the making of a declaration under section 577J(3) of the Telco Act; and
- the making of a declaration under section 577J(5) of the Telco Act.

Clause 21 of the SSU originally set out the Implementation Periods before certain requirements or obligations come into effect. This clause has been amended so that Part D as a whole will now commence from the SSU Commencement Date. The amended clause 21 requires Telstra to take the steps necessary to complete implementation of each of these obligations during the specified Implementation Period (generally two months from the Commencement Date) and provides that Telstra will not be treated as being in breach of these obligations or the overarching equivalence commitment in respect of those matters while they are being implemented.²

3 Relationship of SSU to ACCC Functions and Powers

The SSU establishes a new layer of requirements on Telstra and new points of interaction between Telstra and the ACCC, which will stand beside the existing and well-established regulatory powers the ACCC has under the *Competition and Consumer Act* (Cth) (the **CCA**) and the Telco Act.

Concerns were raised as to whether the requirements imposed on Telstra under the SSU could constrain the ACCC in exercising its powers or functions under its existing legislation.

In order to address those concerns, the SSU has been revised to provide that the SSU does not operate to constrain any of the ACCC's existing powers under the CCA or the Telco Act.³ A similar clarification is set out in paragraph 1 of Schedule 11 in relation to the Independent Telecommunications Adjudicator (ITA) Process and in relational to the organisational commitments in clause 8.8.

In addition, the ACCC's power to obtain information under the SSU has been expanded to expressly apply to any function or power the ACCC is exercising under the SSU, through amendments to clause 24.

¹ Clause 2.
² Clause 21.2.
³ Clause 1.4.

4 Organisational Structure and Arrangements

The SSU included the commitment to maintain separate business units for wholesale, retail and network support services, and set out detailed provisions relating to staffing and the interaction between these units.

Some concerns were raised, however, as to how the provisions would apply to employees with senior management responsibilities which involved oversight, on the one hand, of a Retail Business Unit and, on the other, of the Wholesale Business Unit and/or the Network Services Business Unit.

As Telstra is a single company, management and reporting lines must necessarily come together at a senior level in the company.

However, Telstra has made a number of amendments to address concerns of the ACCC and wholesale customers.

First, the SSU has been revised to clarify the application of clause 8.10 to Employees with direct managerial roles, expressed as Line Management Responsibilities, in relation to Separated Business Units. An Employee has Line Management Responsibilities for a Separated Business Unit when they have accountability for the Business Unit meeting its objectives and the authority to make decisions about the Business Unit's management and operation.

An Employee would not have Line Management Responsibility for a Unit if their functions or decisions with respect to the Unit solely arose as part of group-wide responsibilities, such as company wide support functions like HR.

This definition provides the basis for clearer separation requirements now embodied in clause 8.10. An Employee with Line Management Responsibilities for a Retail Business Unit cannot at the same time have such responsibilities for a Wholesale Business Unit or a Network Services Business Unit, and an Employee with Line Management Responsibilities for a Wholesale Business Unit may not have such responsibilities for a Retail Business Unit at the same time⁴.

The only exceptions to this restriction apply at the highest levels of management: the CEO, the Chief Operating Officer or any person in a role approved by the ACCC. This will ensure appropriate senior management oversight and reporting while maintaining retail/wholesale separation below that level.

Second, other amendments to clause 8 also enhance the separation elements of the organisational arrangements:

- Strengthening the information security provisions to ensure that Protected Information (i.e. confidential wholesale customer-related information) is not disclosed to an Employee who works outside any Retail Business Unit but who has responsibility for the pricing of retail services. The only exceptions are for the Group Managing Director with responsibility for company-wide pricing and Employees who report directly to the Group Managing Director who themselves do not work for a Retail Business Unit⁵. This will require separation of retail and wholesale information within Telstra Innovation and Product Marketing who have oversight of pricing proposals by the Retail and Wholesale Business Units;
- Applying the information security requirements to any Employee who performs the following functions, even if they are not working for a Retail Business Unit⁶:

⁴ Clause 8.10(a).

⁵ Clause 10.5(d)

⁶ Clause 10.4(a).

- network planning;
- wholesale product pricing;
- processing and implementing certain churn requests;
- some functions Telstra performs on behalf of industry; and
- ensuring that the incentive and Employee benefit provisions will apply to all Employees who work principally for a particular unit.

5 The Overarching Equivalence Commitment

A key issue for the ACCC and industry in relation to the SSU was the absence of an overarching commitment to equivalence between supply of Regulated Services to Wholesale Customers and comparable services to a Retail Business Unit, including price.

