Telstra Submission

Senate Environment and Communications Legislation Committee: Inquiry into the Telecommunications Universal Service Management Agency Bill 2011 & two related bills

5 December 2011

Telstra Corporation Ltd

Contents

01 Executive Summary

Telstra is pleased to respond to the Senate Environment and Communications Legislation Committee's ("**the Committee**") invitation to provide a submission to the Committee's inquiry into the:

- Telecommunications Universal Service Management Agency Bill 2011 ("**the Agency Bill**");
- Telecommunications Legislation Amendment (Universal Service Reform) Bill 2011 ("**the Reform Bill**"); and
- Telecommunications (Industry Levy) Bill 2011 ("**the Levy Bill**"),

(together, "**the TUSMA Bills**").

The TUSMA Bills follow the entry into an agreement by the Commonwealth with Telstra on 23 June 2011 ("**the TUSMA Agreement**"). The TUSMA Agreement was one of a number of agreements Telstra entered into that day as part of a package of "Definitive Agreements" between Telstra and NBN Co and Telstra and the Commonwealth as part of Telstra's participation in the rollout of the National Broadband Network ("**NBN**"). A summary of the key terms of the TUSMA Agreement are set out in Attachment 1.

Telstra supports the TUSMA Bills in the context of facilitating the implementation of the TUSMA Agreement as part of the broader arrangements for Telstra's participation in the rollout of the NBN. More broadly, Telstra supports the move to a contractual basis for the implementation of Government policy objectives together with a more transparent and certain funding commitment.

Telstra does, however, have a number of observations in regard to some aspects of the TUSMA Bills. Namely, that they facilitate increased administrative costs and, in Telstra's view, raise a number of issues with respect to delegations and discretions. These are articulated below.

02 The Agency Bill

2.1. Overview of the Bill

As set out in the Explanatory Memorandum ("**EM**"), the Agency Bill:

- provides for the establishment of the Telecommunications Universal Service Management Agency ("**TUSMA**") as the statutory agency that will have the responsibility for the effective implementation and administration of service agreements or grants that deliver universal service and other public policy telecommunications outcomes;
- sets out TUSMA's corporate governance structure and reporting and accountability requirements;
- provides for the Minister, subject to scrutiny of Parliament, to set the standards, rules and minimum benchmarks for TUSMA's contracts and grants; and
- sets out arrangements for consolidating the two current Universal Service Obligation ("**USO**") and National Relay Service ("**NRS**") industry levy regimes into a single regime to contribute to funding towards TUSMA's costs.

In Telstra's view, this Bill is largely administrative in function other than the third bullet above which provides powers to the Minister in relation to setting the standards, rules and minimum benchmarks for TUSMAs' contracts and grants. Telstra has reviewed the detail of these provisions (contained in Part 2 of the Bill) and agrees that they provide sufficient checks and balances to ensure that the Minister has the power to achieve public policy objectives while at the same time preserving the contractual nature of the arrangements for the delivery of those objectives.

Telstra does, however, have some issues with the other parts of the Bill, namely the overall establishment and administration of TUSMA and the arrangements for the new levy regime as set out below.

2.2. TUSMA - a new agency – paid for by industry

The current arrangements for the delivery of universal service and other public policy telecommunications outcomes reside with the Minister for Broadband, Communications and the Digital Economy, together with his Department, while oversight of compliance of any regulated obligations resides with the Australia Communications and Media Authority ("**ACMA**")[1].

This Bill seeks to establish an additional branch of Government to assume some of the roles of the existing branches, while the Executive, Department and ACMA will each continue with their respective roles in relation to this same subject matter. While the Executive and Department are Government funded, the ACMA is funded by industry through the various licence conditions and other revenue generating fees that the ACMA administers.

The TUSMA Bill envisages that the administrative costs of TUSMA will be added to the costs that TUSMA is required to pay out to contracted service providers and that the total of those costs be funded from its two funding sources – contributions from Government with the remainder from industry levy contributions. As set out on page 9 of the EM to the TUSMA Bill:

> "*On 23 June 2011, the Government announced that it would contribute Budget funding to the costs of universal service outcomes. The Government will commit base funding of $50 million over the two financial years 2012-2013 and 2013-14, and $100 million per annum after that. It will also supplement, during the financial years 2012-2013 and 2013-14, its funding contribution to make up any shortfall arising from the industry's levy contributions*."