Telstra had proposed a detailed Interim Equivalence and Transparency regime built around specific commitments on price and non-price issues in areas of known ACCC and industry concern, such as information equivalence and systems equivalence. Telstra considered that these detailed commitments were consistent with providing clear solutions to specific problems during the transitional period until the NBN was substantially underway.

However, the view was expressed by the ACCC that the SSU should include a broader overarching commitment to an 'equivalence of outcomes' to allow adjustment to the specific commitments if they were not delivering on equivalence and to ensure that in the future the SSU remained 'fit for purpose'.

In response to those concerns, the SSU has been revised to include a new clause 9 which embodies the overarching commitment to equivalence of outcomes sought by the ACCC.

Clause 9(a) expressly provides that the supply of Regulated Services to wholesale customers will be equivalent to the Comparable Retail Services Telstra provides in respect of:

- technical and operational quality;
- operational systems, procedures and processes used in the supply of the service;
- information related to these aspects of the services; and
- the price charged for supplying the Regulated Service.

Clause 9(b) spells out what this equivalence obligation is not, or cannot require.

First, the overarching equivalence obligation cannot be used to require Telstra to adopt functional separation or elements of it. This is made clear by the Explanatory Memorandum to the SSU Guidance that provides⁷:

The transparency and equivalence measures are not intended to require Telstra to implement functional separation. Functional separation would, at a minimum, require Telstra's retail business units to use exactly the same access services on exactly the same terms and conditions and using the same systems and processes as its wholesale customers. It would also require a much stricter form of organisational separation than is intended under the interim transparency and equivalence measures.

Further, while section 577A of the Telco Act draws on the definition of equivalence in the functional separation provisions of Schedule 1, clause 74 of that Schedule is careful to say that the functional

⁷ Explanatory Memorandum, Telecommunications (Acceptance of an Undertaking about Structural Separation – Matters) Instrument 2011, at page 2.

separation principles are not to affect the meaning of anything in the structural separation provisions, including interim equivalence and transparency.

As separation measures fall along a spectrum from accounting separation to full ownership separation, it is appropriate that, when investing the ACCC with a broad overarching equivalence power, functional separation measures should be specified as being beyond the boundaries of that power.

Accordingly, clause 9(b)(i) sets out well recognised elements of functional separation that will not be required:

- the overarching equivalence commitment cannot require Telstra's Retail Business Unit to acquire and utilise Regulated Services supplied to Wholesale Customers;
- Telstra to introduce Transfer Pricing, beyond the price equivalence transparency measures to which Telstra has committed through use of the TEM;
- the Network Services Business Unit to deal directly with Wholesale Customers (i.e. replicating the UK Openreach model); or
- a Retail Business Unit to acquire services directly from a Wholesale Business Unit⁸.

Second, there are a number of other standard limitations. The overarching equivalence commitment does not apply if:

- it would prevent Telstra from obtaining a sufficient volume of a Regulated Service to meet its statutory obligations, including any order to supply services to meet universal service obligations (which is a narrowed down version of the Standard Access Obligation limitation) or if Telstra reasonably believes the wholesale customer would not comply with the relevant supply terms⁹, or
- it would affect Telstra's conduct under the Migration Plan, although consistently with the Migration Plan Principles, there are provisions within the Migration Plan itself which allow the ACCC to require adjustments to ensure equivalence¹⁰.

There can be situations where Telstra, without this safeguard, could be confronted with insufficient capacity to meet both orders from Wholesale Customers and orders from Retail Customers to whom Telstra is required to provide services by its 'social regulatory' requirements. Telstra's scope to refuse to provide USO services has been considerably tightened with amendments to section 9 of the *Telecommunications (Consumer Protection and Service Standards) Act*. For example:

The available spare copper lines in an exchange area are limited. A Wholesale Customer places an order for an active wholesale service or ULLS to premises which have already been provided with retail or wholesale services over a different copper line. At the same time, Telstra receives an order for a standard telephone service from an end user (who also may be a priority assist customer) in the same street which can only be fulfilled by assigning the copper pair which otherwise would be used for the second line services requested by the Wholesale Customer. The network requirements of a USO or priority assist customer should take precedence, given the social nature of these regulations to guarantee the availability of basic telephone services.

Third, clause 9(b) also deals with the relationship between the overarching equivalence commitment and regulated prices set under Part XIC. The SSU requirements and Part XIC need to work together if the price equivalence commitments are to be appropriate and effective. It is conceivable, for example, that if

⁸ Clause 9(b)(i).

⁹ Clause 9(b)(x) and Clause 9(b)(xi).

¹⁰ Clause 9(b)(xiii): see for example, clause 28 of draft Plan.

the SSU operates in isolation from Part XIC, the equivalent external price to the internal price could be higher than the regulated price specified by the ACCC under an access determination or binding rule of conduct issued under Part XIC. Similarly, a different charge structure could be applied under each regime, such as different approaches to geographic averaging.

The SSU has been revised to provide for the price equivalence commitment and Part XIC to work together in the following manner:

- if the ACCC specifies a price under Part XIC, Telstra is required to amend the rate card of Reference Prices published under the SSU to include that price¹¹;
- for relevant reportable products which are declared services, the TEM Reports must report on the comparison between the internal wholesale price and the external wholesale price. Telstra commits that it will use the TEM both for SSU price equivalence reporting and as the main financial reporting and management tool in its day to day business¹²;
- if the ACCC specifies a new regulated price which was previously not specified – either a new declared service or a previously unregulated price for an existing declared service – Telstra also has 3 months (or such longer period as is permitted by the ACCC) to provide the ACCC with a modified TEM Report setting out how Telstra will measure and compare the internal wholesale price/external wholesale price¹³;
- if there is a material disparity between the internal wholesale price and the external wholesale price as reported through TEM, Telstra is required to provide a substantiation report which provides the ACCC with Telstra's explanation of the difference¹⁴. Detailed extracts of the TEM Reports are available publicly¹⁵; and
- the ACCC can at any time, including based on the transparency of the internal wholesale price and the external wholesale price provided through the TEM Reports, make or amend a regulated price under Part XIC. The ACCC's powers under Part XIC are unconstrained so that it can act quickly through binding rules of conduct and it has the power to apply access determinations retrospectively.¹⁶ The re-determined regulated prices then flow back into the SSU Reference Prices and the TEM Reporting measures.

This 'push-pull' approach between the SSU and Part XIC creates an appropriate and effective means of establishing and implementing price equivalence for declared services (current and future) by avoiding the risk of inconsistent outcomes, ensuring the ACCC's powers to set regulated prices is unconstrained and locking regulated prices into the price equivalency and transparency measures of the SSU.

If a service or a price is not regulated under Part XIC, the overarching price equivalence commitment will apply to that price.

If the Wholesale ADSL Layer 2 Service is not a declared service, a RMRC model will be applied under the SSU to achieve price equivalence between Telstra's Retail Business Unit and supply to Wholesale Customers by deducting retail costs from the retail prices to establish the wholesale price. The SSU provided for avoidable retail costs to be deducted but the SSU has been revised, in response to ACCC concerns, to provide for total retail costs to be deducted.

¹¹ Paragraph 1.2(d)(iii) of Schedule 8.
¹² Clause 18.4(c)
¹³ Paragraph 1.2(d)(iv) of Schedule 8.
¹⁴ Clause 18.4(b).
¹⁵ Paragraph 2 of Schedule 9.
¹⁶ Clause 18.5(b).

Clause 9(b) provides that the ACCC cannot use the price equivalence commitment to move away from an RMRC approach for Wholesale ADSL Layer 2 services, but it can require Telstra to revise its RMRC model to the extent that the prices do not conform to a basic set of RMRC Fixed Principles.¹⁷ This approach is analogous to the fixed principles approach under Part XIC for declared services. Again, the ACCC's power to declare Wholesale ADSL Layer 2 services and its power to specify access prices is unconstrained (and any such prices will flow back into the Reference Prices under the SSU).

For other currently unregulated prices, such as ancillary charges and TEBA, the ACCC can use the price equivalence commitment to adjust those prices, but any changes can only apply prospectively. However, the ACCC's powers under Part XIC, including to apply regulated charges retrospectively, are also unconstrained in respect of these charges.

6 Breaches of the Overarching Equivalence Commitment

The SSU now contains in Schedule 11 a detailed and comprehensive enforcement process which applies in the event of any potential breach of the overarching equivalence commitment in clause 9(a).

An objective of the ACCC is to ensure that the interim equivalence and transparency measures were designed in a way which would drive 'cultural change' within Telstra.

This objective has influenced the design of a two track compliance and enforcement process. Telstra has incentives to self report possible equivalence breaches and to offer 'fixes' acceptable to the ACCC to avoid enforcement under section 577G of the Telco Act.

First, Telstra can report any possible breaches that it became aware of to the ACCC¹⁸, in which case:

- Telstra must present a Rectification Proposal to the ACCC within 30 days which sets out Telstra's solution or 'fix' to the possible breach;
- The ACCC may accept that Rectification Proposal, in which case it becomes binding, or reject it and issue a Rectification Direction with the ACCC's own 'fix';
- If Telstra seeks judicial review of an ACCC Rectification Direction, Telstra must still comply with the Rectification Direction pending the court decision (unless stayed by the court); and
- as an incentive to self report possible breaches, Telstra will not be subject to any retrospective penalties if it self-reports, but the ACCC can seek compensation for loss or damage suffered by any person as a result of the breach.