The result is that after the 2012-2014 years, any increases in the administrative costs of TUSMA will be borne by industry, in addition to the amounts that industry is required to pay generally under the TUSMA arrangements to the contracted service providers and to the ACMA in the form of the various fees and charges that support the ACMA's administrative costs, together with other imposts that industry participants are required to pay such funding for the Telecommunications Industry Ombudsman ("**TIO**") (although on a complaints driven basis).

Page 9 of the EM to the Bill contains an estimate of approximately $5 million for the administrative costs of TUSMA but it does not identify:

- any savings in other parts of Government that may be achieved through the establishment of TUSMA;
- a detailed breakdown of the estimate of the administrative costs of TUSMA; and
- any guidance or measures to ensure that TUSMA's costs do not exceed the estimate.

We note further that although clause 74 of the Bill requires TUSMA to prepare a corporate plan at least once each 3-year period and give it to the Minister, there is no requirement for the plan to contain a budget or other financial information. Although clause 75 requires TUSMA to prepare an annual report, this is a report in retrospect.

[1] The Australian Competition and Consumer Commission also has an oversight role in relation to some aspects of policy.

Therefore, there seems to be no Ministerial or Parliamentary control on the costs of TUSMA. As additional costs will be borne by industry rather than Government, there is little incentive for Government to control these costs. The fact that there is little oversight of this factor in the TUSMA Bills illustrates the impact of such an incentive imbalance.

Telstra therefore has issues in relation to the increased costs to industry of over bureaucratisation across the various Governmental bodies with little oversight or containment of costs. Moreover, no efficiencies have been identified to lessen these burdens on industry.

2.3. STS Characteristics

Sub-clause 6(2) of the TUSMA Bill provides the Minister with power to determine specified characteristics applicable to standard telephone services for the purposes of the TUSMA Bill. However, section 6 of the Consumer Protection Act providers the power to declare regulations on such characteristics. It is not clear how these two clauses can operate concurrently without creating different standards under the TUSMA Bill and the Consumer Protection Act. Telstra suggests that the power under the Bill not operate until the powers under the Consumer Protection Act no longer have any practical effect.

2.4. Committees

Clause 56 of the TUSMA Bill empowers TUSMA to establish Committees to advise or assist in the performance of TUSMA's functions. The scope of “advise” and “assist” is broad and the Bill does not provide a limitation as to who may be appointed to the Committee. For example, the members of the Committee do not have to have any particular qualifications and they are not subject to any conflict of interest obligations.

2.5. Distribution of balance of the Account

Clause 87 of the TUSMA Bill provides TUSMA with the power to distribute the remaining balance of the Telecommunications Universal Service Special Account but without an actual requirement that the balance be so distributed. In Telstra's view, there at least should be a distribution bias (unless a clear extenuating circumstance exists for which the payments would be required under the legislation) or preferably a clear requirement to distribute.

2.6. Who pays what

The TUSMA Bill contains specific formulae for the determination of the amount each industry participant is required to pay towards the levy by which the costs of the TUSMA contracts, grants and administrative costs are to be paid (see sub-clauses 99(1) and (3)). The formulae are linked to:

- a person's eligible revenue which is an objective, auditable and transparent criterion; and
- the costs of TUSMA as set out by the Minister (a forward looking estimate in the first two financial years of the new arrangements (see sub-clause 99(4)) and TUSMA's actual costs in the financial years thereafter (see clause 90)).

However, the Bill provides the Minister with power to modify these formulae (see sub-clauses 99(2) and (8)). Telstra is concerned that any such modification may mean that the payment of the levy by various industry participants may be based on a criterion that is neither objective, auditable nor transparent. In Telstra's view such an important aspect of the TUSMA arrangements should not be left to Ministerial discretion therefore the sub-clauses should be removed.

2.7. Levy cap amount

The Minister has the power to determine a levy cap amount in proposed sub-clause 99(4). In Telstra's view this amount should be specified to be generally consistent with the estimate of the overall levy target amount for the forthcoming financial year made under proposed clause 89 of the TUSMA Bill.