Alternatively, the ACCC may notify Telstra of matters which it considers give rise to a possible breach of the overarching equivalence commitment¹⁹, in which case:

- Telstra can choose to submit a Rectification Proposal in relation to the possible breach within 30 days of such notification;
- If Telstra submits a Rectification Proposal, the ACCC can either accept the proposal or, if satisfied it does not provide an effective remedy, issue a Rectification Direction to Telstra;
- If Telstra seeks judicial review, Telstra must still comply with the ACCC's Rectification Direction pending the court decision (unless stayed by the court); and
- Where the ACCC originally notified the breach, the ACCC can seek court orders for fines in addition to compensation.

¹⁷ Clause 9(b)(vi).

¹⁸ Paragraph 2 of Schedule 11.

¹⁹ Paragraph 3 of Schedule 11.

Where the ACCC initiated the report of the breach, and Telstra has not given a Rectification Proposal, the ACCC may enforce the equivalence commitment under section 577G of the Telco Act.²⁰ However, even though the possible breach has been ‘fully litigated’, a follow on process between Telstra and the ACCC is still more likely to produce an effective ‘fix’ than relying on court orders. Therefore, if a court declares Telstra is in breach of clause 9(a), Telstra is required to lodge a Rectification Proposal with the ACCC within 30 days. The ACCC has powers to make binding Rectification Directions if the Telstra Rectification Proposal is unacceptable.

In considering whether to issue a Rectification Direction under both tracks, or apply to a court for orders in relation to a breach, the ACCC would have to be reasonably satisfied that imposing the Rectification Direction or seeking the orders is a proportionate and justified remedy for the breach, having regard to the benefits, the costs of compliance and the comparative cost of the matters sought to be imposed by the ACCC.²¹ As Rectification Directions are to deal with the ‘fix’ required to solve equivalence problems going forward, they cannot have retrospective effects or consequences, such as requiring Telstra to pay compensation or financial penalties.²²

In order to ensure that where possible, any issues that arise with Telstra’s Wholesale Customers are dealt with in a speedy and cost-effective manner, and that Telstra is made aware of any concerns that Wholesale Customers have, Wholesale Customers need to raise any complaints first with Telstra. This provides a reasonable opportunity for Telstra to investigate and take action, before the ACCC would exercise its powers to notify Telstra of a possible breach.²³

Telstra’s original proposal for an overarching equivalence commitment included a materiality threshold which provided that conduct only breached the commitment if it had a material impact on Wholesale Customers’ ability to compete. In response to ACCC and industry concerns that this set the bar too high, the revised SSU substantially lowers the threshold: if Telstra’s failure to comply with a requirement of clause 9 is trivial, then Telstra is not in breach, and the ACCC will not take any action in relation to a breach which is trivial or act on a complaint which is a vexatious or frivolous²⁴. Similar changes have been made in the thresholds which applied to any breach of the specific commitments on organisational arrangements, on equivalent systems and processes, and on matters which could be referred to the ITA Process.

Telstra considers that the enforcement process which is now set out in the SSU provides strong reassurance that Telstra will have the incentive to address expeditiously any possible breach of the overarching equivalence commitment. If the possible breach was not dealt with by Telstra it could be dealt with by the ACCC through a binding direction power and court enforcement.

7 Compliance Reporting

In its discussion paper on the SSU, the ACCC identified effective compliance reporting as essential not only to determine if the SSU is being complied with but also as part of the ‘cultural change’ the ACCC wanted to see within Telstra.

Compliance reporting around the Interim Equivalence and Transparency measures has been enhanced:

²⁰ Paragraph 4 of Schedule 11.
²¹ Paragraph 5 of Schedule 11.
²² Paragraph 6 of Schedule 11.
²³ Paragraph 3.4(a)(i) of Schedule 11.
²⁴ See paragraphs 1(b) and 1(c) of Schedule 11.

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- additional compliance reporting requirements which cover the Overarching Equivalence Commitment in clause 9 have been added to the SSU. These reporting requirements cover the commitments in clauses 8, 10, 11, 12, 13, 14, 15, 16, 18, and the associated Schedules;
 - clause 23.3 provides that Telstra must submit monthly compliance reports to the ACCC providing details of any equivalence issues received from Wholesale Customers, or identified by Telstra or the ACCC, during that month, together with Telstra's assessment of the issue, the action it proposes to take to address or respond to the issue, and its view of whether a breach of clause 9(a) has occurred, giving reasons.

The SSU has been revised to enhance compliance monitoring and reporting in relation to the interim equivalence and transparency commitments in Part C. In addition, there is a requirement that Telstra develop, no later than six months before the Designated Day, a Separation Compliance Program which will monitor compliance with the structural separation commitments in Part B of the SSU²⁵.

The Separation Compliance Program must contain a strategic outline of how the commitment to compliance with Part C of the SSU will be realised within Telstra. It must also contain a process for whistle-blowers to follow, and a statement that Telstra will take internal action against any persons knowingly or recklessly concerned in a contravention of Part C of the SSU and will not indemnify them.

Telstra will also provide a briefing to the ACCC on the Compliance Program and consult with the ACCC on any recommendations it has with respect to the Compliance Program.

The Annual Compliance Report which Telstra must provide to the ACCC with respect to the SSU overall must now contain:

- details of any identified possible breach by Telstra of the provisions of the SSU, with an explanation of the cause of the breach;
- details of any Exempt Services supplied during the year using Non-Exempt Networks; and
- details of its compliance training and any new measures implemented to ensure compliance with the provisions of the SSU.

8 Service Quality and Operational Equivalence

The SSU has been revised to strengthen and clarify the provisions regarding service quality and operational equivalence.

First, to provide more transparency for wholesale customers that processes are equivalent, the revised SSU provides that within six months of the Commencement Date, Telstra will publish on its wholesale website, for each Regulated Service and its Comparable Retail Service, a detailed description of the processes and systems used for:

- Service Qualification;
- Service Activation and Provision; and
- Rectification of Faults.²⁶

The published descriptions must be updated within 30 days of material changes. These descriptions will provide an information baseline against which the ACCC and Wholesale Customers can assess equivalence.

²⁵ Clause 23.8.

²⁶ Clause 11.8.

Second, operational equivalence is enhanced with the inclusion of an equivalence commitment in relation to the performance of service qualification systems. It provides a specific undertaking that the overall standard of reliability and response accuracy in the systems used to process service qualification requests received from Wholesale Customers for Wholesale Copper Services (except ULLS) will be equivalent to that provided by the systems Telstra uses to process service qualification requests received for Copper Services from a Retail Business Unit.²⁷ In relation to ULLS, there is a commitment to permit Wholesale Customers to use the LSS Service Qualification tool as a means to service qualify lines for ULLS until a common Service Qualification system is developed. This formalises the current practice amongst Wholesale Customers.

The revised SSU further extends to a commitment that when Telstra deploys a new service qualification system, it will use the same system to process requests from Wholesale Customers (except for ULLS) as it uses to process those from Retail Business Units.

9 Operational Equivalence and Transparency Metrics

The revised SSU has a number of changes relating to equivalence and transparency metrics, which will enhance the provision of information about equivalence and the availability of rebates for non-performance.

These include:

- The SSU originally limited the performance metrics to the copper network, as this is the network which Telstra is committing to structurally separate. However, the SSU has been revised to remove this limitation and Telstra's performance commitments will apply to Regulated Services provided over Telstra fibre networks;²⁸
- An improvement in the service level for ULLS individual cutovers: Telstra will commit to meet 95% of the time the date first requested by the Wholesale Customer for an in place service (unless the delay is Wholesale Customer or end user caused);²⁹
- A narrowing in the range of metrics which do not need to be taken into account in calculating performance where areas are subject to active NBN rollout. In effect, any impact of the NBN rollout must be equivalent between retail and wholesale;³⁰
- Removal of the low volume exclusion - the metrics will be calculated and rebates will apply even where the volume of Wholesale Customer orders is very low, including below 10% of the volume of Retail Customer orders;
- For each quarter commencing after 1 July 2012³¹, Telstra will include additional average performance data in the Quarterly Operational Equivalence Reports, which will now be provided to the ACCC and the ITA Adjudicator, including:
 - Telstra's average performance on each of Metrics 1-11 and Metric 18 for each relevant Regulated Service and its Comparable Retail Service; and,
 - an explanation of any corrections or adjustments to the data or a statement of any qualifications to the accuracy, quality or representative nature of the data.

Telstra has also undertaken to investigate the feasibility of amending or providing new metrics to measure and compare job tasks which are undertaken in common between ULLS, transmission services and LSS and their respective Comparable Retail Services.³²

²⁷ Clause 13.5.

²⁸ Clause 7.3.

²⁹ Paragraph 5 of Schedule 3. The requested date cannot be earlier than the earliest date applicable in different geographic zones provided for in the ULLS industry code, as amended from time to time.

³⁰ Paragraph 10 of Schedule 3.

³¹ Clause 16.2(d).