2.8. Delegation

Clause 119 provides the Minister with the power to delegate his or her powers under proposed Part 6 of the Bill (Assessment, collection and recovery of levy) to an employee, or an acting employee, of the ACMA. The powers in this part of the Bill, relating to estimating and setting levy target amounts, setting levy cap amounts and modifying the formula (if this power is retained) and determining whether there will be a set-off are fundamental decisions to be made by the Minister and we query the appropriateness of allowing them to be delegated. The power to delegate should be reconsidered.

03 The Reform Bill

3.1. Overview of the Bill

As set out in the Explanatory Memorandum ("**EM**"), the Reform Bill seeks to:

- amend the Telecommunications (Consumer Protection and Service Standards) Act ("**the Consumer Protection Act**") to provide a framework to allow the Minister to make declarations to enable the removal of the current regulated obligations on Telstra to make standard telephony services and payphones reasonably accessible, and shift to a fully contractual model for provision of universal service outcomes;

- amend the Consumer Protection Act and other legislation such that the USO and NRS levies will cease to apply after 30 June 2012 (so that the new scheme set out in the TUSMA Bills can apply);

- provide that TUSMA will be a prescribed agency for the purposes of the Financial Management and Accountability Act 1997; and

- amend provisions in a number of statues to recognise the establishment of TUSMA, to allow the ACMA to administer, enforce and report on the levy provisions in the TUSMA Bill and to reflect the shift in responsibility for the delivery of universal service outcomes and other public interest services to TUSMA.

From Telstra's perspective, the first of these items is fundamental, as it is the mechanism by which the overarching policy objective of moving the fulfilment of public policy objectives to an ongoing contractual rather than regulated basis will occur. This is to be done through Ministerial declaration subject to a number of criteria to which the Minister must have regard. This process contains a number of safeguards which would prevent the Minister from making a relevant declaration unless there was a record of compliance with the existing regulatory and contractual obligations on Telstra.

3.2. Delegation

By operation of section 23A of the Consumer Protection Act, the Minister is able to delegate his or her powers under Part 2 of the Act to an employee, or an acting employee, of the ACMA. This ability to delegate power would now encompass proposed sections 8H (Meaning of designated STS area), 8J (Declaration about alternative contractual arrangements relating to standard telephone services) and 8K (Declaration about alternative contractual arrangements relating to payphones) as set out in the Reform Bill. These declarations are fundamental decisions to be made by the Minister as introduced by the Reform Bill and we query the appropriateness of allowing them to be delegated. On that basis, they should be carved out from the Minister's power to delegate under section 23A.

04 The Levy Bill

4.1. Overview of the Bill and comments

As set out in the Explanatory Memorandum (“**EM**”), the Levy Bill seeks to impose a levy to fund TUSMA in relation to payments made by TUSMA to contractors or grant recipients under the TUSMA Bill and TUSMA’s administrative costs.

This Bill is procedural in nature and Telstra’s substantive comments on the Levy are set out in our comments above on the Agency Bill.

Attachment 1

Telecommunications Universal Service Management Agency (TUSMA) Agreement

Topic	Summary
Purpose	The Telecommunications Universal Service Management Agency (**TUSMA**) Agreement aims to ensure: • continued delivery of the universal service obligations (**USO**) (currently set out in the *Telecommunications (Consumer Protection and Service Standards) Act 1999)* (**TCPSS Act**) to ensure that standard telephone services (**STS**) and payphones are reasonably accessible to all people in Australia on an equitable basis, regardless of where they reside or carry on business; • for premises not served by the NBN fibre network, continued reasonable access to the existing copper access network for STS; • the ongoing delivery of emergency call handling (Triple Zero '000' and '112'); • that appropriate safety net arrangements are in place that will assist the migration of voice-only customers to a NBN fibre service as Telstra's copper customer access network is decommissioned; and • if required, technological solutions will be developed for continuity of public interest services (i.e. public alarm systems and traffic lights). The TUSMA Agreement consists of a series of modules, with the main service terms (being the terms on which Telstra will perform, and be paid for, certain public interest services) contained within Modules B to F. Module A includes general contractual terms, as well as terms relating to a contractual review, cost saving proposals and an adjustment mechanism to apply to scope changes. The intention of the Government is to implement USO reform so that delivery of universal service outcomes and other public interest services will progressively transition from a regulatory model (with obligations imposed directly on Telstra and other service providers), to an open competitive contractual model. TUSMA, a Government statutory agency, will progressively assume responsibility for delivery of the USO and other public interest obligations and will fulfil its statutory functions by contracting with Telstra and third parties on behalf of the Government. The TUSMA Agreement will be executed by the Commonwealth. It will be administered by TUSMA (on behalf of the Commonwealth) once TUSMA is established. This agreement commences on 1 July 2012 and has a term of 20 years,