- Within six months of the SSU Commencement Date, Telstra will provide a report to the ACCC which identifies the Common Retail/Wholesale Job Tasks for which Telstra considers it reasonably practicable to separately measure and compare its retail and wholesale performance;
- The report will also set out Telstra's proposed changes to the Equivalence and Transparency Metrics in respect of those Job Tasks;
- Within 30 days of providing the Report, Telstra will provide the ACCC with a variation to the SSU to incorporate any proposals for new or amended Equivalence and Transparency Metrics.

10 Equivalence Complaints - Dispute Resolution

Issues were raised in connection with the operation of the Adjudicator, with some concern expressed that because the ITA is established by Telstra, the Adjudicator may not be sufficiently independent. Telstra believes that there are effective measures in the SSU to ensure the independence of the person appointed as Adjudicator, including the ACCC's powers over his or her appointment, and the ACCC's right to approve a Charter of Independence and the ITA's constitution submitted by Telstra, which together will govern the relationship between the ITA board and the Adjudicator.

However, as a further measure to address concerns, the SSU has been revised to provide for the ACCC to act as an optional alternative to the ITA Adjudicator, at the Wholesale Customer's election.³³

The SSU also has been revised to clarify the relationship between the Accelerated Investigation Process (AIP) and other dispute resolution procedures³⁴, specifying that Telstra cannot terminate the AIP until either a 'fix' is in place which the Wholesale Customer accepts, or the Wholesale Customer has rejected Telstra's proposed 'fix'. The only exceptions are where the Wholesale Customer itself decides to exit the AIP process or the ACCC has accepted or required a 'fix' for the same problem under the overarching equivalence processes (which avoids overlap).

Where the dispute is referred to the ACCC as Adjudicator, the ACCC will perform its role and exercise its functions in accordance with the provisions in Schedule 5. The ACCC may publish rules governing the practice and procedure by the parties and the ACCC in hearing an ITA Dispute.³⁵ The ACCC is subject to the monetary caps on decisions when exercising powers as the Adjudicator, but paragraph 1 of Schedule 5 makes clear that these caps do not limit the ACCC in its other roles, including under the overarching equivalence commitment.

Industry has raised questions about the overlap between the ITA Process and other processes under the SSU (and the CCA) for dealing with Wholesale Customer complaints. Telstra has intentionally provided that more than one process may be available – inside and outside the SSU – to deal with equivalence complaints. This reflects the varied nature and circumstances of complaints. Wholesale customers, in effect, get to choose which process they consider most appropriate to resolve their complaint. Telstra anticipates that the ITA Process will be most effective for smaller complaints or for complaints which are amendable to practical or technical 'fixes'. Complaints which Wholesale Customers consider go to the root of equivalence can be addressed under the overarching equivalence commitment or as a breach of a specific commitment on equivalent systems and processes. The ACCC could also address such issues under its Part IV, Part XIB or Part XIC powers.

³² Clause 16.5.

³³ Paragraphs 1, 6 and 9 of Schedule 5.

³⁴ Clause 19.4(b).

³⁵ Paragraph 9.2 of Schedule 5.

The Adjudicator, in considering whether to accept a dispute, must also consider any guidance produced by the ACCC on the kind of equivalence complaints which are appropriately addressed by the ITA.³⁶

Concern was expressed by the industry that wholesale customers would be locked into the ITA Process and could be bound by the outcomes. The SSU now provides that Wholesale Customers are also entitled to withdraw from the ITA process at any time prior to a determination of the Adjudicator becoming binding (10 Business Days after the final determination).³⁷ Telstra cannot unilaterally withdraw and will be bound by the ITA Decision, unless the wholesale customer has withdrawn. A withdrawing party is required to meet the Adjudicator's costs, to provide an incentive to ensure that, if a party starts the process, it should have an incentive to allow the process to run its course or pay the wasted costs.

The ACCC and industry also expressed concern that the ITA's powers were too limited. The revised SSU clarifies the Adjudicator's power to make directions to a party to provide a proposal for the modification of its processes or systems, and if the Adjudicator is not satisfied with that proposal, to make binding directions to the party in relation to specific systems, process designs or technologies, which they must implement.³⁸ Such a direction cannot require Telstra to supply any product or service which is not a Regulated Service: for example, the Adjudicator could not require supply of mobile services or a bundle including Regulated Services and mobile services, but the Adjudicator could give a direction in relation to process issues which impair supply of Wholesale ADSL Layer 2 Services. The Adjudicator's directions also are subject to the monetary caps in paragraph 11.5 of Schedule 5.

To avoid uncertainty, the SSU now confirms that the annual monetary cap is a single total cap applying to decisions of both the Adjudicator and the ACCC.

11 Additional Commitments on Wholesale DSL

The SSU has been revised to add specific additional provisions relating to Wholesale ADSL Layer 2 services. If the Wholesale ADSL Layer 2 service is not an active declared service, Clause 18.1 provides that, if a Wholesale Customer requests, Telstra will supply a Wholesale ADSL Layer 2 service so the Customer can provide carriage and/or content services.

The service would not need to be provided if doing so would mean that either an existing Wholesale Customer or Telstra would be unable to obtain a sufficient volume of the service to meet their reasonably anticipated requirements, measured at the time of the request.

Telstra is also not required to extend or enhance the capability of its facilities to be able to supply this service, and is not required to supply the service to a Customer if there are reasonable grounds to believe that they would not comply with Telstra's terms and conditions or meet Telstra's integrity or safety standards.

In effect, this is an SSU version of the Standard Access Obligations which applies to those Regulated Services which are declared services.

Telstra has simplified the operation of the price-related terms so that they no longer apply just to a "standard wholesale ADSL2+ service", but instead apply to any Wholesale ADSL Layer 2 Service, as defined in the Regulated Services Instrument.³⁹

³⁶ Paragraph 1 of Schedule 5.

³⁷ Paragraph 7.3 of Schedule 5.

³⁸ Paragraph 11.2 of Schedule 5.

³⁹ Paragraph 1.2(f) of Schedule 8.

This means that:

- the reference price will be available in respect of all wholesale ADSL Layer 2 services covered by the definition in the instrument, including both ADSL1 and ADSL2+ services; and
- it will also apply, from time to time, to any new or upgraded features of those wholesale products.

Wholesale Customers acquiring Wholesale ADSL Layer 2 services under contracts existing at the SSU Commencement Date will be able to notify an election to acquire the service at the Reference Price instead of the contracted price and Telstra will agree to the necessary changes to the contract.⁴⁰ This election is to be exercised within 3 months of the Reference Price being published.

The revised SSU does not constrain the ability of wholesale customers and Telstra to negotiate commercial pricing. However, new provisions in the revised SSU provide additional transparency measures⁴¹:

- Telstra will provide the ACCC with copies of each Wholesale ADSL Layer 2 service Agreement it enters into or varies after the SSU Commencement Date, as well as notify it of any termination, cancellation or rescission of a Wholesale ADSL Layer 2 service Agreement; and
- The ACCC may notify Telstra of specific information it wants reported in conjunction with the provision of copies of such Agreements, and where the ACCC has done so, Telstra is required to provide the additional information with each Agreement.

In effect, this mechanism replicates the requirements under the amended Part XIC requiring lodgement of access agreements relating to declared services.

12 Access to Exchange Buildings

Concerns were raised by the industry with respect to ensuring that Wholesale Customers could obtain Exchange Capacity in Telstra Exchange Buildings. The issues raised included the view that Customers needed to be able to reserve space well in advance, and that insufficient information was known about Telstra's available exchange space.

The new Schedule 12 sets out principles for Telstra Exchange Buildings Access (TEBA) requests. Wholesale Customers can request TEBA for the purpose of meeting their future anticipated requirements at an Exchange Building Facility. Telstra must process that request using ordinary TEBA processes and practices, including undertaking a preliminary study review to determine whether sufficient floor space is available. Where space is available using ordinary TEBA processes and practices, it would be allocated and the Customer is allowed 36 months to use the allocated floor space.

Telstra would be entitled to terminate the allocation if unused within 36 months. The Wholesale Customer can withdraw at any time without penalty (subject to payment for the period prior to withdrawal). Allocation entitlements cannot be transferred.

The ACCC has expressed concerns about Telstra's own processes to reserve space for its own use. The amended clause 12 now contains a provision under which Telstra is required to advise the ACCC

⁴⁰ Clause 18.3.

⁴¹ Clause 18.8.

on a confidential basis within three months of the Commencement Date, of any floor space or block positions on an MDF which Telstra has reserved at:⁴²

- any Capped Exchange Building;
- any Potentially Capped Exchange Building;
- any Exchange Building which is a POI for interconnection with the NBN; and
- any other Exchange Building, where the ACCC seeks that information.

Telstra is required to keep this information updated.

Telstra has also provided more detailed commitments about the way in which it will manage ordering queues and common construction works in a new Schedule 13. This order management process provides for the following:

- Telstra to handle TEBA orders received from Wholesale Customers using the same order management 'queue' as it uses when processing internal requests for access to exchange space or infrastructure.
- Orders for use of exchange space will be queued and managed on a 'first in, first served' basis.
- Where construction works are required to expand or augment exchange space in order to provide access, Telstra will ensure that this is done (either itself or by a Wholesale Customer if at the front of the queue) in order to provide sufficient capacity to meet all orders in the queue at that time.
- Telstra will manage the queue during construction works so that only other orders that are dependent on the works being undertaken are put on hold – any unaffected orders (referred to as 'parallel Applications') can still be processed.