	though shorter terms apply to specified Modules.
Standard Telephone Service Universal Service Obligations	From 1 July 2012, for a term of 20 years, Telstra will have a contractual obligation to supply the STS nationwide, as necessary, to fulfil the STS USO such that: • in areas where the regulatory obligation has transferred to TUSMA, Telstra has a contractual obligation to fulfil the USO for TUSMA; and • in areas where Telstra is the primary universal service provider, Telstra has a contractual commitment to comply with its regulatory obligation. From 1 July 2012, TUSMA must pay Telstra $230 million pa (not indexed to CPI) for supply of the STS services, subject to payment adjustments to take account of increases or reductions in Telstra's costs if there is a change in the scope of the STS services Telstra is required to provide. Telstra is entitled to a payment adjustment whether Telstra is the primary universal service provider or responsibility has shifted to TUSMA. Within NBN Co's fibre footprint, Telstra will fulfil the role of retail provider of last resort (ROLAR) for customers who wish to take only a voice STS over the NBN (**ROLAR voice-only customers**). This commitment will apply as a contractual obligation even after the regulatory USO obligation shifts to TUSMA. Telstra will receive funding to operate and maintain its existing copper network, to provide STS, in areas outside NBN Co's fibre footprint (the "copper continuity obligation"). This obligation requires that Telstra not disconnect a service address that is connected to the copper network as at 1 July 2012: • in areas where the NBN will not be deployed, for the term of the TUSMA Agreement; and • in the NBN fibre footprint, until the copper line is disconnected in accordance with the Subscriber Agreement. This commitment is subject to a limited number of specified exceptions which allow Telstra to disconnect copper lines at a service address from the copper network, including (subject to an annual quota) where the copper line is damaged or has deteriorated or has been unused for a significant period.
Payphone USO	From 1 July 2012, for a term of 20 years, Telstra will have a contractual obligation to supply, install and maintain payphones, comprising the Telstra public payphones in place at the commencement date of the agreement and new payphones required over the term of the agreement to fulfil the USO, and supply payphone carriage services to fulfil the Payphone USO. From 1 July 2012, TUSMA must pay Telstra $40 million pa (not indexed to CPI) for supply of the payphone services subject to payment adjustments in qualifying circumstances. A payment adjustment will not be triggered if the number of listed Telstra public payphones increases or decreases within a specified range.