Telstra also intends for Wholesale Customers to be able to use standard TEBA ordering processes to acquire space in Exchange Buildings to interconnect with the NBN, as it is rolled out. This will be based on the same 'Acquirers Cable' process used today to interconnect with other Carriers. There will be variations required to existing contracts to provide for this and Wholesale Customers wishing to interconnect with the NBN in Telstra Exchange Buildings will need to contact their account manager or business operations manager in that regard.

13 Price Equivalence Transparency

As noted above, Telstra's commitments in respect of price equivalence have been expanded in the revised SSU in a number of ways, including:

- through the operation of the overarching equivalence commitment in clause 9 – which extends to price-related terms (subject to some specific fixed methodological principles for the Retail Minus Retail Costs (RMRC) process, which are set out in Schedule 8, as discussed above);
- in Schedule 8, Telstra now 'pulls through' price terms for any new declared services (or any additional pricing published as part of an access determination or binding rule of conduct for an existing declared service);
- through specifying in the standard 'rate card' pricing for TEBA products as well as any pricing for products (such as WLR and PTSN OTA) which are currently exempt from regulated pricing – with pricing in each case based on standard pricing which is in market for those services;⁴³ and
- the Reference Price now applies in respect of the Wholesale ADSL Layer 2 Service – which means it extends to all standard Wholesale ADSL1 and ADSL2+ services.

⁴² Clause 12.1

⁴³ Paragraph 2 of Schedule 8.

Telstra may still levy charges for 'one off' or additional requirements (such as charges for failure to pay bills on time, missed appointments etc). However any ancillary or 'one off' charges of this kind remain subject to the overarching equivalence commitment in clause 9 and would also be incorporated into the Reference Price and TEM Reports if these were regulated in the future by the ACCC under an access determination or binding rule of conduct.

Telstra has also simplified the RMRC calculation:

- Telstra has moved from having a 'usage trigger' value that was used as a threshold for updating the average usage used in the calculation to adopting a new, reasonable forward looking view each time the calculation is run and notifying the ACCC in each case of the usage figure;
- consistent with the ACCC's views, Telstra has moved from an 'avoidable cost' approach to a 'total retail cost' approach;⁴⁴ and
- various aspects of the calculation methodology will be specified by Telstra and notified to the ACCC, rather than the approach in the original version of the SSU which required all of the detailed methodologies to be agreed with the ACCC up front.

These changes reflect that the ACCC now has the scope to intervene under the overarching equivalence commitment to monitor the continuing operation of the RMRC model and not just at the 3 year review as originally provided for in the SSU (but which has also been retained).

Applying the RMRC methodology set out in Schedule 8 of the SSU, the initial monthly Reference Prices for the Wholesale ADSL Layer 2 Service will be \$30 in Zone 1, \$37 in Zone 2 and \$55 for the AGVC.

New provisions have also been added in clause 8.7 and Schedule 10 governing Price Equivalence (PE) Billing Disputes and other General Price Equivalence Disputes. For PE Billing Disputes, Customers may submit PE Billing Dispute Notices within specified time periods, and may withhold payment if the Notice is lodged prior to the Due Date for the bill.

Telstra can reject a Notice which is incomplete, inaccurate or does not meet its requirements, and can also request additional information from the Customer which the Customer must provide. Telstra must investigate and notify Customer of the outcome of a PE Billing Dispute within 30 Business Days. Customers can lodge objections to a PE Billing Dispute Determination within 5 Business Days stating the reasons for their objection and Telstra then has 5 Business Days to provide a revised Determination.

Schedule 10 then provides for an escalation procedure if the matter is not resolved, in which the representatives of Telstra and the Customer meet within 5 Business Days to try to resolve the dispute. If this is unsuccessful, the dispute further escalates to a meeting with Telstra's commercial manager. Either party may commence litigation if the matter is then not resolved.

For General Price Equivalence Disputes, if a party provides written notice of a dispute, both parties nominate Dispute Officers to meet within 10 Business Days. If not resolved, either party can ask for the Dispute to be referred to an ADR process in the Telstra Wholesale Alternative Dispute Resolution Policy. If the parties agree, the matter is dealt with in the ADR process, and if the parties do not agree, then either party may commence litigation in relation to the Dispute.

⁴⁴ Paragraph 3.1 of Schedule 8.