	When the NBN is deployed in a rollout region, TUSMA can decide whether to fund the migration of each listed Telstra public payphone in that rollout region to the NBN or to an alternative technology or fund an alternative payphone from a third party provider, in which case Telstra can close down the payphone. If a listed Telstra public payphone remains connected to the copper network 3 months before the disconnection date, TUSMA must fund its migration to the NBN. Telstra is required to comply with the payphone-related performance standards and other specific requirements set out in directions and determinations issued by the Minister or the ACMA under the relevant Act. These requirements will continue to apply as contractual obligations once Telstra ceases to be the primary universal service provider for payphones.
Technology review for STS USO and Payphone USO	There is a mandatory 10 year review to be undertaken by an independent expert of the technologies and systems used by Telstra to provide the USO STS and Payphones services, with a view to determining if the use of alternative technologies or systems (including by an alternative provider of the USO) would result in cost savings to Telstra (therefore reducing the amount that TUSMA pays to Telstra). The outcomes of this review process are binding. There are mechanisms to deal with any overlap between the geographic areas covered by the review and the NBN long-term fibre footprint. Separately, either party may, at any time, provide the other with a cost saving proposal. Such proposals cannot be unreasonably rejected.
Voice-only customer migration	This deals with the terms on which the Commonwealth will fund certain customer costs for migration of voice-only retail customers to the NBN who have not yet migrated six months before the disconnection date in each rollout region (**late voice migration customers**). It is anticipated that the Government will enter into similar arrangements with other retail services providers and Telstra is to be treated no less favourably than other providers. There are two components to the assistance that TUSMA will be required to provide: • customer management tasks – TUSMA must pay to Telstra customer management fees if Telstra performs customer management tasks to be specified by the Commonwealth after a public consultation process; • connection costs – TUSMA must fund the reasonable connection costs of (either Telstra or a third party contractor) installing in-house wiring that is required to connect late voice migration customers and ROLAR voice-only customers to the NBN, this work to be undertaken by Telstra or a third party contractor at TUSMA's election; and • The amount of these fees is to be determined by an independent expert if not agreed.
Emergency	From 1 July 2012, Telstra will have a contractual obligation to supply the

call service	emergency call service in accordance with applicable regulatory requirements. Telstra will be entitled to recover its costs, up to a cap of $20 million pa. TUSMA will also meet the reasonable costs of any major upgrade in the Telstra emergency services platform that is required to ensure the continued provision by Telstra of the emergency call service in accordance with applicable regulatory requirements. Telstra will be contracted for 20 years to deliver the emergency call service, subject to the outcome of a tender for the supply of the emergency call service which TUSMA is obliged to issue within the first 5 years with a view to appointing a new emergency call person. There is provision for a transition phase funded by TUSMA. If TUSMA has not received any acceptable tender bids, Telstra will remain the emergency call person and this module will continue to apply.
Migration of public interest services	Telstra may notify TUSMA that a technological solution does not exist for the migration of public interest services (defined as traffic light and public alarm services) from copper to fibre. If TUSMA is reasonably satisfied that a solution does not exist, TUSMA will either request Telstra or a third party for proposals to develop the solution. Any solution that is funded by TUSMA will be owned by TUSMA (unless agreed otherwise) and made available to all service providers on an equivalent basis.
Payments to Telstra	Payments to Telstra under the TUSMA Agreement (and other liabilities of TUSMA) will be funded by a combination of levy contributions and direct funding from the Commonwealth of $50 million in FY12/13 and FY 13/14 and $100 million for each subsequent FY during the term of Module B (relating to the STS USO). Telstra will be required to contribute its share of any industry levy contributions that are implemented for this purpose. At this stage the Government has announced that contributions from industry members will be determined based on eligible revenue principles similar to those currently used for the USO and NRS levy schemes, and that these schemes will be replaced by a new scheme. During the first two years of the new scheme, the aggregate contribution of telecommunications firms other than Telstra will remain at the level contributed by these firms under the existing scheme for 2011/12.
Remedies and termination	If Telstra commits a material breach, TUSMA may require Telstra to prepare and implement a rectification plan. If Telstra fails to perform in accordance with the rectification plan, TUSMA may: • withhold payments to Telstra for the module relevant to the breach until that breach is rectified; and/or • for a breach of the STS or payphone module, engage a third person to supply the relevant services during the period of breach (in which case Telstra must pay the reasonable costs of the third party supplier subject to the liability cap). TUSMA may terminate a module in defined circumstances, including extended non performance. In addition, either party may terminate the agreement in the event that a permanent cessation of rollout occurs

	under the Subscriber Agreement before the rollout has reached 20% of premises. Telstra must develop and implement a transition plan for termination of the STS or payphone module. If a permanent cessation of rollout occurs after the rollout has reached 20% of premises, either party may elect to seek renegotiation of the agreement. If the parties cannot agree amendments (having regard to specified facts, objectives and principles), a panel of independent experts maybe appointed to resolve any dispute. Where Telstra remains the primary universal service provider or emergency call person, there are limitations on TUSMA terminating the relevant module of the agreement or, where Telstra is also subject to regulatory remedies, exercising contractual remedies in respect of the same events.